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Attorney Communication With DSS

Permissible?

Part One of a Two-Part Article

By Jerome A. Wisselman and Lisa M. Gregg

Custody proceedings in the Family Court are governed generally by Article 6 of the Family Court Act. In an Article 6 proceeding, a court may direct a "court-ordered investigation" (often referred to as a COI) to be conducted by the local department of social services (DSS) or child protective services (CPS). The purpose of this investigation is broad and includes the gathering of information concerning the home and background of the parties and the children, and about allegations made against either party as to abuse or neglect of the children. A caseworker "investigator" is assigned, who will then visit the parties' homes and interview them, the children and any other relevant people, in accordance with the type of allegations or issues in the particular case. The caseworker will issue a written report, and often times progress notes, which are sent directly to the court, setting forth the results of the investigation.

In theory, such independent investigations by a DSS caseworker can be extremely helpful

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The Child-Centricity of Our Matrimonial Courts

Children Should Be Seen and Heard Less Often

By Lee Rosenberg

Despite amendments to statute and court rule, it unfortunately remains all too common for the court still improperly to see the renamed "Attorney for the Child" if not as an aid to the court, as a purported "impartial" and "independent" sounding board whom the court will hear first at any conference. (The title "Attorney for the Child" was officially changed from the term "Law Guardian" in accordance with the Laws of New York, 2010, Chapter 41 amending the Domestic Relations Law, Civil Practice Laws and Rules, Family Court Act, Public Health Law, and Social Services Law, as well as the Rules of the Chef Judge at 22 NYCRR § 7.2.)

In this regard, the child's attorney often gives the court his view of the case, at least as it relates to his client, and sometimes includes his "opinion" on the parents, the parents' interactions, and their purported parenting skills. It then becomes a defensive battle for the parent's attorney to start trying to refute an opinion (sometimes skewed) that may very well be taken, if not as gospel, *at least* as a reliable starting point for discussion.

I suggest that this ongoing disparate treatment, though perhaps well-intentioned, violates the parents' right of due process and too often improvidently empowers children in their familial relationships as their influence becomes litigation leverage. This is not to say that there is no time or place for a child's influence to be paramount, but our matrimonial courtrooms have lately become far too child-centric.

The Extent of Children's Knowledge

It has become traditional for many judges to address the parties in open court. Court rule now exists requiring the court to personally address the parties at the preliminary conference. 22 NYCRR § 202.16(f)(1). More often than not, the court

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NJ & CT NEWS

NEW JERSEY

NJ Supreme Court Hears Arguments in Name-Change Dispute

New Jersey's Supreme Court is considering an appeal of *Emma v. Evans*, A-2303-10, a case in which the Appellate Division reversed a lower court ruling that concluded divorced custodial parents have the ultimate say in whether to re-name their children. The intermediate appeals court found that such a presumption would not be gender-neutral because mothers most often exercise primary custody over the children of divorce. During oral arguments before the state's high court, Justice Anne Patterson questioned the mother's attorney about the possible impediment to settlements that a ruling in her client's favor could engender, because a father would be concerned that once the property settlement was signed, the mother could unilaterally change his child's last name. The attorney for the mother answered that perhaps these concerns could be addressed during pre-divorce negotiations.

Claim Seeking Damages for False FRO Filing Not Subject to Federal Abstention

A man who claims New Jersey court employees conspired to tar his reputation by planting a fake restraining order against him in their files has been given the go-ahead to sue the employees in their personal capacities. The plaintiff in *Robinson v. State of New Jersey Mercer County Vicinage-Family Division*, 2013 U.S. App. LEXIS 3239 (3d Cir. 2/25/13), a Florida resident, filed a medical malpractice suit in Texas against dentists who treated him there. It is his belief that, in order to discredit his testimony in the medical malpractice case, the owner of the dental office in which the accused dentists practiced conspired with three court employees in New Jersey to place a false restraining order against the plaintiff in their files, backdating it to 1990. After the plaintiff discovered the restraining order's existence, he got it dissolved. Thereafter, he brought suit in federal court against the Family Division and the three New Jersey court employees, alleging violation of his Second Amendment rights and his civil rights (under 42 U.S.C. § 1983), as well as claims under several state law theories, including defamation and infliction of emotional distress. The court dismissed all the claims under the doctrine of federal abstention, explaining that the federal court could not review the state court decision that granted the restraining order.

However, on appeal, the *pro se* plaintiff successfully argued that he was not asking a federal court to review the state court decision to enter the final restraining order; instead he sought only damages from individuals and entities he thought unlawfully created that restraining order. The suit may go ahead against the three court employees who, although immune from suit in their official capacities under the 11th Amendment, are amenable to suit in their personal capacities. The Family Division, however, is exempt from suit under the 11th Amendment.

CONNECTICUT

Divorce in Foreign Court Leaves Connecticut Court Without Jurisdiction

The Appellate Court of Connecticut, in *Zitkene v. Zitkus*, 140 Conn. App. 856, has affirmed a trial-court dismissal of a divorce action brought by a Lithuanian woman whose marriage had previously been dissolved by a Lithuanian court. The trial court, granting comity to the Lithuanian decision, properly determined that there was no longer any marriage to dissolve, that it therefore lacked subject matter jurisdiction, and that the case must be dismissed.

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Meeting with DSS

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in gathering facts in what are, often times, hotly contested custody proceedings. But, what if there are problematic issues with DSS's investigation, or with the caseworker assigned by DSS? And when and how, if at all, may a party's attorney contact DSS about those problems?

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Authority for a Court-Ordered Investigation

The authority of the Family Court to order DSS to conduct an investigation in the context of both an Article 6 and an Article 10 proceeding, is found in Article 10 of the Family Court Act, which applies generally to child protective proceedings. Sections 1034(1)(a) and (b), provide, in relevant part:

> (1) A family court judge may order the child protective service of the appropriate social services district to conduct a child protective investigation as described by the social services law and report its findings to the court:
>
> (a) in any proceedings under this article [Article 10], or
>
> (b) in order to determine whether a proceeding [an Article 10 proceeding] under this article could be initiated.

Although the court's statutory authority to order a social services investigation in an Article 6 custody proceeding is found in Article 10 of the Family Court Act, this does not mean that, if a DSS investigation is ordered, the proceeding falls under the ambit of, or becomes, an Article 10 proceeding. This distinction is extremely important in addressing the question of whether a party's attorney may contact DSS.

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Article 10 Proceedings

Whether a party's attorney may directly contact DSS during the course of a court-ordered investigation is dependent upon the type of proceeding pending before the court. In an Article 10 proceeding, DSS is the prosecuting party and is represented by a prosecuting agency (generally, the County Attorney or office of the Corporation Counsel in New York City). Inasmuch as DSS is a party represented by counsel, neither the responding party's attorney nor the attorney for the child may contact DSS, including the assigned caseworker, without the consent of DSS's attorney. If a party's attorney does so without permission, that attorney has violated Rule 4.2 of the New York Rules of Professional Conduct, which provides:

> In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
>
> Rules of Prof. Con., Rule 4.2 McK. Consol.Laws, Book 29 App.

Because in an Article 10 case DSS is both an investigatory body and a represented party, the Rules of Professional Conduct apply. Therefore, if the Family Court orders DSS to conduct an investigation in an Article 10 proceeding, the attorneys for the responding party and the child may not contact DSS during the course of that investigation.

Next month we will discuss a recent case that distinguishes the treatment of DSS attorney contact in Article 10 and Article 6 hearings.

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Forensic Reports

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representatives of all the City Bar committees dealing with children, education, family, family court, juvenile justice, and the needs of lesbian, gay, bisexual and transgender youth. Also sitting on the Council are representatives of the child welfare, juvenile justice and foster care communities, including attorneys representing parents and children." (www.nycbar.org/children-council-on.) During that discussion, some members voiced support for the MPAC proposal with modifications such as: allowing disclosure of the forensic expert's files, notes and other documents upon which the forensic report is based; allowing counsel for parties to provide the forensic report to a retained expert engaged to assist counsel with the matter, provided that the expert execute an affidavit swearing not to disclose the forensic report; and allowing self-represented litigants to provide a copy of the forensic report to a mental health professional with the assistance of the court.

A further issue raised at the New York City Bar's Family Court and Family Law Committee is whether Family Courts would have the resources to manage the dictates of those proposals wherein a self-represented litigant can only review the forensic report at the courthouse.

Conclusion

We do not know what OCA will do with the three proposals and, in some instances, the various disparate positions taken by bar associations across the State. It does appear that OCA understands that a change should be made, but just how drastic a change remains to be seen.

It is the belief of the authors of this article that due process of law is being denied to *pro se* and represented litigants alike when the fundamental right to custody of one's child is at stake by not permitting litigants the opportunity to prepare fully and adequately to confront forensic custody evaluators. These litigant parents should be given free and unfettered access to the report prepared by those evaluators.

It is time for OCA to take a bold position on this issue, a position that was outlined by Justice Saxe in *Sonbuchner*. The "state" should be required to afford every parent the fullest safeguards to ensure that the parent has every opportunity to prepare to prosecute or defend a claim for custody of a child, which includes, at a minimum, rights equivalent to those of an accused in a criminal case to prepare to refute the evidence that the state intends to use against him or her. For example, how else can a litigant find witnesses who will support his or her claims, or who can refute the statements contained in the forensic reports, unless he or she is able to show that report to those witnesses? The right to confrontation of witnesses is a hollow right if parties cannot use the forensic reports to the fullest extent possible. In addition, equal protection of law forbids treating self-represented litigants any differently than litigants represented by counsel.

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Children in Court

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of interest; and becoming a witness in the litigation." 22 NYCRR §7.2(b). According to 22 NYCRR §7.2(b), in non-juvenile delinquency proceedings, the attorney for the child must zealously advocate that child's position. In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.

If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of that child, even if the attorney for the child believes that what the child wants is not in his or her best interests.

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