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# When Child Protective Services Comes Knocking

What family law attorneys need to know

BY VIVEK S. SANKARAN

**A** child protective services (CPS) worker knocks on the door of your client, a 36-year-old mother involved in a contentious child custody case. The worker reveals only that she received an anonymous phone call alleging that your client physically abused her son and now she must investigate those allegations under state law.

The worker demands to enter the house, interview the children, and inspect the premises. She threatens that a lack of cooperation may result in the filing of a court petition and the possible removal of the child.

Your panicked client calls with a plethora of questions: Can CPS do this? Why can't I find out who is making these allegations against me? Can CPS really remove my child from the home? What are my rights? The questions contin-

ue. Am I entitled to a court-appointed attorney? Will I get to visit my child if he's placed in foster care? Can he go live with my mother? A traumatic situation, indeed. Your client will undoubtedly look to you for guidance to resolve these issues.

As a practicing domestic relations attorney, you feel helpless. Your knowledge of civil child protection cases is limited and extends only to the occasional story that appears in the

media. Although you do not represent this mother in the child abuse and neglect matter, you'd like to provide her with some helpful information to resolve the situation favorably. Answering your client's basic questions about the system may put her at ease and give her a sense that she has some control over the outcome. Additionally, the results of the CPS investigation could significantly affect the outcome in your child custody case.

### **Constitutional protections**

The Fourteenth Amendment of the United States Constitution protects a parent's right to direct the upbringing of his or her child from state interference. Parents need not be model parents to receive constitutional protection, and the state bears the burden of demonstrating parental unfitness prior to removing a child from the home.

The Supreme Court has described this right as "perhaps the oldest of the fundamental liberty interests" (see *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) recognized by the Court and that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). State action that temporarily or permanently severs parental relationships creates a "unique kind of deprivation," (*Id.*) not otherwise seen in civil proceedings.

Yet, some situations require the state to intervene to protect the safety of a child and thus necessitate the existence of a child protection system. The governance of this system is controlled by a complex web of federal and state laws. Generally speaking, state child-protection systems throughout the country share the same basic characteristics as a consequence of federal laws, such as the Adoption and Safe Families Act and the Child Abuse Prevention and Treatment Act, which impose requirements on states in exchange for federal funding. Thus, the steps that follow will likely occur in every case, but variations in the process undoubtedly exist depending on state law. For example, states diverge on issues such as the timing and compensation of court-appointed attorneys for indigent parents, the form of representation the child receives, and the specific legal standards that justify intervention. Before advising any parent on child protection issues, an advocate must become familiar with the laws of the respective state.

### **Investigation**

A child protection investigation usually begins after CPS receives a report from someone in the community alleging that a child has been abused or neglected. These allegations may come from individuals, such as relatives or neighbors who voluntarily contact CPS with concerns or from professionals mandated by state law to make reports if they have reason to believe a child has been maltreated. State laws identify

who must make these reports—typically people with regular contact with children, such as teachers, doctors, and social workers—though some states require all persons to do so.

CPS must keep the identity of the reporter anonymous, and the reporter will be immune from civil or criminal liability if an investigation fails to substantiate his or her claim as long as it was made in good faith. However, an individual's failure to report, if required by state law, could result in significant penalties. Child protective laws are designed to encourage individuals to err on the side of making reports to CPS so that CPS has the discretion to determine whether further action needs to be taken.

Once CPS receives a report, a worker will be assigned to investigate the allegations, unless the allegations are screened out immediately, which occurs in a small number of cases. The worker's investigation may include interviewing the parent(s) and the child(ren), inspecting the condition of the home, reviewing relevant records from school and doctors, and speaking with others who may have relevant information about the child's condition. Although parents cannot be compelled to cooperate in this process absent a court order,

## **Although you do not represent this mother in the child abuse and neglect matter, you'd like to provide her with some helpful information to resolve the situation favorably**

failure to cooperate may increase the likelihood that a worker will determine a child is at risk in the home.

After completing the investigation, which may take a matter of hours or a number of days, depending on the nature of the allegations, the worker will determine whether to substantiate the allegation of child maltreatment, based typically on a finding by a preponderance of evidence that child abuse or neglect has occurred. If the allegation is not substantiated, CPS still may recommend that the family voluntarily participate in community-based services or will determine that no services are needed.

If CPS substantiates the allegation of maltreatment, its next steps will be guided by a determination of the risk of harm to the child in the home. Many child welfare agencies utilize structured decision-making tools to make this determination. If the risk is low, then CPS may determine that all that is needed is for the family to participate voluntarily in services such as parenting classes. If it is determined, however, that the potential risk of harm is high, CPS may require a court petition to be filed, regardless of whether the family is willing to cooperate. State law also may mandate that perpetrators be listed on a centralized child protection registry after abuse or neglect is substantiated.

In extreme situations, CPS may determine that, in addi-

tion to filing a petition, a child needs to be removed immediately (*i.e.*, prior to a court hearing) to protect the physical well-being of the child. State laws vary on who may remove the child without a court order—for example, in some jurisdictions only the police have the authority to do this—and the legal standard that must be met for immediate removal, which most frequently involves a showing of imminent danger of harm to the child and the impracticality of obtaining a court order. The unauthorized removal of a child from his or her home without a court order could form the basis for a federal lawsuit under 42 U.S.C. § 1983.

### **Preliminary hearing or detention**

Soon after the state files a petition, the court will convene a hearing—commonly called a preliminary, initial, shelter care, or detention hearing—to make short-term decisions regarding the child and to determine how the case will proceed. If the child has been removed, this hearing will be held between 24 and 96 hours after removal. In many states, child protective hearings are closed to the public, and the records are confidential, except to the parties and their attorneys. Depending on the state, confidentiality laws may prevent documents generated in child protection proceedings from being used in a subsequent custody or divorce cases.

## **The unauthorized removal of a child from his or her home without a court order could form the basis for a federal lawsuit under 42 U.S.C. § 1983**

An array of other actors typically enters the case at this juncture. The worker who requested the filing of the petition will appear and may be represented by a prosecutor or an attorney from another governmental office. The court will appoint an advocate for the child, who may or may not be an attorney, and who may represent either the child's wishes or best interests. The court also may appoint an attorney to represent the parents if they are indigent. State law dictates the specifics of establishing indigence and when advocates for the parties will be appointed.

At the preliminary hearing, the court will determine whether to authorize the petition upon a showing of probable cause and will make decisions on other issues, such as the placement of the child pending trial, visitation for the parents if out-of-home care is ordered, and the provision of services to parents. If removal is requested, the state bears the burden of demonstrating why it is necessary and must show that it made "reasonable efforts" to prevent removal or that the situation was so grave that no efforts could have been made. Due to the emergency nature of this hearing, the rules of evidence generally do not apply, and the judge will consider all relevant evidence.

Even if the court denies the state's request to remove the child or the state does not seek removal, the court still may authorize the petition. If it does, the case will proceed; if the court refuses to authorize the petition—a rare result—then the case is over and the state cannot compel the parents to do anything.

### **Pretrial hearing**

Regardless of the decisions made by the court at the preliminary hearing, the parent still has the right to a trial on the allegations in the petition, at which the state bears the burden of proof. The next major event in the case, the pretrial hearing, focuses on resolving issues related to that trial.

In many ways, a pretrial hearing in a child protective case is no different than a hearing in any civil proceeding. Parties may file motions raising problems with discovery, anticipated evidentiary issues at trial, or difficulties in arranging for trial testimony. The court will ask whether the parents are willing to plea or stipulate to the allegations against them or at least enough of the allegations to permit a judicial finding of abuse or neglect. Such an agreement will give the court the authority to act in its dispositional capacity to make decisions regarding the child's placement and to order parents to comply with services. If no resolution is reached, the court will set a trial date, which may be held before a judge, jury, or referee depending on the jurisdiction.

At the pretrial hearing, parties may raise immediate concerns, as they may at any hearing in a child protection case. For example, a parent who chooses to participate immediately in services may ask the court to have the child returned at the pretrial hearing. If the agency fails to provide visitation or services to the parent, then the parent's attorney may file a motion requesting an order mandating services or, if already ordered, a finding of contempt. The agency may compel a parent to take certain actions, such as comply with drug testing if issues arise necessitating the order before the trial.

Many of the immediate issues raised at the pretrial hearing will involve details of the case plan, a document outlining steps that need to be taken to reunify the family, which pursuant to federal law the agency must develop within 60 days of a child's removal from the home. Parents and children have a right, which they should be encouraged to exercise, to participate in creating the case plan. The attorney should ensure that elements of the plan are narrowly tailored to the grounds for dependency since failure to comply with the plan can have negative consequences, including termination of parental rights.

### **Trial**

If parents do not agree with allegations in the petition, they have the right to take the case to trial. State law determines how quickly the adjudicatory hearing must be held. At this trial, the state will bear the burden of demonstrating that

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evidence of abuse or neglect, as defined by state law, exists. Like any trial, each party will have the opportunity to call and cross-examine witnesses (though the ability to compel the participation of children may be limited), and a chance to argue positions to the fact-finders.

Common witnesses at these trials include the CPS worker, the parents, professionals such as doctors and teachers, relatives, and others familiar with the case. The rules of evidence may or may not apply. If the parent prevails, the case will be dismissed. The child, if removed, will be returned home, and the court's oversight will conclude. If the state succeeds in proving its case, then the court will obtain jurisdiction (or

temporary custody) over the child and will move to the dispositional stage where it will focus on remedying the problems affecting the family by ordering appropriate services. A parent may appeal a finding that the court has jurisdiction.

The dispositional hearing may be held immediately after the adjudication trial or at a later date. The purpose of the dispositional hearing is to determine the plan to remedy the conditions that led to the court's assumption of jurisdiction. Prior to the hearing, the child-protection-agency caseworker will prepare a report for the court outlining the agency's recommendations. At the hearing, the court will review the

*(Continued on page 14)*

plan and will, after hearing from the parties, issue orders adopting whatever portions of the plan it deems necessary and furthers the child's best interests.

To aid its dispositional decision-making, the court may order the parents and children to submit to psychological or psychiatric evaluations. Typical services ordered at this stage include parenting classes, counseling, in-home reunification services, substance abuse treatment, and anger management programs. Again, these services should be tailored to the facts of each case and the specific conditions to be addressed. The court also will address issues involving the child's placement and visitation with the parents. Even if the court makes a finding that a child was abused or neglected, the court may return the child home at any point, including at the dispositional hearing.

The court will review the plan implemented at the dispositional hearing every three to six months, depending on state law. At these review hearings, the court will ascertain progress made in the case to address the goals set forth in the case plan, which can be modified at any time. The court may

amend the case plan to include additional services or remove requirements, to change the child's placement or alter the visitation schedule, or to address new issues raised by the parties. The review hearings will continue to occur until the child protective case is closed, which will happen after the child achieves permanency through reunification with the parents or another long-term custodial arrangement, such as adoption, custody or guardianship, or when the child reaches a certain age as defined by state law, at which point the court case must end.

### **Terminating parental rights**

In certain states, the child protective agency may have the power to request that the court terminate the rights of either parent at the first dispositional hearing without ever giving the parent an opportunity to participate in services. These requests typically occur in cases of severe physical or sexual abuse or when the rights of the parent to another child were previously terminated. If the agency seeks such a result, then it will file a petition requesting the relief, a trial will be held,

and a judge will determine whether clear and convincing evidence exists to prove at least one statutory ground for termination under state law. The immediate termination of parental rights is uncommon but may occur depending on the facts of the case and the laws of the state.

The federal Adoption and Safe Families Act requires the court to hold a permanency planning hearing within 12 months from the child's entry into foster care or within 30 days of the court's finding that the agency is relieved of its obligation to provide reunification services. At this hearing, the court will determine the long-term plan for the child based on the individualized assessment of the child's needs and the progress made by the parents. Each party will have the opportunity to introduce evidence and to persuade the judge that a particular plan should be adopted. If the court determines that the plan is reunification, the court may order the child returned home at that hearing or may hold subsequent review hearings to allow the parent to have more time prior to making that determination.

### **Devising the alternate plan**

At the hearing, the court also may conclude that reunification is no longer feasible and an alternate plan, such as adoption, guardianship, custody, or independent living (for an older child), should be adopted. Once the alternate plan is developed, the court may order the parties to take steps to effectuate the plan. The alternative plan may necessitate termination of parental rights, and, thus, at the permanency planning hearing the court may order the agency to file such a petition. Federal law requires the agency to file a termination of parental rights petition if a child has been in foster care for 15 out of the last 22 months, unless compelling reasons exist. Compelling reasons may include the agency's failure to provide appropriate services to the parent or the placement of a child with a relative.

If the agency files a petition to terminate parental rights, the court will schedule a pretrial hearing to determine each party's position on the requested relief. At any point in the court process, the parent may choose to relinquish voluntarily her rights to the child, which the court may accept upon a finding that relinquishment is in the child's best interests. If parents contest the petition, the trial court will schedule an evidentiary hearing.

At that hearing, the state will present evidence that grounds for termination exist under state law. Failure to comply with the court-ordered case plan to remedy the initial abuse or neglect is a common statutory ground for termination. Similar to the initial trial on the court's jurisdiction, the parent will have the opportunity to controvert the state's evidence by cross-examining the state's witnesses, calling their own witnesses to testify, and introducing relevant documents and exhibits. At the conclusion of the hearing, the state will prevail if it provides the grounds for termination by clear and convincing evidence, a constitution-

ally required standard of proof, unless the court concludes that termination is not in the child's best interests. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

If the parent prevails, then the court will continue to hold review hearings to ascertain the progress of the parents and to determine if and when reunification is warranted. The agency may refile a termination petition at any time during the case and, if it does so, the court will schedule another evidentiary hearing to adjudicate the petition. Double jeop-

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ardy principles do not apply in civil child protective cases.

If the court grants the petition and the parent's rights are terminated, then the legal relationship between the parent and the child is permanently severed, unless the decision is overturned on appeal. The parent is no longer a party to the child protective proceeding and, if the rights of both parents are terminated, the child legally will be free to be adopted. The court will hold posttermination review hearings to ensure that the child's needs are being met and to determine the agency's progress in securing a permanent living arrangement for the child. As noted above, these hearings will continue until a long-term custodial arrangement is in place for the child, such as adoption, guardianship, or custody, or the case must close because the child has reached a certain age, which depending on state law may range from 18 to 21.

### **Conclusion**

Family law attorneys must emphasize to their clients the consequences of failing to cooperate with the child welfare agency and to comply with court-ordered deadlines. Since many nuances pervade each state's child protection laws, advocates are urged to contact a child welfare attorney should the need arise. National organizations, such as the National Association of Counsel for Children ([www.nacc-childlaw.org](http://www.nacc-childlaw.org)) and the ABA Center on Children and the Law ([www.abanet.org/child](http://www.abanet.org/child)) have developed resources to help practitioners. The Child Welfare Information Gateway, a service of the Children's Bureau, also has a plethora of useful information on its website ([www.childwelfare.gov](http://www.childwelfare.gov)). The field of child welfare has become much more specialized over the past 30 years, and many experts are available to help guide you and your clients through these challenging and complex cases. **FA**

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