



WHEN DHS GETS INVOLVED IN A CUSTODY CASE

By Arly Smith-Pearson

You're involved in a traditional child custody case in Philadelphia Family Court. It's Mom v. Dad ("he said, she said") as to who is the better parent. Assume they're separated, perhaps divorced, perhaps never married. Out of nowhere, your client, Dad, gets a letter from the Department of Human Services saying that they're investigating an abuse allegation as to the child. You don't know who made the report; it's confidential under the law and you cannot find out. But you suspect Mom did it for leverage in the custody case. You learn that it's been claimed that the child has been returning home from Dad's partial physical custody time with bruises, and DHS wants to interview Dad. Meanwhile, Mom's lawyer says there will be no custody for Dad until a disposition from DHS, despite the parties' informal, out-of-court agreement giving Dad partial custody. Although many clients and lawyers assume DHS involvement can only negatively impact their client's custody matter, this is not always the case. Depending on the circumstances, a DHS investigation could even be helpful to a client involved in a custody battle.

The first thing that is important for your client to understand is that a DHS investigation is different than a dependency proceeding. Anyone can make a report of child abuse or neglect, and DHS must investigate. Most investigations are closed as "unfounded" or "invalid" meaning no evidence of abuse or neglect is identified. Even if evidence of abuse or neglect is found, DHS often takes steps to connect parents to services to assist in correcting the identified issue, such as enrolling the parent in substance abuse treatment or helping to get utilities restored to a home. When DHS is involved with a child and

is either investigating or providing services, the Domestic Relations Division of Family Court retains jurisdiction and custody proceedings continue unimpeded. If the situation escalates, and the City Law Department files a petition for the child to be adjudicated dependent, Domestic Relations loses jurisdiction and the Dependency Division of Family Court has exclusive jurisdiction over the matter. The two courts cannot maintain simultaneous proceedings. The Domestic Relations custody case will either be dismissed or stayed, pending the dependency proceedings.

As a neutral third party, a DHS worker's testimony will be valuable to a custody judge. Try to get as much information from the worker and discuss with them the possibility of testifying early.

With this understanding, you should have an honest conversation with your client. You need to know whether there is any truth to the allegations and whether Mom has any evidence she could present to DHS. Assuming Dad confirms that the allegations are false, you should discuss cooperating with DHS. Encourage your client to be forthcoming with DHS, but inform him that anything he discloses to DHS is not confidential and could be used against him by Mom in the custody case. Explain to him that a DHS worker will speak with the child privately, in addition to speaking with Mom, Dad, and any other person who may have relevant information, including relatives, doctors, etc. The DHS worker will also likely want to investigate Dad's home. While DHS is required to begin an investigation of abuse within 24 hours and one of neglect within 30 days, the investigations can remain pending for long periods of time.

Since DHS initiated its investigation, Mom has withheld the child and refuses to allow Dad to have custody of the child until the investigation is completed. Although at this point, Mom and Dad have equal rights to the child, Dad is in a difficult position. He could file a petition for an expedited custody hearing on the basis of Mom's withholding the child. This petition would get the parties before a judge within about six to eight weeks and provide the possibility of obtaining a temporary custody order. However, with an open DHS matter and testimony from Mom that the child was coming home with bruises after Dad's custodial time, it will be very difficult for your client to receive a favorable order. When there are allegations of child abuse, judges often order the alleged perpetrator parent to have supervised visits at the court nursery. Thus, it may prove to be in your client's interest to enter into a temporary custody arrangement with Mom. In this situation, offering to have Dad's custodial time supervised by a mutually agreed-upon third party may be a good option. If Mom will not agree, you still have to option of filing an expedited petition at a later time.

It is important for an attorney who has a parent involved with DHS to stay in regular contact with the DHS worker. You should obtain a release from you client, consenting to DHS releasing information and records to you. You should find out who the DHS worker spoke to, what steps they took in their investigation, and what were the results of their investigation. As a neutral third party, a DHS worker's testimony will be valuable to a custody judge. Try to get as much information from the worker and discuss with them the possibility of testifying early. DHS workers and DHS records must be subpoenaed and the process can be lengthy.

If the DHS report is valid, the report can, and should, be

appealed if your client believes the finding is erroneous. An appeal must be filed within 45 days for a neglect finding and within 90 days for an abuse finding. Often, validated reports are not referred to the City Law Department, but parents are referred to services. Statutorily, the provision of DHS services must be considered by the court in determining custody. It is generally beneficial in a custody matter for the parent to accept and complete recommended services, even if they are voluntary. You should also determine why a DHS worker recommended services and how this information can be presented at the custody hearing. Often, even with a validated report, the circumstances of the incident of abuse are not as serious as the other parent presents them to be. A DHS worker can testify that this was an isolated event and that there are no concerns for the future. The DHS worker can often speak to a parent's involvement in and commitment to working with DHS, such as completing services.

If the DHS report is invalid, this fact can be helpful in the custody case. Although the identity of the reporter is confidential, you can highlight that DHS was never involved with your client or the child until the parents separated. The DHS worker can testify that they observed your client in the home with the child and had no concerns. Finally, you can highlight that Mom withheld the child and that Dad tried everything he could to see the child. Mom unreasonably refused to allow Dad to see the child, however, even with supervision. In this situation, it may be appropriate to request make up time with the child for your client. When a family becomes involved with DHS, many attorneys assume the worst. However, the independent fact-finding done by DHS can be invaluable to a custody proceeding, and DHS can also provide helpful support services for clients and children.

When a City Law Department files a petition for the child to be adjudicated dependent, a parent is entitled to legal representation. Indigent parents involved in a custody battle are not entitled to legal representation, however, even when there is DHS involvement. Instead, about 85 percent of litigants must represent themselves in Family Court. Only a small fraction of these litigants receive assistance from civil legal aid organizations. Navigating a custody proceeding when DHS is involved requires a skilled attorney and an understanding of the child welfare system. Nevertheless, without the implementation of a civil right to counsel, parents unable to afford an attorney are at risk of losing their children while they navigate this complicated system by themselves. ■

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