

The Family Law/DYFS Overlap: “What Every Family Lawyer Needs to Know”

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The New Jersey Child Abuse Statute (N.J.S.A. 9:6-1, *et seq.*), contains provisions which create a multitude of issues impacting parents, attorneys, physicians and mental health care providers. The statute’s definitions of abuse or neglect are quite expansive and extend far beyond actual physical or emotional abuse or failure to provide proper care or supervision. An exhaustive analysis of the definitions are set forth in G.S. v. The Department of Human Services, 157 N.J. 161 (1999). The statute presents issues which impact the DYFS proceedings as well as effecting Family Part matters (dissolution and non-dissolution), Criminal Matters and Domestic Violence cases. The Statute creates an absolute obligation on behalf of all individuals to report instances of child abuse. N.J.S.A. 9:6-8.10. Thus, any person having reasonable cause to believe that a child has been subjected to abuse or neglect is duty bound to report the same immediately to the Division of Youth and Family Services on a confidential basis. N.J.S.A. 9:6-8.10a. Failure to make a report constitutes a disorderly person offense. The reporting requirement extends to all persons including those covered by evidential privileges.

After instances of child abuse or neglect are reported to the Division, N.J.S.A. 9:6-8.36a requires the Division to transmit the allegations to the County Prosecutor’s Office for its review. The Division then undertakes a Child Protection Investigation governed by the provisions of the Administrative Code N.J.A.C. 10:129-1.1, *et seq.*, which defines when an investigation is required, timeframes, necessary evidence and related

issues. It also contemplates the potential implementation of an emergency (DODD) removal. During the investigation, a determination is made whether or not the allegations are substantiated or unfounded. Any unfounded allegations must be expunged from the Division's records. N.J.S.A. 9:6-8.40a, N.J.A.C. 10:129-6.1, *et seq.* If the allegations are substantiated, the offender's name is placed in a central registry. An appeal from a substantiation must be filed within twenty (20) days of the notice.

If the allegations are substantiated, the Division may employ a broad array of remedial plans including an important but rarely used, "preliminary procedure" mechanism. N.J.S.A. 9:6-8.35. There is great significance to that provision since any statement made by the client during a preliminary conference cannot be admitted into evidence either at a DYFS Fact Finding Hearing or in a Court of Criminal jurisdiction at any time prior to conviction. The usefulness of this provision cannot be overstated. It permits the client to provide information and engage in negotiations with the Division without those statements having evidential effect. It is especially important due to the required exchange of information between DYFS and Law Enforcement. It also creates a basis for entering into a Protective Order barring the later use of statements made to a DYFS worker or mental health professional/s. Every attempt should be made to implement the preliminary procedure protocol, or alternatively, to enter into a Protective Order during any pending DYFS proceeding.

Due to the inter-relationship between DYFS proceedings and other matters, the issue of dual representation may arise. Since allegations of child abuse or domestic violence are exchanged between the Division and Law Enforcement Agencies, the possibility of criminal charges necessarily arises. In the past, based upon the confidential nature of DYFS proceedings, there was a prohibition against a single attorney handling both the DYFS and the criminal matter. That issue was raised and considered in two (2) Trial Courts with different results. In DYFS v. J.C., 399 N.J. Super. 444 (Chan. Div. 2006), the Court concluded that as a matter of public policy, dual representation was prohibited. However, in DYFS v. V.J., 386 N.J. Super. 71 (Chan. Div. 2006), the Court rejected the contention that an attorney's representation of the Defendants in both the DYFS and criminal matters offended statutory confidentiality. The Appellate Division finally addressed the issue in DYFS v. N.S. and R.B., 412 N.J. Super. 593 (App. Div. 2010). There, the Court discussed the competing concerns and established a procedure allowing dual representations subject to Protective Orders

preserving the confidentiality. The Court recognized that any authorization for criminal counsel to undertake representation in a parallel Title 9 case would be subject to the provisions of N.J.S.A. 9:6-8.10a, concerning the confidentiality of DYFS records and proceedings. It further recognized that confidentiality could be pierced in the criminal proceeding pursuant to the holding in State v. Cusick, 219 N.J. Super. 452 (App. Div.) *certif. denied*. 109 N.J. 54 (1987). It therefore held that no automatic disqualifying conflict exists when an attorney assumes the tandem roles of counsel for the same Defendant in both the Title 9 actions.

Apart from the dual representation arising from parallel Title 9/criminal proceedings, dual representation can occur when parents are involved in domestic violence litigation. Instances of domestic violence which occur in the presence of children are reported by law enforcement to the Division which then implements an investigation. Moreover, the same issue surrounding dual representation would arise and would be subject to the rationale espoused in G.S., *supra*.

Once an attorney undertakes DYFS representation, either on a dual or individual basis, it is absolutely necessary to understand the provisions of Title 9. The Division undertakes litigation under the statute and the Administrative Code. Therefore, it is essential for practitioners to be totally conversant with DYFS' own requirements for justifying interference with parental rights. The DYFS realm is different than other aspects of law. DYFS possesses an extraordinary advantage since it can present hearsay evidence pursuant to statute and Court Rule. However, there are constraints limiting how far the Division can make use of hearsay. A finding of abuse or neglect must be based upon a preponderance of the evidence and only upon competent material and relevant evidence. N.J.S.A. 9:6-8.46(b)(2); R. 5:12-4d; DYFS v. M.C., 201 N.J. 328 (2010). Whatever the potential outcome in the DYFS proceedings, counsel must be aware of the potential pitfalls arising from parallel proceedings in either Criminal and Family Courts or Domestic Violence Court. If dual representation is inappropriate based on expertise factors, then a team approach should be implemented.