

SUPREME COURT CRIMINAL AND FAMILY

PRACTICE COMMITTEES

Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases

REPORT

November 27, 2006

The Joint Ad Hoc Committee was created by the Supreme Court Criminal Practice Committee, chaired by the Honorable Edwin H. Stern, J.A.D., and the Supreme Court Family Practice Committee, chaired by the Honorable Eugene D. Serpentelli, A.J.S.C., to review and make recommendations concerning two key issues that arise as the result of an action instituted against a parent or guardian in the Family Part by the New Jersey Division of Youth and Family Services (DYFS) based upon allegations of child abuse, pursuant to N.J.S.A. 9:6-8.8, et seq. and N.J.S.A. 30:4C-11 to -12.2, and the concurrent criminal prosecution of that parent or guardian in the Law Division based upon the same incidents of child abuse. These two issues are:

1. The nature and extent of parental contact with the child, pending criminal disposition, given the need to protect the child from further abuse or neglect, the prosecutorial objective of preventing against unwarranted recantation, and the statutory requirement contained in N.J.S.A. 30:4C-11.1 that DYFS exercise reasonable efforts to effect family reunification, unless otherwise excused by the exceptions set forth in N.J.S.A. 30:4C-11.3;
2. The extent of sharing of information between DYFS and the prosecutor at the pre-indictment stage of a criminal investigation concerning the act or acts of child abuse in light of the statutory requirements contained in the Federal Adoption and Safe Families Act of 1997 (ASFA), Pub.L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.), and in Title 30 and Title 9 of N.J.S.A., that mandate the need to secure permanency and stability for children subject to abuse or neglect without undue delay, see In re Guardianship of DMH, 161 N.J. 365, 385 (1999), thereby dictating the expeditious scheduling of a child abuse fact-finding hearing.

Although there may be dual criminal and civil prosecutions of the child's parent or guardian, the timing sequence of those prosecutions is rarely parallel. More often than not, the fact-finding hearing pursuant to N.J.S.A. 9:6-8.44, conducted in the Family Part to determine whether the child is an abused or neglected child, is held prior to the criminal indictment of the parent or guardian, and often while the criminal investigation is still pending.

I.

The first issue to be addressed concerns parental contact with a child-victim or witnesses. N.J.S.A. 9:6-8.36a requires DYFS to immediately report all instances of suspected child abuse and neglect to the County Prosecutor. See also N.J.A.C. 10:129-1.1 to -1.5. At or about that time, if DYFS determines that the child is in need of protection, DYFS may effect an emergency removal of the child from the home without a court order pursuant to N.J.S.A. 9:6-8.29, and then is required to file a verified complaint against the parent or guardian in the Family Part, alleging that the parent or guardian has subjected the child to abuse or neglect, within two court days after such removal takes place. N.J.S.A. 9:6-8.30b.

Obviously, the Family Part complaint may name one or both parents or guardians as defendants, depending upon the circumstances as revealed by the initial investigation by DYFS. In some instances, it is alleged that both parents or guardians have subjected the child to abuse or neglect. In others, although one parent is the apparent perpetrator, the child must be removed from the home because the other parent denies the allegations and supports the denial position of the other parent, leading to circumstances where the non-abusive parent fails or has failed to protect the child from the actual abuse or the danger of continued or further abuse.

If the circumstances warrant continued removal, the Family Part often issues an order to show cause directing continued out-of-home placement by DYFS and no parental contact or such supervised parental contact as DYFS permits, pending further order. Issues of parental representation, discovery, parental contact, evaluations and others are then routinely addressed by the Family Part on the return date of the order to show cause. See N.J.S.A. 9:6-8.31; Rule 5:12.

By the time of the return date of the order to show cause, if not before, a criminal complaint may have been filed against one or both parents or guardians. The criminal complaint may charge the commission of one or more indictable offenses, ranging in severity from first-degree aggravated sexual assault, contrary to N.J.S.A. 2C:14-2a, to second- or third-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) or -1b(7), to second- or third-degree child endangerment, contrary to N.J.S.A. 2C:24-4a, to fourth-degree child abuse, contrary to N.J.S.A. 9:6-2, or any other number of criminal offenses.

Upon issuance of the criminal complaint(s) and arrest, with or without a warrant, "without unnecessary delay, and no later than 12 hours after arrest, the matter shall be presented to a judge," Rule 3:4-1, who shall set bail. Routinely, where the victim is a child, a condition of bail is that the defendant have no contact with the child. The issue of bail pursuant to Rule 3:26 is normally revisited at the first appearance conducted in accordance with Rule 3:4-2. Generally, the no-contact condition of bail is continued.

The dilemma created by these parallel proceedings is that the issue of the nature and extent of parental or guardian contact with the child-victim is essentially simultaneously before both the Family Part and the Law Division (Criminal Part).

Both DYFS and the County Prosecutor have the responsibility to investigate and safeguard abused children. However, there are competing considerations. DYFS is subject to a statutory requirement to exert reasonable efforts to effect family reunification. The primary interest of the County prosecutor is the criminal culpability of those accused of child abuse and neglect, see DYFS v. Robert M., 347 N.J. Super. 44, 63 (App. Div.), certif. denied, 174 N.J. 39 (2002), and to protect the child-witness from direct or subtle pressure that may lead to recantation, presenting special proof problems. See State v. J.Q., 252 N.J. Super. 11 (App. Div. 1991), aff'd, 130 N.J. 554 (1993) (approving use of Child Sexual Abuse Accommodation Syndrome (CSAAS) expert evidence to explain why a child recants or delays in reporting the act of abuse). Then, of course, there is the right of the parents to participate in child-rearing of their children, a right of constitutional dimension. See In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999) (citing Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 12087, 31 L. Ed. 2d 551 (1972)).

The delicate balancing of these considerations requires a coordinated and comprehensive approach, rather than separate adjudications in different parts of the Superior Court that are based on different objectives.

Accordingly, it is proposed that where a civil child abuse or neglect complaint initiated by DYFS against parents or guardians is pending in the Family Part, and there is a no-contact bail condition as the result of a criminal complaint filed against the parents or guardians, arising out of the same incident(s), a hearing shall be held in the Family Part to determine the nature and scope of parental or guardian contact, if any, with the child. The hearing shall be on notice to the County Prosecutor, the Public Defender(s) or other counsel representing the parents or guardians in the criminal prosecution, the Deputy Attorney General representing DYFS in the civil Family Part matter, the attorney from the Public Defender's Office, designated counsel, or other counsel representing the parents or guardians in the civil Family Part matter, and the designated Law Guardian for the child in the Family Part matter.

Prior to commencement of such a hearing, an appropriate protective order should issue governing disclosure of confidential DYFS records. See N.J.S.A. 9:6-8.10a. No bail condition except contact will be entertained in the Family Part.

Upon considering the evidence and proofs and weighing the competing considerations, the Family Part shall determine the nature and scope of parental or guardian contact with the child, and an order memorializing that decision shall be issued. A copy of the resulting order shall be transmitted to the Law Division (Criminal Part) and shall constitute a condition of the bail ordered by the Law Division. Any applications for modification of that order shall be made to the Family Part, upon notice to the same parties and counsel as required in the first instance.

II.

The second issue pertains to the dilemma that is best illustrated by the circumstances in DYFS v. Robert M., *supra*. In that case, the court reversed an order entered in the Family Part that had dismissed the Title 9 child abuse and neglect complaint initiated against Robert M. and Brenda M. on the grounds that DYFS had failed to prove abuse or neglect of their four children under N.J.S.A. 9:6-8.21. *Id.* at 47.

The parties' age seven male child was hospitalized on an emergency basis in critical condition when he was unable to breathe, had no pulse, and was in septic shock. DYFS became involved when hospital personnel reported "suspicious injuries consisting of cuts and extensive bruising on his legs, knees, arms, hands and forehead." *Id.* at 50. When asked, the parents attributed those conditions to self-inflicted injuries; the child died three days later. *Ibid.*

An autopsy report noted the bruising and listed the cause of death as undetermined pending further studies. *Ibid.* A medical and fatality report prepared by the Child Protection Center of the New Jersey Central Abuse Center issued about eight days after the child's death set forth physical findings suggestive of physical abuse, and cast doubt on the parents' explanation of the injuries as being self-inflicted. *Id.* at 50-51. The report considered medical neglect to be a contributing factor to the child's death. *Id.* at 51.

On the date of issuance of that report, the parents were arrested and criminally charged with endangering the welfare of a child. They were released on bail with the specific condition they have no contact with their remaining children. *Id.* at 52.

On that same date, the three remaining children were interviewed at the county prosecutor's office in the presence of the DYFS caseworkers. *Ibid.* (Best practice in concurrent criminal and DYFS investigations calls for joint interviews to minimize repeated interviews of children).

DYFS effected an emergency removal of the children from the parents' care and placed them in foster care overnight. *Ibid.* On the next day, DYFS filed a Title 9 child abuse and neglect complaint in the Family Part against the parents, seeking custody and protective services. *Ibid.* DYFS was given custody of the children by the Family Part and the children were placed into the care of their grandparents. *Ibid.*

The Family Part case proceeded and DYFS continued its investigation. About two months after the child's death, the medical examiner amended the death certificate to state the cause of death as cardiac arrhythmia due to hypothermia, and determined the manner of death as homicide. *Id.* at 53.

The required fact-finding hearing in the Family Part Title 9 action began less than three months after the child's death. At that time, the investigation by the county prosecutor's office was still on-going and the transcripts of the children interviews that had been conducted by the prosecutor's office were not released and hence not given in the discovery packet to the parents' counsel in the Title 9 Family Part action. *Id.* at 55.

The Family Part judge ruled that, notwithstanding N.J.S.A. 9:6-8.46a(4), because the transcript of the children's statements had not been provided to the parents, the DYFS workers, although present

during the interviews, would not be permitted to testify to the content of the statements of the children. Additionally, the reports of examining psychologists, presented by DYFS, were redacted to exclude any references to the interviews of the children at the prosecutor's office. Ibid.

The fact-finding hearing was delayed after receipt of the amended death certificate of the medical examiner. Counsel for the parents in the Family Part action filed a motion seeking discovery of all autopsy photographs; autopsy body diagrams; all photographs of seized items by the prosecutor's office; all post-mortem x-rays; the complete forensic death medical investigation; interim toxicology reports; and a complete copy of the statements of the children given to the prosecutor's office. Id. at 56. The DAG representing DYFS responded that she did not have those items because they were in the exclusive control of the prosecutor's office. The prosecutor responded to the DAG's discovery request by stating "that criminal charges were pending presentation to the Hunterdon Grand Jury and that 'my office will not provide any material obtained in the course of our criminal investigation other than through the appropriate criminal discovery process outlined in R. 3:13-3. That means, as we have said repeatedly, no pre-indictment discovery will be provided either directly to the defendants or through your office.'" Id. at 56-57.

The prosecutor then obtained a protective order from the assignment judge directing that no member of the prosecutor's office would be required to testify in the Family Court case. Id. at 57. A motion by the DAG in the Law Division (Criminal Part), seeking release of the transcripts of the children's statements was rendered moot when, about five months after the child's death, an indictment was returned against the parents, charging them with aggravated manslaughter and endangering offenses. Ibid. Following the indictment, the statements were released to the parents' counsel in both cases. Id. at 57-58.

However, apparently the children's statement was not released by the time that the fact-finding hearing continued and discovery issues persisted concerning autopsy materials sought by defendants for review by an expert pathologist. Ultimately, the judge excluded all evidence concerning the children's interviews as well as the results of the autopsy report. After conducting the redacted hearing, the judge found that DYFS had failed to prove its case as to four of the children and dismissed. Id. at 63. The Appellate Division reversed and remanded for further proceedings, concluding that the children's statements and autopsy report had been wrongfully excluded. Ibid.

Judge Collester then focused on the discovery issues, stating in pertinent part:

This case presents an unfortunate and extreme instance of conflicts and problems in Title 9 and Title 30 proceedings which can arise from the relationship between the Division and law enforcement agencies when parallel investigations are pursued. . . . The Division is required to investigate allegations of abuse and neglect, . . . to ascertain their veracity, to take action to safeguard abused children from further harm, either by seeking ways to remediate such conduct or, in a proper instance, by placing the child in protective custody of the State. . . . The interest of law enforcement is different since the focus is the criminal culpability of those accused of child abuse and neglect under N.J.S.A. 2C:24-4a. . . .

* * * *

The statutory scheme and administrative regulations envisage cooperation between the agency and law enforcement. . . . The Division is obliged to immediately report to the county prosecutor all instances of suspected criminal activity including child abuse or neglect. . . . If the Division initiates a child abuse complaint in the Family Court, a copy must be sent to the county prosecutor. . . . Alternatively, if the prosecutor decides to bring a criminal case, the caseworker must be so advised. . . .

While the Division must maintain strict confidentiality of records and reports of child abuse, an exception requires release of such information to law enforcement agencies investigating child abuse. . . . However, no statute or rule requires the county prosecutor to disclose information of an ongoing criminal investigation to the Division. While Title 9 contemplates that actions brought by the Division will continue after referral to the county prosecutor, . . . the prosecutor is not restrained from continuing its investigation while the Title 9 action proceeds to trial.

Parallel investigations and proceedings by the Division and the county prosecutor have resulted in thorny constitutional issues. . . . Defendants may face the Hobson's choice of deciding whether to testify and risk incrimination or remain silent in the face of testimony that could deprive them of custody of their children. Judges must be mindful of the potential for abuse of defendant's civil or criminal procedural rights. However, the fact of parallel proceedings does not invest a defendant with any additional procedural safeguards beyond those provided by constitution, statute procedural rules. . . .

[Id. at 63-64 (citations omitted).]

This case illustrates the proof problems that may result when there are dual, but not parallel, civil and criminal prosecutions and investigations of the same incident(s). Indeed, it is conceivable that the deprivation of certain information within the control of the County Prosecutor may lead to DYFS being unable to prove in the Family Part, by a preponderance of the credible evidence, that the defendant parents or guardians subjected the child to abuse or neglect. It is equally conceivable that the withholding of exculpatory evidence could result in an unjust finding of abuse or neglect.

However, there are also dangers associated with the release of pre-indictment investigatory materials. First, ongoing investigations are incomplete. There is a very real danger that information that might be seen in a different light upon completion of the investigation will be misleading if viewed piecemeal. Furthermore, prosecutors live in a real world where desperate and unscrupulous defendants, possibly facing substantial jail time, will go to great lengths to sabotage a criminal prosecution. Absent a protective order, defense attorneys must disclose any discovery information provided in the Title 9 case to their clients, but have no power to prevent those clients from misusing the information.

Therefore, it is also likely that premature disclosure of the substance of an ongoing investigation will enable defendants to conceal evidence, tamper with witnesses and compromise law enforcement's ability to successfully conclude the investigation.

Certainly, it is well-recognized that there is generally no pre-indictment discovery concerning the investigation conducted by the county prosecutor. However, there is an equally well-recognized function of the county prosecutor to assure that victims -- particularly children -- are protected from continued abuse.

This was explicitly recognized in DYFS v. H.B. and L.M.B., 375 N.J. Super. 148 (App. Div. 2005). There, in discussing the release of information from a closed Megan's Law file, the court ruled that:

...absent compelling reasons grounded in preserving the integrity of pending or ongoing criminal cases, prosecutors should view their relationship with DYFS as a collaborative enterprise, designed and intended to promote the overarching public policy running through both Title 9 and Megan's Law: protecting our children from those who would do them harm.

The norm, in this collaborative environment, is for information to be liberally shared between these two public agencies. In this context, the need for judicial resolution of disputes arising as a result of an application filed by one agency against the other seeking injunctive relief, either to protect or to disclose information, should be a rare occurrence. In such a case, the party bringing the action would have the burden to establish, as a threshold matter, that (1) all other means for amicable resolution have been exhausted; and (2) judicial intervention is required to protect the integrity of an ongoing investigation or, in the case of a disclosure order, to establish an element of proof in an abuse or neglect case. [Id. at 179-180].

Thus, in order to balance these competing, and sometimes conflicting, interests and to assure the fair administration of justice, we believe that where there are concurrent civil and criminal prosecutions arising from investigations being conducted by DYFS and the county prosecutor concerning an alleged incident of child abuse or neglect, and there is no consensus concerning the sharing of pre-indictment information, a conference should be conducted on informal application to the Assignment Judge, who shall either hear the matter or assign it to an appropriate judge in the Family Part or Criminal Part. The purpose of the conference is to determine what information, if any, contained in the investigation conducted by the county prosecutor shall be released to DYFS. In making this determination, the presiding court may wish to review the records in camera. This conference should take place expeditiously bearing in mind that for cases of children in DYFS placement, fact-finding hearings must occur within four (4) months of placement.

Notice of the conference shall be given to the county prosecutor and all counsel in the Family Part case. Any agreements reached shall be placed on the record and memorialized by an order issued by the Family Part.

No order shall issue as a result of the conference requiring the release of pre-indictment information from the prosecutor's office without the prosecutor's consent. Any party to the conference may file a formal motion seeking an order governing discovery.