
EDITORIAL

Strategies and Pretrial Hearings for Child Protection

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ABSTRACT. There are various tools that attorneys and their clients might use in custody and/or visitation disputes involving family violence. This column sets forth examples of pretrial motions, hearings, and other strategies. These are used to provide the court with detailed information about the abuse that has happened and the impact that the court's decisions will have upon the children involved. [Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2004 by The Haworth Press, Inc. All rights reserved.]

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FRAMEWORK FOR CHILD PROTECTION STRATEGIES

Frequently, judges are called upon to make interim custodial and visitation decisions. While the term “interim” may suggest a temporary solution, the ruling could be in effect for several years and have lasting effects on children and their families. A temporary decision by a judge may even provide avenues through which family violence continues.

This column overviews tools that can help the court remain child centered and sensitive to abuse issues in a child custody case. A lawyer must understand these tools in order to form a strategy for protecting children during the course of custody/visitation litigation. While there are many ways to educate the court and to favorably position one’s case prior to trial, the impact of the abuse upon the child is the filter through which all information should be presented. The strategies that I will suggest are designed to keep the court focused on the needs and welfare of the child. Further, employing the strategy of using permissible motions and hearings also helps keep the court from utilizing a criminal standard (which requires an overarching concern for the rights of the defendant and securing the rights of the accused) rather than promoting the welfare of the child.

In the early stages of a case, the court should apply what is known from the literature about the effects of domestic violence on children. Children are at risk when they are exposed to one parent controlling the other by power, coercion, exploitation, put downs, threats, and/or physical or sexual violence. When the court ignores this abuse in making visitation orders, child safety takes a back seat to parental rights. Without a showing of risk of harm to a child, it is difficult to reduce contact between a parent and their child because of the understanding under the U.S. Constitution that adults have the right to parent their children.

A judge who lacks information about family violence is likely to consider due process and what would appear to be fair for each parent. However, recognition of the due process rights of the parents does not guarantee protection for a child. A problem occurs when a child is a direct victim of, a witness of, or has been exposed to abuse. The court should question what can be done to keep a child emotionally and physically safe, to help a child recover from their trauma, and to prevent re-traumatization. A court order that reduces or eliminates contact between the abuser and the child may not alone produce the desired effect. In many cases, without treatment, the child’s fear of abuse does not end. Untreated trauma may result in behavioral problems and ultimately in psychopathology and, thus, the child remains unprotected. This may send the wrong messages to the child and the abusive parent. The child comes to believe that

their parents, professionals, and the courts will not protect them. At the same time, the abusive parent may think that the court will allow parental rights to take precedence. The stage is then set for the abusive parent to continue to victimize during the litigation, leaving the child at risk.

The use of a variety of pretrial strategies helps to remind the court about the abuse and may help keep the court more focused on the child's rights rather than abusive parent's rights. In practice, crucial information is often lost or is given little weight by the court because evidence of abuse has not been presented in detail either by the victim or counsel. I have found this to be true even in cases in which there have been findings of fact that validate the allegations of abuse resulting in domestic violence restraining orders.

Attorneys who wait until a custody or visitation trial to present evidence of abuse potentially squander invaluable opportunities to educate the court, to argue their client's position early, to create a record, and perhaps to exclude or limit spurious defenses and/or testimony from proposed experts. Various strategies can be used during pretrial hearings, including focusing attention on the sufficiency of scientific/medical/psychological certainty concerning proposed expert testimony; factors affecting reliability of child testimony; access to historical and current information about the parties (e.g., personnel records); and the qualifications and appointments of particular experts, Guardian ad Litem, and/or evaluators.

STRATEGIES AND HEARINGS

Tort claims. Tort claims (i.e., suits for damages) are valid and important litigation remedies. These actions are not based on a contract and are referred to in the law as a tort. When a marriage partner injures the other partner during the marriage, there may be a cause of action in the court for damages sustained as a result of the injuries. These injuries are sometimes physical, as with assault and battery, and sometimes emotional, such as with battered women's syndrome and posttraumatic stress disorder. A tort complaint sets forth a detailed history of abuse and serves as a road map for the court to better understand the history of the parties' relationship. The complaint can be filed on behalf of a party or on behalf of children who have sustained damages as a result of injury by a parent. These claims require support by an expert.

In certain circumstances, these actions are joined with and may later be separated from the divorce action. A separate tort claim allows for the possibility of a jury trial, which affords an opportunity to explain to the court the behavior of the abusing spouse as well as its effect on the children. Whether a tort claim remains a part of the divorce action or not, the claim itself, where valid, provides an opportunity to review matters of abuse in the family that might otherwise be glossed over in a divorce action.

Pretrial hearings. Another strategy that may be helpful is for a party to file a motion seeking a pretrial ruling on whether the opposing side's expert is

qualified, is using reliable data, and whether the expert's opinion is consistent with the standard of practice. Courts may be reluctant to hold pretrial admissibility hearings in custody matters, believing that psychologists and social workers rely on accepted studies, methods, or practices. It is well worth pursuing in order to alert the court that the adversary's position is weak by exposing and undermining the opposing expert if they relied on suspect procedures, articles, studies, or junk science. It alerts counsel that you intend to hold experts to high professional standards. It is also an opportunity to explain to the court the impact of violence on the child as well as a reemphasis on the importance of relying upon qualified experts. This may prevent the judge from agreeing with an attack on your expert and bolster the court's faith in testimony by the person who presents your point of view.

Even if you do not prevail, the attack on the other side's expert early in the process may set the tone for the eventual trial, and it may help to focus the court on the child's welfare. I believe that in all family law cases, attorneys must assist the court to maintain its focus on issues related to the risk of physical as well as emotional harm to the child.

In my home state of New Jersey, criminal procedures through the Rules of Court allow for pretrial hearings about particular evidentiary issues. States commonly set forth a framework in criminal practice to deal with some evidentiary issues pretrial. There are hearings to resolve issues relating to the admissibility of statements by a defendant, pretrial identifications of defendant, sound recordings, and motions to suppress evidence. There is a substantially identical rule for municipal matters in New Jersey. Curiously, in New Jersey, civil practice does not have a similar rule. Family courts, in particular, have been reluctant to apply a similar framework to flush out and resolve issues in advance of trial. The Rules of Evidence, unlike the Rules of Court, however, provide some guidelines regarding the use of pretrial hearings as a means of resolving admissibility issues.

Each state adopts its own Rules of Evidence. Some state rules conform to the federal rules, while others do not. While each state rule may differ slightly, there is a broad similarity overall. For expert testimony to be admissible under New Jersey Rule of Evidence 702, the discipline, methodology, or premises relied upon by the expert must be sufficiently reliable.¹ The issue of admissibility of expert testimony is whether the experts' methods and premises are "generally accepted" under the *Frye* standard.² Scientific evidence is admissible in a civil case if "it derives from a reliable methodology supported by some expert consensus."³ "In addition to showing its general acceptance in the scientific community, a party offering scientific evidence must show that the technique, methodology, or procedure was correctly used to produce that evidence."⁴ The parties have a right to challenge the expert's methodology and to challenge the reliability of any findings based upon that methodology in an evidentiary hearing, the purpose of which is to demonstrate that the testimony is so lacking in foundation as to be worthless.⁵ The court should hold an eviden-

tiary hearing pursuant to New Jersey Rule of Evidence 104 to determine the admissibility of challenged evidence.⁶ Judges are gatekeepers for determining whether proffered evidence and its consistency and compliance with an underlying theory of science and scientifically based methods of assessment meet the criteria for admissible scientific evidence.⁷ There are two major cases that assist courts in making that determination. Some states use *Frye*,⁸ some use *Daubert*,⁹ and others utilize a combination of the two cases.

The judge's task under *Frye* is relatively simple: to determine whether the method employed by the experts is generally accepted in the scientific community. Under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, there is a difficult two-part analysis. First, it must be determined whether the experts' testimony reflects "scientific knowledge," whether their findings are "derived by the scientific method," and whether their work product amounts to "good science." Second, the court must ensure that the proposed expert testimony is "relevant to the task at hand" (i.e., that it logically advances a material aspect of the proposing party's case).

"The *Daubert* case was returned to the 9th Circuit Court and again, the scientific evidence proffered by the plaintiffs was rejected by the Court *Daubert v. Merrell Dow Pharmaceuticals, Inc. (on remand)*, 43 F.3d. 1311 [9th Cir. 1995]). Judge Alex Kozinski, writing for the Court, declared that '[s]omething doesn't become 'scientific knowledge' just because it's uttered by the scientist . . .' (at 1315-16). The Court's task, Kozinski wrote, 'is to analyze not what the experts say, but what basis they have for saying it'" (at 1316).¹⁰

While the *Daubert* court clarified for federal courts that the standard for expert testimony lies in the federal Rules of Evidence, not all states have adopted the more stringent *Daubert* standards. However, both the *Frye* and the *Daubert* standards represent the basis upon which courts determine the admissibility of challenged testimony. After *Frye* or *Daubert* hearings, the court is left with testimony that is more reliable. Due process requires an equal opportunity to present qualified experts, not necessarily the same number for both sides.

RECORDS

The other party's employment or personnel records, police reports, or medical or psychological records may be relevant to the allegations asserted in a custody action. Such information may provide direct evidence on the issues at question and may be subpoenaed. In addition, as a part of a thorough custody evaluation, evaluators can seek to obtain this collateral data from current and historical records where abuse is an issue.

A party may seek to keep these records from being disclosed by asserting a privacy right. In that event, an opportunity presents itself for filing a brief and requesting a hearing. In many cases, the information sought may provide "other

bad acts” or damaging information that the court should weigh in its final and ultimate custody determination. Even if the court ultimately keeps the information from being disclosed, the facts and circumstances of the information will have been made known to the court. In family matters, the rules often are not strictly adhered to, so information that might otherwise be kept from view of the court may be considered relevant to the best interests of a child. Of course, if the information is deemed impermissible, the court is not permitted to place any reliance upon it in making a final determination.

CHILDREN’S TESTIMONY

Often a party’s expert(s) will testify about the child’s statements to the expert or to other investigators. The data from these interviews are considered hearsay, though experts may be permitted to testify about hearsay evidence in certain circumstances, for example, if it is the type of information normally relied upon by an expert conducting such an evaluation. Typically the expert will present a written report that may contain statements made by a child. Also, the expert may be asked to testify as to the same statements that were in the written report. In some states and in certain circumstances, expert reports may be admissible. Absent consent by both parties or unless the written report is a statement subject to one of the hearsay exceptions, it can generally be kept from being admitted as evidence for consideration and only the testimony of the expert will be considered as evidence at trial.

Experts may present to the court statements and interpretations that conflict with those provided by a child. The expert is generally permitted to testify as to the child’s statements under New Jersey Rule of Evidence 702 and 703 because they are considered information or facts normally relied upon by experts in that field. Cross-examining the adversary’s expert as to the child’s purported statements can be made more difficult if the child’s statements are not recorded. Even when they are recorded, the expert’s questions, demeanor, technique, body language, and timing can greatly affect whether the child will talk about the relevant issues and whether the child will feel comfortable enough to divulge sometimes stressful information to a stranger.

Sometimes courts interview children. Such interviews may be mandatory unless doing so would harm the child. An attorney may seek to have a child interviewed by the court. There may be a hearing to determine whether there will also be testimony by a child, in court or out of court and/or by videotape. If an interview is videotaped by the court, there is an opportunity to view the child’s statements in a different light and to review them as many times as necessary. Another strategy is to challenge the competency of the child to testify. A competency hearing provides the opportunity to put issues of concern for the child’s welfare before the court.

Independent party-selected vs. court-appointed evaluators. When the issue of custody/visitation is presented, there is a question about whether to rely upon an independent, party-selected expert or a court-appointed expert. Part of a judge's task lies in understanding the expertise, neutrality, and bias of evaluators. Sometimes judges rule out appointing the very experts they ought to be choosing because that expert "finds" more child abuse. Just because someone works in the field of domestic violence and child abuse does not make that person inherently biased and does not mean that person believes that everyone is a domestic violence perpetrator or child abuser. Proper training and experience makes them credentialed.

Before an evaluation is conducted, sometimes it is helpful to file a motion challenging the adequacy of a court-appointed evaluator's credentials. Abuse victims are more likely to select a mental health professional who is an expert in abuse-related issues just as a medical patient would see a cardiovascular surgeon for heart surgery and not go to a general surgeon. If a child remains fearful because of her father's past violence, would she heal best if forced to visit her father? Can you imagine ever telling a child who had seen a street fight that the most violent person in the fight would babysit them that night? An attorney must bring these concerns to the judge by filing motions.

A professional's report on the status of the child who was emotionally hurt by family violence should be part of the information brought before the court at the earliest opportunity. This can take the form of a child abuse evaluation or an assessment to see if a child needs therapy. This type of evaluation would be tantamount to giving a child necessary medical attention. For example, if a child had a broken bone, a parent would not decide if it was broken, nor would she be expected to set the bone. An experienced professional needs to conduct the abuse assessment and make recommendations to the court that result in the child getting proper care. Neither the attorney, nor the parent, nor even the court on its own would "set a bone." Likewise, they would not, by themselves, render treatment to an abused child. If therapy is recommended for the child, it should begin immediately unless there is a legal reason it is impermissible. As a case moves forward, it is important that the record reflects that a parent did what one would expect of a parent and not that the parent was simply preparing for litigation. Since most people use doctors to diagnose illnesses, one should do no less in situations involving abuse.

Try to imagine the degree of fear that you might experience if you were in a serious car accident. The same level of fear may afflict an abused child. Using analogies such as a car accident will most likely enhance the court's understanding of child abuse. For example, traumatic memory may not be recovered as immediately as the memory of a football game on TV. After such an event, most of us recognize that sometimes we cannot remember the details of what happened. Details may come back slowly, unlike the precise mental images that we retain from last night's football game. Furthermore, if a child does not feel safe, s/he may not remember what they witnessed or experienced. Children are vulnerable and need the assurance that when they talk about what happened, they will be believed.

CONCLUSION

In order to provide maximum protection to abused children, the protective parent or counsel must avail themselves of all of the tools at their disposal from the very start of litigation. Through the use of these and other pretrial procedures and hearings and a thorough presentation of the abuse, the judge will be better educated and the children will be more likely to receive the necessary protection.

NOTES

1. State v. Kelly, 97 N.J. 178, 210 (1984); N.J. R. Evid. 702, Note 3.
2. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
3. State v. Harvey, 151 N.J. 117, 168 (1997).
4. State v. Marcus, 294 N.J. Super. 267, 275 (App. Div. 1996), *cert denied* 157 N.J. 543 (1998).
5. Biro v. Prudential Ins. Co. of America, 57 N.J. 204 (1970), *aff'g o.b.* 110 N.J. 391 (App. Div. 1970).
6. Suarez v. Egeland, 353 N.J. Super. 191, 195 (App. Div. 2002).
7. Gould, J.W., & Lehrmann, D. (2002) *Evaluating the probative value of child custody evaluations*. *Juvenile and Family Court Journal*, 53 (2), 17-30.
8. *Supra* note 2.
9. Daubert v. Merrell Dow Pharmaceuticals, Inc. (*on remand*), 43 F.3d. 1311 (9th Cir. 1995).
10. Gould, J.W., Kirkpatrick, H.D., Austin, W.G., & Martindale, D.A. (2004) *Critiquing a colleague's forensic advisory report: A suggested protocol for application to child custody evaluations*. Manuscript in preparation.