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DYFS Is Misdirected and Misunderstood

While DYFS must consider the safety of children, its primary mandate is reunification and preservation of the family

The policy mandate for reunification of the family outlined in various statutes and employed by both the courts and the Division of Youth and Family Services fosters a system that does not serve to protect children. The public policy and statutes of the state of New Jersey should be reviewed and revamped as they relate to child protection.

Recent public incidents involving DYFS, as exemplified in Newark with the death of Faheem Williams at the hands of his caregiver (and abuse of others in the family), and more recently in Woodbridge with the death of 3-year old Amir Beeks by a minor, underscores that the DYFS system is not working. In each of these cases, DYFS was involved and the system failed children.

Child protection policy needs to be examined as a public health concern and cannot be repaired in a piecemeal fashion. DYFS, the agency mandated to reunify the family, cannot serve as the agent to protect children while it is

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required serve the goal of reunification of the family. See, for example, N.J.S.A. 9:2-4, Legislative findings and declarations, which notes that it is the public policy of state to assure minor children of frequent and continuing contact with both parents; N.J.A.C.10:1331-4.2, guidelines for diligent efforts of DYFS to reunite families and the services they must provide; and N.J.S.A. 30:4C-1, et seq., Institutions and Agencies, Division of Family Development, Dependent and Neglected Children — “the declared public policy of this State, whereby the safety of children shall be of paramount concern, the preservation and strengthening of family life is a matter of public concern; all reasonable efforts should be made to reunify family; obligation of the State to preserve the sanctity of the family and prevent the placement of children outside the home.”

The public policy of the state, as set forth in the statutes, creates a framework and directs the court and DYFS, in part, by designating and defining roles for each of them. When issues of child protection, abuse/neglect and abuse prevention are present, we are dealing with domestic violence, abuse and neglect.

Issues of abuse typically arise in several ways. They may arise in the context

of domestic violence and custody/visitation disputes, and may be brought to the court directly without DYFS, but litigants may never file abuse/neglect complaints per se even though they are permitted by statute. N.J.S.A. 9:8.34 permits a parent or other person interested in the child to originate an abuse and neglect case on behalf of a minor child. Schools, state agencies, mental health professionals and individuals may bring abuse/neglect of children to the attention of DYFS.

DYFS's Dual Purpose

When DYFS was initiated as the Bureau of Children's Services, its primary mandate was the reunification and preservation of the family. This mandate derived from the constitutionally protected right of citizens to parent their children as recognized and interpreted under the First and Fourth Amendments to the United States Constitution.

This right, though not specified, is derived from the court's judicial gloss placed on the privacy rights implicit in the First Amendment (religion, free exercise, speech); the Fourth Amendment (right to be secure in their persons and houses); the Fifth Amendment (no deprivation of life, liberty ... without due process); and the Ninth and 10th Amendments (enumeration of certain rights, no denial of other rights retained by the people, and powers not delegated ... are reserved to ... the people) — all secured through the 14th

Amendment restriction on state action.

The Legislature modified language through the years to try to make a child's safety a serious concern, but because DYFS is still intertwined with maintaining parents' rights, it has yet to unravel the inexorable problem; the conflicting nature of its dual mandate.

As it exists now, DYFS is relied upon by the state as the child protective agency but it monitors itself and is required to try to keep a family together and to reunify the family after its members have been separated. DYFS is required to make plans for future child placement where a child is removed from the home. Ultimately, despite its obligations to reunify the family, under N.J.S.A. 30:4C-2(a), DYFS has also been designated as responsible for "the care, custody, guardianship, maintenance and protection of children."

Unfortunately, the clear message is that safety is merely a concern to be considered, and this allows children to be placed at risk. DYFS cannot be expected to both promote reunification and child protection simultaneously any more than a prosecutor could be expected to defend someone he is prosecuting.

Moreover, legislation does not have specific standards to ensure prevention of further injury while facilitating the goal of maintaining the familial relationship. It is axiomatic that the best predictor of future behavior is past events. If a child was harmed by a parent, he is at risk of harm with that parent in the future.

The case in Woodbridge of the child who killed Amir Beeks was closed by DYFS in 2002. DYFS had provided services and counseling. Clearly it was not enough. The dichotomy is clear; children are not truly paramount and risk of harm is tolerated.

In fact, the stated purpose under N.J.S.A. 9:6-8.9 is to prevent children from only "serious abuse," not necessarily all abuse. This is so despite the fact that psychological maltreatment is recognized as abuse.

Best Interests Not Promoted

Until New Jersey's policy is altered to make clear that protection of children in all contexts from abuse, violence and neglect is critical to promote their best

interests, and policy and laws are set forth to make clear that the safety of children is the mandate of DYFS and the court, the system fails our youngest citizens and compromises their welfare.

Viewing the notion of best interests for children should change from balancing the parents' interests to a view through the eyes of a child. Children as citizens should be afforded rights that are guaranteed under the U.S. Constitution: The very first sentence of the 14th Amendment makes clear that a person's age is not relevant as "all persons born or naturalized in the United States are citizens of the United States," and the states are not permitted to pass any laws that abridge their privileges nor are the states allowed to deprive them of life or liberty without due process, nor deny them equal protection.

Children, having no power of their own, must rely on the state in its role as *parens patriae* to secure those rights and afford them those protections and safeguard their welfare. To give meaning to the notions of prevention from abuse, the right of children to be safe and secure in their homes should be given more weight than the weight of a parent's right to raise them.

Under N.J.S.A. 9:6-8.8, the comprehensive child abuse and prevention act, the statute is designed to protect children from "serious injury" and to safeguard the "legal rights of such children," and DYFS is required to "make reasonable efforts ... to preserve the family in order to prevent the need for removing the child from his home." The underlying premise is that the child's best interests lie in his return to his home.

Perhaps the underlying question should be what the agency can do to secure the child's rights to be safe and secure; and to prevent that child from suffering future physical and/or emotional abuse.

No Public Accountability

Even if DYFS were to put child protection before parental rights, a child may still go unprotected. Consider the case where DYFS is involved but does not substantiate abuse or does not seek court intervention. Assume further that for any number of reasons, an investigation is improperly done.

The investigatory and decision making powers of DYFS are broad and they are also sealed from public review. See, for example, N.J.S.A. 9:6-8.10(a); N.J.A.C. 10:133G-2.1.

Thus, DYFS is not accountable to the public or individuals. (For an example of the lengths that one must go to even get a glimpse of DYFS's records, see *Charlie and Nadine H. v. Whitman*, 2003 WL 1451289 (D.N.J. March 20, 2003).)

One must wonder who this policy is protecting. The most fundamental rights of due process are at issue when a protective parent disputes a finding of "not substantiated" by DYFS and which then gets relied upon by the court and the case is dropped. (A finding of "not substantiated" is used when a preponderance of evidence indicates the actions of the caretaker were either unjustified or inappropriate but did not cause serious harm or risk of serious harm to the child. The actions would be a cause for concern and addressed by the facility. A finding of "unfounded" is used when no incident occurred and the allegation is found to be inherently improbable or admittedly false. See "Support Operations Manual," DYFS, Findings and Recommendations section 601 (May 1, 2000).)

The adversary system requires opposing positions to have information and to be able to challenge available information. Cross-examination is said to be the searchlight for the truth. In the case where a complaint of abuse is actually filed, under N.J.S.A. 9:6-8.23, the role of the law guardian as it is set up is to "help protect [the child's] interests and to help him express his wishes to the court."

But law guardians rely on DYFS investigations. So they too go unchecked. As long as these investigations are not subject to public or private scrutiny, flaws are less likely to be found and challenged and the adversary system of justice is aborted. No death can be prevented until DYFS is required to undergo public scrutiny and required to have competent and knowledgeable professionals charged with assisting to recognize and understand the early impact of psychological and physical abuse of children.

Incompetent Investigations

A critical issue in the most recent

publicized cases is the inability of DYFS or any of its agents to ascertain that these children were at risk or abused. The knowledge and training of people able to substantiate abuse where there are no physical findings is paramount.

In both of the aforementioned cases, it is all too clear that abuse preceded a death. The Legislature has the capacity to require use of trained professionals who are able to substantiate abuse based on known psychological data and what is known about family violence. Each of these cases is about family violence. Yet violence went unchecked.

In the Woodbridge case, based on the 10-year old's behavior and ongoing observations from neighbors, this child may have been abused. A trained professional in the area of family violence might have predicted future violence and possible removal from the home — even absent physical findings. More than 80 percent of victimized children are victimized by a parent or parents. See David Kalko "Treatment and Intervention for Child Victims of Violence," in *The Family and The Community* (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998).

Failure to protect may have been in part caused by a caseworker not having the requisite knowledge and training. Was it policy or was it incompetence?

There is an implicit reluctance to accept the word of a child, or to minimize a child's report when it is juxtaposed with a denial by a parent. This is true despite the vast amount of knowledge that domestic violence is a private crime and that children do not generally lie about abuse, even in the context of divorce. See Dr. Lenore E. Walker, *The Battered Woman's Syndrome*, (Springer Publishing 2000).

Further, it is well known that perpetrators use custody and visitation as a continuing means of control and that it is psychologically detrimental to children. While failure to protect may be a part of a

larger complex social problem, it cannot be corrected by avoidance.

Sometimes the system may fail because of a lack of knowledge and expertise. Take the case of *Gubernat v. Deremer*, 140 N.J. 120 (1995). In *Gubernat*, the Supreme Court finally held that the child's last name should not be based on a historical bias toward the father's surname. Rather, the best interest of the child should be examined.

Unfortunately, the child's mother — the custodial parent and primary caregiver — won the right to the child's surname, but the father killed the child and himself just days later. This child need not have died had someone understood and recognized the father's abuse.

A Potential Solution

N.J.S.A. 2C: 25-18, commonly referred to as the Prevention of Domestic Violence Act, has mandated ex parte relief for victims of domestic violence with the policy being maximum protection for victims. This statute recognizes that even when they are not directly victims of abuse, children suffer long lasting effects from living in a home where domestic violence exists. That statute also recognizes a positive correlation between spousal abuse and child abuse.

Nevertheless, the Legislature has fallen short of providing children the same protections afforded the adult by way of relief from contact with that parent. To enjoin a parent from contact with a child should be no more or less stringent than the standards for injunctive relief set forth in N.J.S.A. 2C:25-28 and should be made permanent in the same fashion as other injunctive relief.

In *Peregoy v. Peregoy*, 2003 WL 942754 (App. Div. March 11, 2003), the court once again confirmed that injunctive relief in a family court matter would follow the standards first detailed in

Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982).

Thus, the movant must establish: the likelihood of irreparable harm; that the applicable law is well-settled; that the material facts are not substantially disputed; that she will likely prevail on the merits; and, that the hardship on the non-movant does not outweigh the benefit to the movant.

However, when a child is in need of injunctive relief for her safety and well-being, the same standards do not apply. Rather, the state's strong public policy and DYFS's mandate to preserve and foster the family unit requires the child to meet a much higher standard.

To stop contact between a parent who may have abused a spouse or a child in that context contradicts the state policy assumption that contact between a child and his parent promotes the welfare and growth of that child. To stop contact absent notice and an opportunity to be heard would prevent that parent from his constitutionally protected right to parent that child as well as to deprive him of procedural and substantive due process.

Nevertheless, suspension of contact between a child and a parent to prevent abuse and neglect should not undergo a more rigorous test than would be required to enter any injunction under the Prevention of Domestic Violence Act. But no such law exists to protect children and provide restraining orders for children.

The protection of children in New Jersey's statutory schemes derived in the context of parents' rights should be the primary consideration. The Supreme Court can provide administrative directives, but an agency designed solely to afford protection to children must be separately constructed by the Legislature. A new and specially trained court dealing only with issues of family violence and abuse may need to be considered. ■