How DYFS Administrative Findings May Impact Matrimonial and Custody Proceedings

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Abuse Allegations Prompting a Change in Custody and Parenting Time 5

Reliance Upon and Refutation of DYFS Findings in Custody Litigation 12

Several arguments militate in favor of the Court relying upon the DYFS finding substantiating abuse (points; counterpoints)..... 13

1. DYFS is the agency charged with investigating abuse. The agency is keenly suited to detect and address abuse of children 13

2. DYFS investigators are trained to investigate abuse. They have personal knowledge of the parents; they observe the children..... 14

3. DYFS can obtain and verify information from multiple sources, which may or may not be presented by the parents to the Superior Court in custody litigation..... 14

4. DYFS's findings are a final agency determination unless and until overturned on appeal. Thus, for purposes of the custody litigation, the finding is tantamount to an Order having preclusive effect. The accused parent must exhaust administrative remedies

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to challenge the findings..... 15

Numerous arguments support the Court's relying upon the DYFS investigation in which the allegations are deemed unfounded (points; counterpoints)..... 17

1. Child protective agencies are taught to err on the side of caution. Thus, allegations are much more likely to be substantiated than unfounded..... 17

2. DYFS investigators have immediate access to children, with whom they must speak in the course of an investigation. Trial Courts often choose not to interview children, and when they do, they usually do not do so until the end of the case..... 19

3. With multiple referrals, a DYFS investigator would be more inclined to substantiate to get the referent off of his/her back; thus, it is unlikely an investigator would make unfounded findings, thereby increasing the likelihood of additional referrals being made..... 20

Filing A Title 9 Complaint on behalf of a Parent 21

The Pros of filing a Title 9 Complaint 23

1. In title 9 actions, though general discovery is initially quite limited without leave of Court, the rules do provide for essentially unlimited access to records than is typical in the Part 4 discovery rules. 23

2. Incompetent evidence is allowed in all DYFS hearings, except at fact-finding..... 26

3. The admissibility of certain hearsay documents is greatly liberalized, even in fact-finding hearings 26

The Cons of filing a Title 9 Complaint 30

1. Discovery is initially limited, except upon leave of Court..... 30

2. The filing of a Title 9 Complaint by a private party may result in assignment of a Family Judge rather than a Children in Court (CIC) who is less familiar with FN cases 31

3. The absence of DYFS may taint the judge's view of the case..... 32

Conclusion 34

It is not uncommon that allegations of child abuse and/or neglect arise in the context of pending or contemplated custody litigation – whether in a pending divorce matter, post-judgment custody or parenting time modification application or non-dissolution custody action. Nor is it an infrequent occurrence for such allegations to precipitate custody litigation, either at the behest of the Division of Youth and Family Services (DYFS) or upon application of the non-accused parent. When such allegations arise, they present opportunities for advocacy by family law attorneys, no matter which parent (the accused or the non-accused) is represented. This article will explore the contexts in which abuse and neglect allegations arise against custodial and non-custodial parents, provide tips on how to handle the DYFS investigation, identify arguments to be made during custody litigation once DYFS has rendered either substantiated or unfounded findings against the accused parent, and analyze the pro's and con's of filing a Title 9 Complaint in the event DYFS chooses not to substantiate abuse or neglect, or substantiates but fails to take appropriate action to protect the child.

Abuse Allegations Prompting a Change in Custody and Parenting Time

When DYFS receives a referral that a child may be abused or neglected, the agency is mandated to investigate, which investigation must include an interview with the accused parent. Once the accused parent is contacted, the parent will be asked by a DYFS investigator to discuss the allegations. Oftentimes, by the time counsel is made aware that the parent was contacted, the parent has already spoken to the DYFS investigator. However, if the parent is in the midst of custody litigation, the parent may contact his or her attorney prior to agreeing to speak with DYFS. This, of course, is the preferable course of action.

At that point, counsel must decide whether or not to produce the parent for an interview, and if so, how to handle same. If counsel chooses to have the parent give a statement, this should only occur in the presence of counsel. Invariably, when a parent has spoken with DYFS outside the presence of counsel and DYFS later substantiates abuse or neglect, inculpatory statements will be attributed to the parent – many of which the parent will deny ever making. If counsel is present for the interview, such statements are much less likely to materialize.

If counsel for the parent plans to attend the interview, a Deputy Attorney General (DAG) will be present as representation for DYFS. In advance of the interview, counsel should attempt to learn the general nature of the allegation(s). If it appears from the allegation that non-accused parent either made the referral or facilitated the making of the referral (i.e., took the child to a physician who made the referral or notified the police who made the referral), the following steps should be taken in advance of the interview to decrease the likelihood that the Division will substantiate abuse or neglect:

1. Outline in written correspondence the history of custody disputes between the parents.
2. Outline in written correspondence the history of custody litigation between the parents.
3. If custody litigation is pending, provide pertinent pleadings to the DAG.

It is particularly helpful to note which parent commenced the custody litigation. If the accused parent commenced the litigation, point out the likelihood that DYFS is being used by the non-accused parent to defend his/her position in the litigation and maintain the status quo. If the non-accused parent commenced the litigation, point out the likelihood that the non-accused parent is using abuse allegations to "shore up" his/her position in

the litigation and obtain further confirmation of his/her asserted basis to establish or modify custody.

4. If the accused parent has a mental health history, be candid about it; however, be very careful not to waive the client's privilege with any treating physicians.

5. Come prepared with names of persons who can provide exculpatory information to the investigator.

DYFS is required to interview every person who the accused parent identifies who ***could*** provide evidence that the parent did ***not*** abuse or neglect the child[i].

Allegations can be made against either the custodial or non-custodial parent. Depending upon the severity of the allegations against the non-custodial parent, DYFS may ask the custodial parent to sign a Case Plan, which prohibits contact between the non-custodial parent and the child. This request, in effect, constitutes a "removal" of the child from the accused parent. Usually, there is at least *some time* between the Division's initial investigation and the non-custodial parent's next contact with the child for parenting time. The Division, thus, has time to apply for a Court Order prohibiting contact between the child and the non-custodial parent before the child

would again have access to that parent. DYFS has a statutory mandate to seek a Court Order prior to removal where no imminent danger to the child's life, safety or health is present and where the Division has time to seek a Court Order[ii], or alternatively, to apply for a Court Order within two (2) days of the "removal" to ratify its decision to remove[iii].

Consequently, the Division's action of unilaterally severing contact between the non-custodial parent and the child by the expedient use of a Case Plan, thereby shifting the burden to the non-custodial parent to litigate to recommence parental access is the agency's end-run around its statutory mandate. The action by DYFS also places the custodial parent in the impossible position of either refusing to sign the Case Plan and risk having the child removed from his or her care by DYFS, or, signing the Case Plan and simultaneously violating a Court Order that grants the non-custodial parent the right to parenting time with the child. If the custodial parent did not make the referral or facilitate the making of the referral, the custodial parent has surreptitiously coerced into violating a Court Order, which may in the immediacy appease DYFS, but which may place the custodial parent at risk of future loss of custody rights[iv].

As noted above, abuse or neglect allegations may also be made against the custodial parent. Depending upon the severity of these allegations, DYFS may ask the non-custodial parent to sign a Case Plan promising to keep the child and to refuse to return the child to the custodial parent. This may result in the same quandary as is faced by the custodial parent when presented with a DYFS Case Plan. Sometimes, DYFS will direct the non-custodial parent to apply for a change in custody, or else, DYFS will file a Complaint against *both parents*, accusing the accused parent of the underlying allegation of abuse or neglect, and accusing the "non-accused" parent of neglect by failing to protect the child from the allegedly abusive or neglectful custodial parent! This threat is usually sufficient to warrant the non-custodial parent filing the application to change custody, even where he or she does not believe the custodial parent committed an act of abuse or neglect.

The non-custodial parent's application to change custody necessitates DYFS involvement, though the degree of involvement often varies from Court to Court. Superior Court judges have authority to compel DYFS to submit its records for an in camera review[v]. The Court may then review the records to determine whether disclosure to the parents is warranted or whether a change in custody is appropriate.

Alternatively, the Court may compel DYFS to investigate further, to offer services to the family or to participate in the family Court proceedings. Many times, the judge will speak directly with the DYFS caseworker. The end result may be a temporary transfer of custody, pending completion of the DYFS investigation, a return of primary custodial status to the accused parent or any numbers of alternatives in between.

In the event the non-custodial parent does not heed DYFS's instruction to file for a change in custody, or if DYFS decides to file a Title 9 Complaint against the custodial parent, the first preference will be for the non-custodial parent be designated the custodial parent pending an outcome of the Title 9 litigation. This change in custody is not a DYFS "placement"[vi]. At the conclusion of this Title 9 litigation, if the accused parent is exonerated or has addressed whatever issue prompted DYFS's involvement, the accused parent is entitled to a hearing to determine whether custody should be returned to the accused parent or should remain with the previous non-custodial parent[vii].

DYFS involvement in the context of Title 9 litigation that the agency initiates is outside the scope of this article[viii]. However, in discussing the impact of DYFS

involvement in the wake of custody litigation, one would be remiss not to note the possibility of DYFS commencing litigation, exclusive of the parents' litigation.

That being said, the next issue which often plagues family law practitioners involved in custody litigation is the rather common occurrence that DYFS investigates, chooses not the remove the child, chooses not to file litigation because the parents are presently litigating or litigation is contemplated to occur in short order, and the agency closes its administrative file on the family by issuing a finding as to the allegations against the accused parent. The determination letter will come only to the accused parent (the non-accused parent does not have a presumptive right to this information and must request the determination letter from DYFS, and failing its release, must file an application in Superior Court to compel its disclosure).

The letter will be a form letter that notes the date of the referral, the accused, the children at issue and the result of the investigation – i.e., either that the allegation is "substantiated" (meaning, DYFS finds it more likely than not that the allegation is true) or "unfounded" (meaning DYFS cannot confirm the allegation). Depending upon which parent counsel represents, counsel may want to

challenge or to rely upon the DYFS findings. There are several pitfalls to avoid when addressing DYFS administrative findings in custody litigation.

Reliance Upon and Refutation of DYFS Findings in Custody Litigation

As counsel for the non-accused parent, a letter from DYFS substantiating abuse or neglect by the accused parent can be seen as the "smoking gun" for custody litigation. Many times, the letter is enough to create a running theme throughout the custody litigation that the accused parent is abusive. In cases in which the non-accused parent has alleged or proven a prior history of domestic violence, even where no Final Restraining Order is currently in place, the cycle of domestic violence and its impact – both directly and indirectly – upon children is arguably confirmed by the substantiated finding, militating in favor of the Court applying the presumption in favor of the non-abusive parent found in the Prevention of Domestic Violence Act[ix] and in case law[x].

Even where there is no domestic violence, the DYFS finding that the accused parent abused or neglected the child can be used effectively to enable the non-accused parent to obtain an Order granting him or her primary custody. At the same time, the accused parent, armed with

the following arguments, can defeat any inference or suggestion that an administrative finding by an over-worked, under-staffed, usually less than meticulous agency should carry weight in the custody litigation.

Several arguments militate in favor of the Court relying upon the DYFS finding substantiating abuse, some of which are presented here (with their counter-points provided below):

1. DYFS is the agency charged with investigating abuse. The agency is keenly suited to detect and address abuse of children.

Be careful in making this argument where DYFS does not request any services be undertaken by the accused parent. DYFS's failure to require services by the accused parent often signals – appropriately – that while the parent may have violated the statute defining an abused or neglected child[xi], his or her conduct does not present on an ongoing risk of harm to the child such that intervention is warranted. For example, this author has represented a parent found to have abused a child by slapping him in the face, causing a laceration where his glasses pressed upward upon contact with his mother's hand. DYFS investigated and made an administrative finding that the parent had committed an act of abuse, but the agency viewed the

incident as an isolated episode in the life of an otherwise stellar parent[xii].

2. DYFS investigators are trained to investigate abuse. They have personal knowledge of the parents; they observe the children.

Of course, the scope and nature of the investigator's training, particularly as it relates to this investigation may be subject to strict scrutiny. For instance, in a case involving alleged abuse of an infant, an investigator's training in "Finding Words" – a training program mandated by DYFS that is often identified by caseworkers when asked about their training in abuse detection, training wherein investigators learn how to question children – is irrelevant to that particular investigation at hand.

3. DYFS can obtain and verify information from multiple sources, which may or may not be presented by the parents to the Superior Court in custody litigation.

The diligence of the DYFS investigator is subject to the same criticism as is the diligence of any person conducting an analysis of children's behavior – including mental health professionals and judges. A DYFS investigator's inquiry cannot and <u>should</u> <u>not</u> be presumed to be superior.

As for the information obtained, there are reasons why much information obtained by DYFS cannot be presented in

Court in either testimonial or documentary form. The Rules of Evidence are designed to ensure trustworthiness and reliability of evidence. While DYFS may not concern itself with such inconvenient burdens as trustworthiness and reliability, which are mandated to ensure fairness in legal proceedings against an accused parent, the trial Court operates under this rubric for a variety of reasons, including simply justice. Thus, if the choice need be made between a DYFS investigator and a Superior Court judge to determine the validity of abuse allegations, the latter will always be a superior choice in a democratic society.

> 4. DYFS's findings are a final agency determination unless and until overturned on appeal. Thus, for purposes of the custody litigation, the finding is tantamount to an Order having preclusive effect. The accused parent must exhaust administrative remedies to challenge the findings.

An administrative appeal of a DYFS matter usually takes in excess of one year to conclude. The Family Court system would grind to a halt were it to treat DYFS administrative findings as anything other nugatory, base a custody determination solely upon a substantiated abuse finding, then be forced to revisit its finding upon the successful reversal of an administrative finding following an appeal. For this reason, the issue of abuse or neglect must be litigated in the context of the custody litigation.

More importantly, the trial Court is required to consider numerous factors in making custody determinations, which includes "the safety of the child ... from physical abuse by the other parent"[xiii]. A violation of the Title 9 statute may warrant DYFS making an administrative finding against the accused parent, but if safety is the polestar of the determination by the trial Court, some inquiry into the facts of the substantiation is absolutely vital to the Court's analysis. For instance, take the matter referenced above – the mother who slapped her unruly child. Were the Division's finding of abuse to have any bearing upon a custody matter, without questioning the nature of the "abuse" finding, the trial Court may be inclined to transfer primary custody from a stay at home mother with a stellar record of parenting because some agency worker believed that a slap in the face to a rambunctious child somehow equaled abuse.

Our Appellate Division has made emphatically clear that DYFS administrative findings must be subjected to a vigorous review in a trial setting where DYFS's proofs will be subject to cross examination in order to truly validate its conclusion:

> Such judgments cannot fairly be made outside a true truth-testing process. While the [Division's] revised procedures have the

> benefit of flexibility and informality and may indeed resolve some challenges to a DYFS finding, where after exhaustion of the informal procedures, the subject maintains his or her innocence and challenges the DYFS "substantiated abuse" finding as a matter of fact, ***a trial type proceeding is the only way to assure that a reliable judgment will be made***[xiv].

To counsel for the accused parent, a letter stating that the allegations are unfounded may signal victory on the horizon. Again, numerous arguments support the Court's relying upon the DYFS investigation in which the allegations are deemed unfounded. These arguments include the points and counter-points cited above regarding the training of investigators, the ability of the agency to obtain and consider information that the trial Court may not have and the parent's ability to exhaust administrative remedies had the allegations been substantiated. In addition, several other arguments exist:

1. Child protective agencies are taught to err on the side of caution. Thus, allegations are much more likely to be substantiated than unfounded.

There is much truth to this argument. Many advocates for reform of the child welfare system have opined that child protection work has regressed into a witch-hunt for parents and a system for targeting otherwise healthy individuals out of fear of leaving a potentially abused or

neglected child behind. One such advocate, Richard Wexler, a former reporter for the Albany, New York, Times Union, has noted that "[t]he war against child abuse has become a war against children."[xv] The manifestation of this war is often the knee-jerk reaction to find abuse where none exists. However, the fact that DYFS often gets it wrong so that the agency cannot later be blamed if something happens to a child who was the subject of a protective services investigation, does not ***and should not*** mean that every time DYFS finds that allegations are unfounded, that DYFS got it right.

Mistakes have been made in both directions. For this reason, private citizens, including parents, caregivers, anyone vested in the welfare of a child, have statutory authority to file their own protective services Title 9 Complaint. (The logistics of initiating private Title 9 litigation are addressed below.) Ultimately, the only way for the Court to know if DYFS made the correct determination is to view its records, understand the steps taken in the investigation and, if the investigation appears deficient, call those involved in the investigation as witnesses in the custody litigation and allow aggressive cross examination regarding what was done and not done.

2. DYFS investigators have immediate access to children, with whom they must speak in the course of an investigation. Trial Courts often choose not to interview children, and when they do, they usually do not do so until the end of the case.

It is true that DYFS investigators have an opportunity speak to an alleged child victim long before a trial Court would have the opportunity to do; consequently, one might postulate that a child's denial of abuse or failure to exhibit signs of abuse at the outset of an investigation is more reliable than subsequent disclosures made during adversarial litigation between the parents. However, this argument is easily undercut by examining the quality of the investigation undertaken.

Many times, abuse and neglect allegations are more amorphous than "Dad punched the child" or "Mom had sex with the child" – easily detectable claims, which would manifest to an investigator upon viewing or speaking with the child. For allegations which go to a more global assessment of the accused's parenting, the investigator can easily truncate his or her time in the investigation by simply asking the child if mom or dad commits an allege act of abuse, and upon the child denying it, making an unfounded finding and closing the case.

In addition, some social scientists believe that children often are not inclined initially to disclose or confirm abuse by a parent because they fear reprisal or severance from the family unit[xvi]. For this reason, a stranger (i.e., a DYFS investigator) may be less likely to obtain an accurate disclosure than a trusted friend. The value of the investigation will vary from person to person – this must be argued any time a parent refutes a DYFS finding.

3. With multiple referrals, a DYFS investigator would be more inclined to substantiate to get the referent off of his/her back; thus, it is unlikely an investigator would make unfounded findings, thereby increasing the likelihood of additional referrals being made.

This argument may have some validity if the referrals were made close in time and were systematically investigated by the same investigator. However, this is rarely the case. If a matter is not in active litigation, referrals are not necessarily investigated by the same person.

In addition, the converse of this argument is usually true – i.e., an investigator presented with multiple referrals from the same person may at some point be inclined to outright dismiss any allegations by the

referring person. After several unfounded allegations, absent conclusive proof of abuse (marks, physical injury or disclosure by the child), an investigator may have concluded that the agency is being used by the referral source to harass the accused parent. Thus, substantiation is almost inevitably not going to occur with additional referrals. Again, the quality of the investigation and the skill of the investigator are key.

Having reviewed some of the key arguments in favor of and opposing the trial Court's consideration of DYFS administrative findings in custody matters, the zealous advocate is still left with the question of how to protect a child from a parent believed to have abused or neglected that child when DYFS closes its file with a determination of "unfounded". One area of custody litigation grossly under-utilized is the filing and prosecuting of a Title 9 Child Protective Services Complaint in those cases where DYFS fails to take action.

Filing A Title 9 Complaint on behalf of a Parent

As noted above, there is statutory authority for the filing of a Title 9 Complaint on behalf of a private citizen, in the absence of such Complaint being filed by DYFS[xvii]. The statute authorizes a variety of people to initiate a proceeding under the act, including a parent "or

other person interested in the child"[xviii]; an authorized agency, association, society, institution or DYFS[xix]; a police officer[xx]; the county prosecutor[xxi]; a person acting at the Court's direction[xxii]; and any person having knowledge or information of a nature which convinces him that a child is abused or neglected[xxiii]. The statute further authorizes any individual who is unwilling or reluctant to file his own Complaint to request that DYFS file a Complaint on his behalf. Of course, for obvious liability issues, it appears wholly unlikely that the Division would initiate a protective services Complaint on behalf of a private citizen, when the Division did not, of his own accord, view the matter of sufficient basis to file its own Complaint. Nevertheless, making the request of DYFS – even though likely to be declined – may convince the trial Court assigned to the private citizen's Complaint that the Complainant was left with no alternative but to file the Complaint given the Division's failure to act.

DYFS is not authorized to interfere with the filing of such a Complaint[xxiv]. As with any Complaint filed by DYFS, in a private Title 9 Action, the Superior Court ***and the Division*** must deal with imminent physical harm or actual physical harm on a priority basis[xxv]. One must be wary to

file privately a Title 9 Complaint for a variety of reasons.

One key caution is the drastically open-ended evidence rule, which governs Title 9 matters in concert with the Rules of Evidence[xxvi]. The law on the applicability and utility of this evidence rule in the context of privately initiated protective services litigation, in the wake of DYFS's failure or refusal to file such a Complaint, remains to be developed. However, the evidence rule makes clear that it applies to "any hearing under [Title 9]"[xxvii]. The Title 9 Evidence Rule contains several key components, which are engrafted onto the New Jersey Rules of Evidence. As a result, common objections to hearsay are often inapplicable in Title 9 matters. For this reason, counsel must give careful consideration to whether to file a Title 9 Complaint verses proceeding with alleging abuse and/or neglect in custody litigation.

There are many pros and cons to initiating a Title 9 action. A few of those are summarized below:

The Pros of filing a Title 9 Complaint

1. In title 9 actions, though general discovery is initially quite limited without leave of Court[xxviii], the rules do provide for essentially unlimited access to

records than is typical in the Part 4 discovery rules. Specifically, R. 5:12-3 provides:

> All relevant reports of the Division of Youth and Family Services and other reports of experts or other documents upon which the Division intends to rely shall be provided to the Court and to counsel for all parties on the first return date of the Order to Show Cause, if then available, or as soon as practicable after they become available. The Division's case file shall also be available for inspection to the attorneys for the parties without Court Order.

Because of the dearth of case law on non-DYFS initiated Title 9 Complaints, the manner in which this rule would be implemented in such setting remains to be seen. For instance, if the custodial parent files a Title 9 Complaint and Order to Show Cause against the non-custodial parent, would the defendant be entitled to all DYFS records on the first return date of the Order to Show Cause? Or would the defendant be entitled to all records of the plaintiff who filed the Complaint? Or both? R. 5:12-3 requires that the Division file be made available for inspection. In a private Title 9 matter, would the plaintiff's "file" be presumptively available for inspection? And what if that "file" is held by plaintiff's counsel? Would the attorney-client privilege or attorney work-product doctrine shield the records from disclosure?

The answers to these questions lie in zealous advocacy. Certainly, the plaintiff should assert the right to unfettered access to DYFS records, given that the Court Rules otherwise allow such access (and presumably, the plaintiff standing in the shoes of the Division when filing his/her own Complaint should have no less access than the Division when commencing DYFS litigation). However, be wary of proclaiming a right to unfettered access to the DYFS records when DYFS is not a party to the custody litigation. After all, R. 5:12 is limited to "Proceedings by the Division of Youth and Family Services" – not all Title 9 actions. Perhaps the Court Rule heading "Proceedings by [DYFS]" was designed to identify the rules governing an area of litigation usually commenced by the agency. Or perhaps, the cross-reference to the Title 9 statute throughout the R. 5:12 was meant to connote that any Title 9 proceeding is governed by those rules.

Whatever the answer, it is clear that liberal discovery authorized by Court Rule is the law of the land in Title 9 proceedings, and effective analogizing of the plaintiff filing a Title 9 action in the stead of DYFS should open the doors to considerably greater access to records of the adverse party than is typically the case in non-Title-9 custody litigation.

2. Incompetent evidence is allowed in all DYFS hearings, except at fact-finding.

This is the rule that often confounds counsel who do not practice in this area. Any practitioner who has appeared at the initial Order to Show Cause hearing when DYFS files a Complaint seeking removal of a minor child from his or her parent(s) must recall the utter shock and awe that fills the room as the Deputy Attorney General for DYFS elicits volumes of hearsay testimony – sometimes double and triple hearsay – all of which is allowed into the record by the trial judge. The reason this occurs is that competency of evidence is only required in the fact-finding hearing. Specifically, N.J.S.A. 9:6-8.46(b)(2) provides that "in a fact-finding hearing...only competent, material and relevant evidence may be admitted"; however, N.J.S.A. 9:6-8.46(c) provides that "[i]n a dispositional hearing ***and during all other stages of a proceeding under this act***, only material and relevant evidence may be admitted."

When reading these two provisions in concert, the Court is authorized to accept into evidence and rely upon any information provided by either side during non-fact-finding hearings, so long as the information is material and relevant. Thus, letters from the child,

unauthenticated recordings of telephone conversations, notes from medical providers, and other incompetent evidence may be supplied to the Court and relied upon by the Court. The practical import of these rules is that the plaintiff has an inordinate amount of power to provide otherwise impermissible content to the trial Court for consideration on applications to bar access between the child and the accused parent, premised upon information that the Court may not be entitled to consider at trial! This same broad, sweeping power does not apply to a plaintiff in a custody action.

3. The admissibility of certain hearsay documents is greatly liberalized, even in fact-finding hearings:

> Reports. The Division of Youth and Family Services shall be permitted to submit into evidence, pursuant to N.J.R.E. 803(c)(6) and 801(d), reports by ***staff personnel or professional consultants***. Conclusions drawn from the facts stated therein shall be treated as prima facie evidence, subject to rebuttal.
>
> R. 5:12-4(d)

This court rule allows DYFS to submit into evidence records and reports of its professional consultants in accordance with the Business Records exception to the Hearsay rule. The New Jersey Supreme Court has recently addressed the parameters of this rule and, in this author's view, expanded the Division's ability to enter documents

into evidence without competent testimony as to same. On March 31, 2010, the New Jersey Supreme Court issued its ruling in Division v. M.C. III., A-96/97 (September 2009 Term), reversing the Appellate Division's ruling in October 2008 that certain hearsay documents are not permissible to be entered into evidence in DYFS matters. The high Court's opinion, authored by Justice Wallace, noted that the record did not reveal whether or not the DYFS Screening Summary or a medical record completed by the treating physician should have been admissible in evidence — the fact that the defendant's trial attorney did not object barred the defendant from objecting on appeal.

However, the Court went on to provide guidance for future proceedings. As to the Division's Screening Summary, the Court held that DYFS can satisfy its burden of admitting this evidence by taking testimony that the Screening Summary is kept in the ordinary course of business of the Division. Justice Wallace also alludes to this notion that had defense counsel objected, DYFS could "shore up" its record by producing a witness to testify.

As to the medical form prepared by the treating physician, the Court writes, "The Division's use of a disinterested treating physician is not inconsistent with the purpose of the Rule" (referencing R. 5:12-4(d), which

allows admission of forms from medical consultants of the Division). This broad language may be construed to open the door for the Division to offer any hearsay notation by any medical provider, instead of its paid consultants, as has typically been required. However, in all proceedings initiated by the Division, the seminal case of In re Guardianship of Cope, 106 N.J.Super. 336 (App.Div.1969) provides the over-arching standard for admissibility of evidence into any such proceeding: "evidence upon which judgment is based [must] be as reliable as the circumstances permit and the answering parent [must] be given the fullest possible opportunity to test the reliability of the [State's] essential evidence by cross-examination".

In light of the Supreme Court's expansive view that not only are paid DYFS consultants' reports able to be submitted into evidence, but also, potentially, reports and records of treating physicians who provide information to DYFS, a plaintiff in a private Title 9 may derive significant benefit from filing a Title 9 Complaint verse usual custody litigation. In a custody action, any allegation of medical neglect or physical injury would have to be proven with competent testimony. The trial Court – absent stipulation of the parties – could not agree to

simply review medical records to determine whether or not a child had been abused or neglected. However, in light of M.C.III, Title 9 actions often private party plaintiffs a significant advantage – the ability to offer medical records into evidence without testimony.

Of course, in all practicalities, if a child's medical record disclosed some indicia of abuse and/or neglect, counsel's most persuasive presentation at trial would include the testimony of a medical professional to explain why the record indicates abuse or neglect. Nevertheless, if the injury noted in the medical records is not the seminal issue in the custody litigation, the ability to enter the records into evidence without testimony provides an opportunity to the plaintiff in a Title 9 action, which would not otherwise be available in standard custody litigation.

The Cons of filing a Title 9 Complaint

While filing a Title 9 Complaint offers numerous advantages, it also entails numerous pitfalls, which may negate its usefulness. Some of those pitfalls are addressed herein:

1. Discovery is initially limited, except upon leave of Court.

This means that all discovery matters must be addressed with the Court. Counsel cannot serve interrogatories, schedule depositions or subpoena records without leave of Court. While this author's experience has been that trial judges in DYFS matters are liberal in allowing discovery, the time, effort and expense involved in procuring same often delays the process. Further, discovery is not absolute. For instance, in sexual abuse cases, a trial judge may be loathe to allow a physical examination of an alleged child victim if the State has already obtained this evaluation. More and more, trial judges struggle with allowing multiple custody evaluations, with or without psychological evaluation and testing, due to substantial research that children are harmed by multiple evaluations. In DYFS matters, these evaluations may only be obtained with court permission, whereas in custody matters, parties are entitled to retain their own experts[xxix].

2. The filing of a Title 9 Complaint by a private party may result in assignment of a Family Judge rather than a Children in Court (CIC) who is less familiar with FN cases.

Because the filing of a Title 9 Complaint by a private party is relatively rare, judges are often confused by the

filing. Should it be an FN matter and case type, with those same scheduled Court appearances? Should it be a regular matrimonial or family docket type that happens to address FN issues? Whichever option is chosen, it is conceivable that if there is ongoing custody litigation or if there has been in the recent past, the trial judge who handled that custody litigation may choose to handle the Title 9 Complaint (under the one-family-one-judge preference). Though there are no hard and fast rules, counsel should always advocate to have the Children in Court judge in the County hear the Title 9 Complaint. Failure to do so may result in a well-intention family judge who is unfamiliar with the FN case type becoming overwhelmed by this litigation, thereby increasing the likelihood that mistakes will be made.

3. The absence of DYFS may taint the judge's view of the case.

The Division is required to initiate legal action to protect the welfare of a child when the child is at imminent risk of harm. Unfortunately, many DYFS cases are initiated where no such harm or risk of harm exists, and conversely, many cases are *not* initiated when a child is at risk of harm or has already been harmed. Many times, DYFS may choose not to file a Complaint because the non-accused

parent is taking action to protect the child by filing his/her own litigation. In those instances, a DYFS caseworker will make him or herself available to speak to the Court as to the application. Unfortunately, some judges tend to believe that the allegations of abuse or neglect are not credible or of significant magnitude because the Division chose not to file a Complaint.

This perception can be particularly difficult to overcome in cases whereby the Division investigates, makes an administrative finding of "unfounded", and the non-accused parent initiates a Title 9 action following DYFS's conclusion that abuse or neglect did not occur. The accused parent can continually point to the pink elephant that is *not* in the room – i.e., that DYFS chose not to take action because the allegations are false and therefore, the Complaint should either be dismissed or should be litigated without protective services for the child.

To overcome this perception that DYFS's failure to act somehow validates the accused parent, counsel must be vigilant in pointing out the statutory framework – that parents are allowed to initiate Title 9 actions and that DYFS is prohibited from interfering with such actions – clearly an indication that the legislature acknowledged

that the agency can be fallible and should not be granted some supreme deference under the law.

Conclusion

DYFS administrative findings as to allegations of abuse or neglect can and do present unique opportunities for advocacy in custody actions. No matter which side one is on, the agency's findings can and often do impact custody litigation and can precipitate the initiation of independent Title 9 litigation by a party. Understanding how administrative findings are made is vitally important for effective advocacy for parents accused of abuse or neglect and for the children at issue in these matters.

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[i] N.J.A.C. 10:129-2.5(c)(6)
[ii] N.J.S.A. 9:6-8.29.
[iii] N.J.S.A. 9:6-8.28.
[iv] See N.J.S.A. 9:2-4(c), which requires the Court in making custody determinations to consider "any history of unwillingness to allow parenting time not based on ***substantiated abuse***". DYFS's investigation of abuse is not *substantiated abuse*.
[v] N.J.S.A. 9:6-8.10a.
[vi] New Jersey Div. of Youth & Family Services v. R.G., 397 N.J.Super. 439 (App.Div.2008).
[vii] New Jersey Div. of Youth & Family Services v. G.M., 308 N.J.Super. 21 (App.Div.2008).
[viii] For a comprehensive overview of Title 9 litigation initiated by DYFS, please see David v. Goliath: Defense Strategies for Litigating the Abuse and Neglect Trial Initiated by the Division of Youth and Family Services, 29 NJFL 46.
[ix] N.J.S.A. 2C:25-29(b)(11).
[x] See Grover v. Terlaje, 379 N.J.Super. 400 (App.Div.2005)(statutory presumption in favor of awarding custody of a child to the non-abusive parent relates to legal as well as physical custody).
[xi] N.J.S.A. 9:6-8.21.
[xii] On appeal, DYFS subsequently conceded that a slap in the face of an unruly child is not "abuse" under the statute and did not warrant this

stellar parent being branded a child abuser on the state's Central Registry.

[xiii] N.J.S.A. 9:2-4.

[xiv] Matter of Allegations of Sexual Abuse at East Park High School, 314 N.J.Super. 149, 164 (App.Div.1998).

[xv] Wounded Innocents: The Real Victims of the War Against Child Abuse by Richard Wexler.

[xvi] Stephen J. Ceci & Maggie Bruck, Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony (1995).

[xvii] See N.J.S.A. 9:6-8.34.

[xviii] N.J.S.A. 9:6-8.34(a).

[xix] N.J.S.A. 9:6-8.34(b).

[xx] N.J.S.A. 9:6-8.34(c).

[xxi] N.J.S.A. 9:6-8.34(f).

[xxii] N.J.S.A. 9:6-8.34(e). The statute's authorizing a person acting at the Court's direction to file such a Complaint does not resolve the issue of whether leave of Court need be sought prior to filing the Complaint. It appears, however, that given the broad authority under subsection (a) that *any person having an interest in the child* may file the Complaint, it appears leave of Court is not necessary.

[xxiii] N.J.S.A. 9:6-8.34(f).

[xxiv] N.J.S.A. 9:6-8.35(c).

[xxv] N.J.S.A. 9:6-8.35.

[xxvi] N.J.S.A. 9:6-8.46.

[xxvii] N.J.S.A. 9:6-8.46(a).

[xxviii] See R. 5:12-3.

[xxix] See R. 5:3-3(h)(Use of Private Experts) Nothing in this rule [R. 5:3-3 Appointment of Experts] shall be construed to preclude the parties from retaining their own experts, either before or after the appointment of an expert by the Court, on the same or similar issues.