ILLINOIS STATE BAR ASSOCIATION

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Child Law

The newsletter of the Illinois State Bar Association's Section on Child Law

Chair and Editor's Comments

BY JUDGE ROBERT J. ANDERSON (RET.)

April is Child Abuse Prevention Month. More than 600,000 children are abused in the United States every year. Many of us in the ISBA Child Law Section Council are working to lower that number and eventually end child abuse. This is a difficult task as many of the articles in this Newsletter point out. My thanks and gratitude go out to the many authors in this Newsletter issue. Attorneys Sean Sullivan, Ann Pieper, Lori Levin, and Jessica Hudspeth have each contributed an article. In addition, thanks to Professor Joanna Wells from Southern Illinois University School of Law, two SIU law students, Amber Alexander and Dakotah Hubler, have contributed articles to this edition of

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International Child Abduction: An Overlooked Form of Abuse

BY SEAN P. SULLIVAN

When people think of child abuse, often they are thinking of children who are physically abused in some way. The bruises and scars left behind on the children make it very hard not to recognize this form of abuse. But what is harder to recognize is emotional and verbal abuse. Mental and emotional abuse can be much harder to recognize because the scars left on the children are not as readily apparent and easily observable. As a society we run the risk of overlooking this type of abuse because it is not as easily detected.

Emotional abuse can occur when a child is wrongfully removed from their custodial parent and is prevented from seeing them again because of international boundaries. In essence it deprives the child of their fundamental right to happiness by denying them the love and affection of both parents. When a child is wrongfully detained in a foreign country by the other parent it can seem overwhelming and daunting for the previous custodial parent to imagine how they would ever

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our newsletter.

All the articles in this edition of the newsletter deal with issues involving Juvenile Child Protection. I hope that you find them as interesting and informative as I have. I hope that you find them helpful in your work. I also want to thank all our readers for the work you do to help prevent child abuse and to help families have a better future. In my many years as a judge sitting in juvenile court, I have seen the impact of child abuse on children and families. But I have also seen that in many cases there is hope for the future – thanks to so many great people working in the child protection system and in our courts. People like you who want to make a better future for our children and families! Thanks for all you do!■

International Child Abduction: An Overlooked Form of Abuse

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get their child back. Fortunately, there exists the *Hague Convention on the Civil Aspects of International Child Abduction* ("Hague Convention").[1]

The Hague Convention is an international treaty that was signed by the United States, Great Britain, most of the countries in Europe, South America, and Australia. Currently there are approximately over a hundred (100) countries in the world that have agreed to participate in this treaty. The Hague Convention establishes two ways in which a parent can invoke it's protections: they can appeal directly to a court of appropriate jurisdiction in the country in which the child has been unlawfully removed to, or the can apply directly to the central authority in the participating state.[2] As part of the treaty, each participating country must establish a central authority which is some form of governmental entity directly tasked with aiding a parent in seeking the protections of the Hague Convention. For a parent to avail themselves of the remedies afforded under the Hague Convention to seek the return of a wrongfully abducted child, both the country that the child has been "removed from" and "removed to" must both be participants and signatories to the Hague Convention. [3]

Establishing a *Prima Facie* Case of Wrongful Abduction

A petitioning parent has the burden of proof to establish by a preponderance of the evidence their *prima facie* case of a wrongful abduction. The prima facie case is premised upon three factors:

1. The child was habitually a resident in Petitioner's country at the time of removal.
2. Removal/retention was in breach of Petitioner's rights under the laws of Petitioner's home state;
3. Petitioner had been exercising those rights at the time of the removal.[4]

Though these three factors seem straightforward, they are not. They still require an intricate analysis focusing on the subparts of each of these by the reviewing courts.

Shared Parental Intent to Establish a Habitual Residence

The biggest hurdle in an analysis to a wrongful abduction is establishing the habitual residence of the child. There are several factors courts will look at to help them determine the habitual residence. They are as follows:

- Parents obtaining employment in the new country of residence;
- Purchase of a new home in the new country in conjunction with the sale of the old residence in the prior country;
- Marital stability;
- Retention of close ties to former

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country;
- Storage and shipment of family possessions to the new country;
- Efforts to establish citizenship of the parents and child in the new country;
- Overall stability of the home environment in the new country.\[5]

As you can see this list is quite extensive and very fact specific to a case-by-case analysis by the reviewing court. It is very unlikely that the petitioning parents will be able to meet each and every one of these factors, but being able to establish a majority of them should prove persuasive to the reviewing court.

Acclimatization

If the petitioning parent is able to establish that the majority of factors for showing shared parental intent are present, then the petitioning parent is required to prove the acclimatization of the child. Acclimatization has been defined by "an actual change in geography coupled with the passage of time."[4] This means in effect that it is not sufficient to simply show that the child has moved to a new location. It is also incumbent on the new parent to establish that the child has been living in this new location for some time such that they have begun to establish roots there. In other words, the child's life in the new country has become so comfortable and ordered to them that to remove the child from such a setting would negatively impact their mental and social development. [5]

Custody Rights

Assuming the petitioning parent can persuade the reviewing court that there the child had been acclimated to the new location and was residing at a habitual residence in the new location, then the analysis shifts to focus on the petitioning parent's custody rights. A parent will not be successful in their claim for a wrongful abduction unless they can show that at the time of the abduction, they had a right to be exercising parenting time with the child, *and they were actually doing so* when the child was abducted. This means that the petitioning parent must be able to show that a court awarded them parenting time with the child, and they were actually exercising said parenting time as set forth in such order. This also means that if the parent has been ordered to pay child support, if they can clearly establish that they are up to date on their child support payments at the time of the unlawful abduction this will go a long way toward proving they have been exercising their custodial rights. [6]

Conclusion

Clearly, international child abduction cases are very complex and very fact specific. They require an intricate understanding of the Hague Convention combined with persistent advocation on behalf of the client. The petitioning parent has a high burden to establish their *prima facie* case. But just because these types of cases seem difficult or out of the ordinary, their importance should not be overlooked. International child abduction cases still represent a very real danger of emotional abuse towards children. Even though the evidence of mental or emotional abuse is not so easily recognized, it is no less traumatic or harmful to the children.■

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1. U.S. Department of State, "*The Hague Convention on the Civil Aspects of International Child Abduction*". 51 Federal Register 10494, pages 1-37.
2. *Id.* at 15.
3. Reid T. Sherard, "*Demystifying International Child Abduction Claims Under the Hague Convention.*" SC Lawyer, Vol. 24, issue 5, March 2013, pp. 26 – 31.
4. *Id.* at 28.
5. *Id.* at 29.
6. *Id.* at 29.

Constant Allegations of Abuse and Petitions for Orders of Protection May Have Unintended Consequences

BY ANN R. PIEPER

All family law practitioners can point to numerous clients, or adverse parties, who filed a few emergency petitions for an order of protection for less than an admirable purpose—perhaps to obtain exclusive possession of the marital residence, keep the children at their address long enough to register them for school in a new district, or prevent the other party from taking the children out of state or to visit a new significant other's home. While these types of petitions for orders of protection are annoying for the practitioner and increase the acrimony of the parties in the litigation, they are typically resolved with a cooling off period and a temporary restriction in a parenting plan order as the parties adjust to the reality of their situation. Some parents, however, do not adjust or accept the reality that they cannot control or monitor how the other party parents the children. The lack of trust between the parties and/or the desire to keep the other parent away from the child can create an "allegation of abuse loop" that can lead to a juvenile abuse and neglect proceeding resulting in the child being removed from both parents.

Inevitably, parents who are newly separated will notice things when the child comes from the other parent's home that are unexplained. For example, they will notice physical issues such as bruises, scrapes, a diaper rash that won't clear, or bumps on the head; or they might notice behavior issues, such as young children becoming enamored with their private parts, questioning things that seem to be "adult" topics, having nightmares after visits, or not wanting to go to the other parent's house. When parties are newly divorced or separated, not so good at discussing hard topics, or tend to assume the worst, the parent, in their fear, may take the child to the pediatrician and strongly insinuate a suspicion of abuse or might call the Department of Children and Family Services, "just to be safe." At the same time, or after talking with the DCFS investigator, the parent typically files an emergency petition for an order of protection. Of course, once the other parent finds out that there's an ongoing DCFS investigation and/or an emergency order of protection, the relationship between the parties deteriorates quickly while the investigation pends. When the allegation ends as 'unfounded' and the emergency order of protection is dismissed, the former parenting plan order goes back into effect. If this situation happens once, the parents can get past it and the parties can go back to a "normal" co-parenting relationship.

Often, however, one or BOTH parties refuse to let it go. Parent A continues to look at Parent B with suspicion. In the name of protecting the child, Parent A starts to photograph the child every time they come back from the other parent's home. Parent A will ask questions incessantly about every visit and may even go through a whole "safety speech" about private parts. Parent A becomes hypersensitive anytime the child complains about the other parent, sometimes taking notes or recording the child while the child is speaking. Parent B becomes paranoid, puts cameras up inside their own home, and becomes obsessed with making sure that they can never be accused of abuse. Parent B might even take their own pictures of the child at the beginning of each visit. The child or children, of course, notice and start to modify their behavior accordingly, especially if the child can manipulate the situation to get what they want in the moment. The result is a daily life of suspicion for both parents and the child(ren), leading to multiple orders of protection and/or DCFS investigations. The ongoing abuse allegation loop, even if *all DCFS investigations result in a designation of "unfounded"* put both parents at a very real risk that the state will file a petition that the minor is neglected pursuant to 705 ILCS 405/2-3; especially if the child starts to exhibit *any* adverse behaviors such as suicidal ideation, severe anxiety, aggression, or anti-social behavior.

Children are perceptive and observant. Ongoing suspicion and paranoia between the parents affect the child's environment. I was appointed guardian ad litem for a seven-year-old child who had recently been hospitalized for suicidal ideation when Mom filed an eleventh petition for order of protection against Dad, alleging that Dad's ongoing sexual abuse of the child caused the child's suicidal ideation. The order of protection was denied after hearing, when it became clear to the court that the allegations of sexual abuse, which started when the parties separated when the child was two years of age, were investigated, unfounded, and, in fact, clearly unproven even by the child's treating physicians.

Less than two years later, Mom filed yet another petition for order of protection against Dad and called DCFS stating that her daughter "remembered" being sexually abused. By this time, Dad had put cameras all over his home because he was so used to being accused of sexual inappropriateness that he wanted a real record of every waking moment that his daughter was in his care. Additionally, Dad had, himself, two different suicide attempts in response to constant investigations (unfounded) that he was an abuser. The DCFS investigation, once again, brought the child to a Child Advocacy Center interview (the child's fourth of such interviews) where the child did, indeed, recount that her Dad, or maybe it was her

Dad's friend, had engaged in sexual relations with her. Dad turned over the video footage from his home and Mom turned over the child's iPad and phone to the investigating officers. The child's iPad had over 10,000 pornographic images and videos which prompted a second CAC interview where the child disclosed that she found the websites and images when she was playing in her room or playing games online. She was very interested in sex, because she knew that her dad, or someone around her dad, had tried "things" with her because her mom told her so. Now that she had the videos and pictures, she was experimenting with the girls who lived in her building when she invited her other nine-year-old friends to spend the night. The child admitted to the officer interviewing her that she did not really remember anything her dad or dad's friend may have done, but she knew it would "make her mom happy" if she said that her dad did something to her, and there must be something wrong with her because she is interested in sex things, and her mom had helped her "know what to say" in the first interview.

The state's response was to file a petition for adjudication of abuse alleging that the child was abused in that her parents' conduct created an environment injurious to the child. The state easily prevailed in its petition to make the child a ward of the court pursuant to 705 ILCS 405/2-18(1) as the child's suicidal tendencies and obsessions showed, to a preponderance of the evidence, that the parents' course of conduct, harmed the child. Further, the child's subsequent conduct downloading porn and victimizing other children showed a failure to monitor the child, both online and at home, and was creating an ongoing injurious environment. The child in this case *was* removed from both homes because neither parent would stop blaming the other to focus on the need to lock down the child's electronics and get the child psychological care. This child is still removed from the home as her parents still cannot get past *blaming the other* long enough to make reasonable efforts to correct the conditions that were the basis for the removal of the child to foster care in the first place (750 ILCS 50/1 D(m)(i)).

Research is clear that extreme ongoing acrimony between parents is sensed by the child and harms the child. As practitioners, we do our clients a disservice if we do not warn them that no matter what they *suspect;* without proof, ongoing petitions for orders of protection and/or DCFS investigations that the other parent is abusing the child puts *both parents* at a real risk of the state filing a juvenile abuse case against *both parents.* ■

How Child Protection Services Is Failing to Protect Children Exposed to Domestic Violence: An Examination of the Domestic Violence Safety Threat Criteria in Child Welfare

BY AMBER M. ALEXANDER

Domestic Violence

Domestic violence, often defined as abusive behavior within an intimate relationship, encompasses various forms beyond physical violence, including sexual, economic, and emotional abuse.[1] In the United States, over 12 million adults face domestic violence annually, with approximately one in four women and one in seven men experiencing severe physical violence.[2] Domestic violence affects all communities regardless of demographics, though there are evident disparities in minority and underrepresented communities.[3]

Children witnessing domestic violence, often termed the "forgotten victims," face significant risks.[4] They are more likely to experience abuse or neglect themselves[5], with domestic violence being a leading precursor to child fatalities from abuse or neglect.[6] Even when not physically attacked, children witness the majority of domestic assaults, with an estimated 15.5 million exposed to such violence annually.[7] This exposure can lead to emotional distress, impaired cognitive development, and a range of psychological issues.[8] Infants and toddlers exposed to domestic violence may experience emotional distress and impaired brain development[9], while preschoolers often exhibit symptoms like post-traumatic stress disorder and physical ailments.[10] School-aged children exposed to domestic violence may struggle academically and socially, with long-term impacts including mental health issues and risk-taking behaviors in adulthood.[11] Adults who witnessed domestic violence as children are at higher risk of tobacco use, substance abuse[12], and being victims or perpetrators of domestic violence themselves.[13] For instance, male children

exposed to domestic violence are more likely to abuse their partners as adults[14], and adults convicted of rape often report childhood exposure to domestic violence.[15]

To summarize, exposure to domestic violence in childhood can have lifelong impacts on individuals. This underscores the urgent need for comprehensive support and prevention measures to break the cycle of violence and protect vulnerable children.

Child Welfare Systems

Child welfare agencies operating under titles like the Department of Children and Families (DCF), or the Department of Child and Family Services (DCFS) are responsible for protecting children from abuse and neglect. They are governed by state and federal laws, such as the Child Abuse Prevention and Treatment Act (CAPTA), established in 1974 and amended in 2010.[16] CAPTA emphasizes addressing domestic violence within child welfare systems.

Child welfare systems receive reports of abuse or neglect through mandated reporters or concerned individuals. Each state individually defines abuse or neglect and determines whether reports warrant investigation. Investigations involve meeting with children, caregivers, and collateral contacts (e.g., education or daycare providers, primary care providers, neighbors, extended family, or friends, etc.) to assess safety. Based on safety assessments, founded investigations[17] lead to interventions with options ranging from safety planning to removal from the home.[18]

Safety assessments are integral to investigations. They require child protection investigators to evaluate the immediate risk of harm to the child's safety, health, and well-being. Conducted at the outset of an investigation, safety assessments consider several factors, including alleged abuse, family history, and child and parent functioning. Children are deemed safe or unsafe based on these assessments, guiding subsequent agency responses.

Domestic Violence in Child Welfare

Child protection investigators often face a frustrating dilemma when state laws and policies prevent them from intervening in cases where a child's safety is at risk due to domestic violence. In states where laws do not adequately address the various forms of domestic violence or its impact on children, investigators find themselves unable to act, as emphasized in the following case example from Washington State.

In this particular instance, there was an open investigation due to severe ongoing domestic violence; however, the investigator could not intervene because the children had not been physically harmed during any of the altercations.[19] The father's repeated violent outbursts, including threats and physical assaults on the mother and terrifying incidents witnessed by the children, did not meet the criteria for intervention under existing laws. Although law enforcement responded to the numerous incidents, the lack of physical injuries to the children meant the child welfare department could not take further action. Though the investigator recognized the severe impact of the violence on the mother and children, department policies and procedures prevented the investigator from taking steps to ensure the children's safety and well-being. The investigator offered the mother and children voluntary services, including mental health counseling, domestic violence victim's support, and financial assistance; however, the mother refused all service referrals and declined to participate in a voluntary case. The investigation closed with no resolution, leaving the children vulnerable to ongoing domestic violence.

The case highlights the urgent need for reforms in state laws and policies to better protect children in households with domestic violence. It is not enough to focus solely on the physical harm children suffer from during domestic violence incidents since the empirical evidence shows the significant adverse effects exposure to or witnessing violence can have on children. The criteria for intervention must encompass the emotional and psychological impact on children. By expanding safety threat criteria to include the emotional well-being of children exposed to domestic violence, child welfare agencies can better fulfill their mandate to protect vulnerable children. Such reforms are crucial to breaking the cycle of violence and ensuring the safety and well-being of children in at-risk households.

Domestic Violence Safety Threat Criteria

Despite federal mandates, states vary in implementing CAPTA's domestic violence and safety assessment provisions. While the intention is to ensure child welfare agencies address children's exposure to domestic violence comprehensively, inconsistencies persist across states, impacting the protection and well-being of vulnerable children. CAPTA mandates that each state defines what constitutes child abuse and neglect, leading to variations in safety assessments and domestic violence criteria. The number and specificity of safety threats vary across states, impacting child welfare agencies' responses to domestic violence cases.

Some states, like Arkansas and Kansas, do not recognize domestic violence as a safety threat, focusing instead on other forms of physical abuse or neglect.[20] States like Alaska[21] and Florida have vaguely worded criteria that may encompass domestic violence but lack clarity on its impact.[22] Others, like Kentucky[23] and New Mexico, only consider domestic violence a threat when it results in physical harm to the child.[24] Some states, such as Illinois[25] and Washington, focus on the caregiver's ability to meet the child's needs in the presence of domestic violence. This approach overlooks the direct impact on children and disregards their safety and well-being.

However, states like Connecticut[26], Colorado[27], and New York have reformed their criteria to include domestic violence's impact on both the physical and emotional well-being of the child.[28] This aligns with CAPTA's emphasis on addressing children's exposure to domestic violence comprehensively.

Proposal

Inconsistent criteria across states hinder child welfare agencies' ability to intervene effectively in domestic violence cases. While some states have adapted their criteria to reflect the complex nature of domestic

violence, others lag, failing to protect children exposed to such environments adequately. Standardizing safety assessments nationwide and ensuring they encompass the full spectrum of domestic violence's impact is crucial to safeguarding children's welfare. To address these concerns, child welfare agencies should adopt two key measures: implementing a domestic violence screening tool for all investigations and reforming safety threat criteria to encompass the various impacts of domestic violence on children.

Many child welfare agencies already conduct domestic violence screenings during investigations. For instance, Illinois employs a domestic violence screening process for every investigation, followed by a referral to the "DCFS Domestic Violence Intervention Program" if any domestic violence is disclosed.[29] However, if a parent refuses or declines this referral, this may not adequately address safety concerns related to domestic violence for children based on Illinois' current safety threat criteria.

Agencies must also include specific domestic violence safety threats in their assessments to ensure children's safety through safety plans, services, or removal from dangerous environments. While child welfare agencies can offer community-based domestic violence services, addressing children's safety requires explicit inclusion of domestic violence in safety assessments. This ensures agencies can intervene effectively when domestic violence poses risks to children's well-being.

Moreover, the federal government should mandate states to define domestic violence safety threats concerning children. While the CAPTA Reauthorization Act allows for increased collaboration between child welfare and domestic violence services, these provisions are optional, leaving gaps in protection for children exposed to domestic violence.

Child welfare agencies play a vital role in supporting victims of domestic violence, including both adults and children. Their unique position allows for the assessment of children's safety concerning domestic violence and maltreatment. Specific domestic violence safety criteria at the federal level would ensure consistent protection for children across states.■

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1. Nat'l Coal. Against Domestic Violence, https://ncadv.org/STATISTICS.
2. M.J. Breiding, J. Chen, & M.C. Black, National Center for Injury Prevention and Control of the Centers for Disease Control and Prevention: Intimate Partner Violence in the United States – 2010, 10 (2010).
3. Nat'l Coal. Against Domestic Violence, https://ncadv.org/STATISTICS.
4. U.N. Child.'s Fund, Behind Closed Doors: The Impact of Domestic Violence on Children, 3 (2006).
5. U.N. Child.'s Fund, Behind Closed Doors: The Impact of Domestic Violence on Children, 3 (2006). Even outside of the home, children exposed to domestic violence are fifteen times more likely to be physically and/or sexually abused than the national average. *See* Nat'l Domestic Violence Hotline, https://www.thehotline.org/stakeholders/domestic-violence-statistics/. This statistical risk has been confirmed in other countries, such as China, South Africa, Colombia, India, Egypt, the Philippines, and Mexico. *See generally* World Health Org., World Report on Violence and Health (Etienne G. Krug, et al., 2002).
6. Nat'l Domestic Violence Hotline, https://www.thehotline.org/stakeholders/domestic-violence-statistics/.
7. Renee McDonald, et al., *Estimating the Number of American Children Living in Partner-Violent Families*, J. of Fam. Psych., 137, 138 (2006).
8. *See generally* Sherry Hamby, et al., *Children's Exposure to Intimate Partner Violence and Other Family Violence,* Juv. Just. Bull., Oct. 2011; Kelly Keleher, Co-Occurring Intimate Partner Violence and Child Maltreatment: Local Policies/Practices and Relationships to Child Placement, Family Services and Residence (2006).
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11. U.S. Dept. of Health & Hum. Serv.: Office of Women's Health, *Effects of Domestic violence on children,* https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children (last visited Nov. 4, 2023).
12. Futures Without Violence, The Facts on Children and Domestic Violence, 1 (n.d.).
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14. U.S. Dept. of Health & Hum. Serv.: Office of Women's Health, *Effects of Domestic violence on children,* https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children (last visited Nov. 4, 2023).
15. Dominique A. Simons, Sandy K. Wurtele & Robert L. Durham, *Developmental experiences of child sexual abuses and rapists,* 32(5) Child Abuse & Neglect, 549, 549 (2008).
16. CAPTA Reauthorization Act of 2010 42 U.S.C. § Ch. 67 (West 2024).
17. At the investigation's conclusion, the assigned worker and their supervisor determine whether the allegations of child abuse or neglect are founded or unfounded. An investigation is unfounded if there is insufficient evidence to support the allegations of abuse or neglect or if the evidence does not legally constitute abuse or neglect in the state. In these cases, the assigned worker does not have legal jurisdiction to keep the investigation open once an Unfounded finding has been established, regardless of any concerning circumstances. An investigation is founded (also referred to as "indicated") when there is a preponderance of evidence that child abuse or neglect, as defined locally by the state, has occurred. A founded finding may prompt various responses from the agency depending on state or local policy.
18. Child Welfare Info. Gateway, How the Child Welfare System Works, 2 (2020).
19. Interview with an anonymous Child Protection Investigator, Wash. Dep't of Child., Youth & Fam. (2023).
20. *See e.g.,* Ark. Dep't of Hum. Serv., Investigation of Child Maltreatment Reports, 5 (rev. Feb. 2015); State of Kansas Department for Children and Families, Family Service Risk and Safety Assessment, 1 (2016).
21. Alaska does not explicitly list domestic violence in its criteria but instead lists a vaguely worded safety threat that could encompass domestic violence. Alaska's criteria reads that "one or both caregivers are violent and/or acting dangerously." State of Alaska, Office of Children's Services, Safety Threats Guide: Impending Danger, 3 (2010).
22. *See e.g.,* Florida Department of Children and Families, Core Safety Concepts, 4 (2021).
23. Kentucky's Safety Assessment lists physical abuse as one of its safety threat criteria. It defines this threat as "a caretaker caused a physical injury with intent to harm, AND the injury was more than superficial." Kentucky's assessment provides examples of what may constitute physical abuse according to the criteria. One example states that physical abuse includes when a "child receives injury during a domestic violence incident." Kentucky Cabinet for Health and Family Services, SDM Intake Assessment: Policy and Procedures Manual, 12 (2021).
24. *See e.g.,* New Mexico Child., Youth & Families Dep't, Safety Assessment Policy and Procedures Manual, 9 (2018).
25. In Illinois, the Department of Children and Family Services includes a caregiver-focused domestic violence safety threat in its Safety Assessment.
The threat will be considered active when there is a "presence of violence, including domestic violence, which affects a caregiver's ability to meet the immediate needs of the child." Ill. Dep't of Child. & Fam. Serv., Child Endangerment Risk Assessment Protocol Safety Determination Form, 3 (rev. Feb. 2019); Wash. Dep't of Child., Youth & Fam., 17 Safety Threats, 1 (n.d.).
26. Out of its twelve safety threat criteria, Connecticut's ninth safety threat is "domestic violence exists in the home and poses a risk of serious physical and/or emotional harm to the child." Connecticut Department of Children and Families, SMD Safety Assessment, 2 (2007).
27. Colorado's Family Safety Assessment Tool identifies its fifth safety threat as when the "caregiver(s) is engaged in domestic violence in the home and places the child/youth in danger of physical and/or emotional harm." Colo. Dep't of Hum. Serv., https://cdhs.colorado.gov/ (last visited Jan. 5, 2023).
28. *See e.g.,* New York Administration for Children's Services, Safety and Risk Assessment Resource Guide, 9 (2013).
29. Ill. Dep't of Child. & Fam. Serv., What You Need to Know about Domestic Violence and Child Welfare, 2 (rev. Jan. 2019).

Outline of the Administrative Appeal Process for a Department of Children and Family Services Administrative Appeal

BY LORI G. LEVIN

The Illinois Abused and Neglected Child Reporting Act, of ANCRA, 325 ILCS 5/1, *et seq.,* authorizes the Department of Children and Family Services (the Department or DCFS) to take actions to protect the health safety and best interests of children where they are vulnerable to abuse and neglect.

This article deals with situations where children are not taken into protective custody and petitions are not filed in juvenile court but pertains to the procedures where caregivers, family members, or child workers are investigated for child abuse or neglect.

The Department maintains the State Central Register (SCR), a list of all cases of suspected abuse or neglect. 325 ILCS 5/7.7. Upon receiving a report, DCFS investigates the allegation and determines whether a report is "indicated," "unfounded" or "undetermined". *Id*. at §§ 7.12, 7.14. For an allegation to be indicated, the Department must find credible evidence of the alleged abuse or neglect. *Id.* at §3. Per *DuPuy v. Samuels,* 397 F.3d 493, 505-506 (7th Circ. 2005) in order for the Department to make such a finding there must be consideration of all evidence, both inculpatory and exculpatory.

Depending on the nature of the allegation, a person can be placed on the SCR for a period of five to 50 years. Although the SCR cannot be accessed by the general public, being on that register can have employment implications or other legal ramifications pertaining to family members. For instance, teachers, daycare workers and providers, medical personnel, and other persons who work with children may lose employment or have licensing issues if they remain on the register. Parents who are separated/divorced may have visitation or custody legal issues. Parents who are repeatedly investigated and indicated may be referred to juvenile court and could possibly have children removed from their custody.

A person indicated by the Department is entitled to request an administrative hearing to expunge the finding. At that hearing, DCFS must prove the allegation is supported by a preponderance of the evidence. 89 Ill. Admin. Code 336.115(c)(2)(B)

Persons who work with children, such as most teachers, day care providers, medical professionals, and others, are entitled to an expedited process under DCFS Rule 336.85. In those cases, DCFS notifies the childcare worker of its intent to indicate and the worker is entitled to an administrator's conference where a DCFS supervisor from another area holds such a conference over the telephone. That conference is held prior to the indicated finding being entered into the SCR. If the person is indicated, the childcare worker is entitled to an expedited hearing within 35 days, rather than the normal 90 days.

DCFS formally notifies an indicated person via United States Mail. An indicated person has 60 days to appeal in writing. Appeals must be sent to the Springfield office: Administrative Hearings Unit, Expungement Appeals, 406 East Monroe Street Station #15, Springfield, IL 62701-1498. FAX: 217-557-4652, dcfs.efiling@illinois.gov. An attorney must have an appearance on file to receive the investigative file and act as counsel. The appeal request and appearance may be filed via facsimile, e-file, or United States Mail. I generally e-file the appeal request and my appearance and send a back-up copy via facsimile.

Although the procedure is called an administrative appeal, the hearing is the first time witnesses are called, cross-examined, and testimony is taken.

Once the appeal and appearance are filed, notice of a pre-hearing conference call will be sent to the attorney as well as the investigative file. In practice, the investigative file is supposed to arrive very close to the pre-hearing phone call.

As a practical matter, these hearings are generally not completed during the proscribed time frames. Many times, the Department will not provide an appellant with the investigative file for months. If a forensic interview was taken from a child, the Department must request that interview from a Child Advocacy Center, which may or may not respond in a timely manner. An appellant may need to waive the time period or will be made to go forward without the critical information needed to mount the appeal. Once the investigative file is obtained, an appellant might wish to obtain materials on his own or may request the Department to issue a subpoena on his behalf.

Additionally, the appellant should file a motion for production of documents and list of witnesses. The Department will also file such a motion. Answers must be filed.

At the pre-hearing phone conference, issues such as discovery issues, pre-hearing motions, motions for telephonic testimony, motions for interpreter are considered. When there is a pending juvenile court proceeding or criminal case involving the same circumstances that gave rise to the indicated finding, the administrative law judge will dismiss the appeal without prejudice until such proceedings are concluded. Rule 336.190(b). Should there be no finding of abuse/neglect in concurrent juvenile proceedings and no finding of guilt in criminal proceedings, an appellant must file his request to appeal within 60 days of the termination of said proceedings. 325 ILCS 5/7.16. There can be no such appeal should there be findings against the appellant

in juvenile or criminal court. *Id.*

Should either party wish to call a child as a witness, a motion must be filed, and the administrative law judge will determine if it is appropriate during a pre-hearing call. 89 Ill. Admin. Code 336.105(B)(3)(A) and (B). Note: The child's hearsay statements regarding the alleged abuse or neglect are admissible as non-hearsay evidence. Rule 336.120(b)(10).

The Department's attorneys used to routinely call minors 14 years of age and older at these administrative hearings. They no longer do so. This can be problematic and seems to fly in the face of the due process rights of an appellant. Due process principles apply to administrative hearings, and, in particular, to DCFS administrative hearings. *Lyon v. Illinois Department of Children and Family Services,* 209 Ill.2d 264, 282 Ill. Dec. 799, 807 N.E.2d 423 (2004) The relatively recent practice of no longer calling minors as witnesses, who would testify in circuit court on similar allegations if an appellant was criminally charged, seems to denigrate said due process rights.

The actual hearing may be conducted via telephone, videoconference, or in person. For the most part, these hearings are being conducted via videoconference. The hearing is audio-taped by the administrative law judge. The Department is represented by counsel and the appellant/petitioner is also present during the hearing.

The Department carries the burden of proof that a preponderance of evidence supports the finding. 89 Ill. Admin. Code 336.115(c)(2)(B). Preparation for the hearing should include careful review of the investigative file for any and all inconsistencies, interviews of witnesses, investigation into allegations, and preparation of the appellant to testify. As these hearings are civil proceedings, DCFS can call the appellant petitioner as a witness.

The administrative law judge is not the final decision-maker. The ALJ makes a written recommendation to the director of the Department of Children and Family Services which contains findings of fact and law. Rule 336.220. This recommendation is forwarded to the Director who makes the final decision regarding the administrative appeal. The director shall accept, reject, amend, or return to the Administrative Hearings Unit the case for further proceedings. It is highly unusual for a director to reject the administrative law judge's decision or to return the matter to the Administrative Hearings Unit for further proceedings.

Appellant's counsel receives the director's decision as well as the administrative law judge's written opinion and recommendation. If that decision is unfavorable, it may be appealed to the circuit court under the Administrative Review Act, 735 ILCS 5/3 *et.seq.* There are strict rules regarding the timeliness of administrative review appeals that are fatal if not followed. The administrative review complaint must be filed within 35 days of the date served upon the party. That service date is not the date actually served but the date postmarked. Should the decision be appealed to circuit court, that court will act as an appellate court. Briefs will be filed by the appellant and the Attorney General's Office, which is the attorney for the Department in administrative review proceedings.■

Interesting Intersection in Illinois Laws

BY DAKOTAH L. HUBLER

This article highlights an interesting intersection between two Illinois statutes—the longstanding Juvenile Court Act of 1987 and the new Pretrial Fairness Act. Specifically, this case began in response to the arrest of defendant, early on September 18, 2023. However, because Illinois' new cashless bail system went into effect on the same day, the outcome of this case changed drastically.

Under the Juvenile Court Act of 1987, "Any adult person, any agency or association by its representative may file, or the court on its own motion, consistent with the health, safety and best interests of the minor may direct the filing through the state's Attorney of a petition in respect of a minor under this Act…" 735 ILCS 405/ 2-13(1). Thus, when parents are arrested and detained for certain types of offenses, the state often simultaneously files a petition to remove the minor children from the home, as their parent's actions pose a risk to the child's health, safety and best interest.

On September 18, 2023, Illinois courts made history when they became the first state to replace the wealth-based detention with risk-based detention, eliminated money bail, and mandated a new but rigorous legal standard to protect community safety. 725 ILCS 5/110-6.1. Specifically, the Pretrial Fairness Act (PFA), which was part of a wider package of criminal justice reforms passed by the state in 2021 (known as the SAFET Act) eliminated monetary bail and created a default rule that "[a]ll persons charged with an offense shall be eligible for pretrial release" on personal recognizance, subject to conditions imposed by the trial court, such as electronic monitoring or home supervision. 725 ILCS 5/110-6.1. The law allows prosecutors to seek—and judges to order—pretrial detention in certain specified cases. For instance, a defendant charged with an enumerated felony offense may be ordered detained if the court finds the person "poses a real and present threat to the safety of any person or persons or the community." 725 ILCS 5/110-6.1(g).

On the very same day the cashless bail system went into effect, the Defendant was arrested for several domestic violence charges. The complaint brought by the state specifically alleged domestic battery of his spouse and a violation of a standing order of protection against his spouse. Because the allegations in the complaint posed a

substantial threat of danger to the minor children in the home, the state additionally filed a petition for shelter care hearing alleging the repeated acts of domestic violence in the home were injurious to the child's welfare. Additionally, the new Pretrial Fairness Act required the state to file a motion stating that the defendant should remain detained, given the nature of the alleged offence. The state's motion cited the specific violations under the Illinois Code and argued that the violations posed a real and present threat to his spouse (the victim) and the public. The judge ultimately granted the state's motion and relied on evidence from the charges themselves and additionally the defendant's admission in open court of, "willfully violating the standing order of protection." Because the state met their burden of clear and convincing evidence that the defendant posed a danger to the victim and society at large, the defendant was denied pretrial release and detained until further notice.

Just moments following this order, the court called the defendant's case in juvenile court. After hearing the court's prior denial of release, the state reasoned that a petition seeking shelter care of the defendant's kids was no longer needed as the defendant would be detained. Because the defendant was detained, he no longer posed a threat to his children's health, safety and best interest. Thus, the state dismissed the petition by letting the time in pursuing charges lapse.

Had this defendant been arrested just one day prior, he may have been released under the prior cash bail system and the state would have probably still pursued the shelter care petition alleging that the children were neglected pursuant to the Illinois statute. Thus, because the new law in Illinois allowed the state to detain a dangerous defendant, they were able to dismiss a subsequent petition that alleged their children were posed a threat of danger. Although it is important to realize this is a terrible situation that has uprooted a family, it is truly a rare intersection between the new Pretrial Fairness Act and the Juvenile Court Act of 1987.■

Dakotah L. Hubler, J.D. candidate, class of 2024, Southern Illinois University School of Law

An Interview With Marion County State's Attorney, Timothy J. Hudspeth

BY JESSICA N. HUDSPETH

Jessica: Thank you for taking the time to answer my questions and tell the Child Law Section Council members a little bit about yourself and your work in Marion County, Illinois. If you could start out by giving us some background information about you.

Timothy: I was raised in Carlyle, Illinois. I attended college at McKendree University and, after graduating with my bachelor's degree. I attended Southern Illinois University School of Law and was admitted to practice in Illinois in November 2008. After doing bankruptcy work in Springfield for a year and a half, an opportunity arose closer to my hometown. I moved to Salem, Illinois in 2011 and engaged in general practice until December 2020. In November 2020, I was elected as Marion County state's attorney and took office on December 1, 2020.

Jessica: In your current position as Marion County state's attorney, have you been involved in the prosecution of abuse and neglect cases (typically labeled juvenile cases)? To what extent have you been involved in those cases?

Timothy: Yes. I have participated in juvenile abuse and neglect cases from start to finish. This means I have been involved in staffing the cases with Illinois Department of Children and Family Services investigators, I have prosecuted the adjudicatory hearing, and I have been involved in the proceedings to terminate parental rights.

Jessica: Prior to being elected Marion County state's attorney, were you involved in any juvenile proceedings?

Timothy: Yes, but my experience was limited to appointments as a conflict public defender for indigent parents in abuse and neglect cases. My involvement in these cases significantly increased after taking office in December of 2020.

Jessica: What would you say is the most challenging part of prosecuting juvenile cases?

Timothy: Balancing what you think is best for the child against the rights of the parents, while considering what admissible evidence is available to prove abuse and neglect.

Jessica: Is it difficult to keep your own opinions and values from affecting how you approach a case?

Timothy: Not frequently. In most of the cases my office is presented, it is usually apparent that there is a problem that requires intervention.

Jessica: Do you have any personal experience with the abuse and neglect of a child?

Timothy: Yes. My wife and I adopted a child from another state. He was the victim of significant abuse and neglect from his birth mother. As a result of the trauma he endured, he has physical and emotional scars that he will live with for the rest of his life. His birth mother was allowed to retain custody of him despite multiple attempts at

intervention, leading to the incident that left him physically scarred. It was apparent that intervention was necessary, but the system in that state failed to protect him.

Jessica: What changes, if any, to the juvenile justice system do you feel would help to protect children better in situations where there is abuse and neglect?

Timothy: Better communication between the service providers and evaluators, case workers, and families (both foster and biological), could help better protect the children. It is crucial for the children to be evaluated and directly enrolled in services to address the trauma they have endured prior to intervention. This would likely maximize the benefits from any treatment they may receive. As the goal of these proceedings always begins with reunification of the family, it is necessary to have parents evaluated as soon as practicable and enrolled in services to better equip the parents to provide for their children.

Jessica: Are there any services or resources you would like to see provided that are not available to these children in Marion County, Illinois?

Timothy: The services and resources are present, but there is a severe lack of available providers for prompt behavioral and/or mental health evaluations as well as counseling in our area. The rural location of Marion County, Illinois puts a strain on the providers we do have for these services. We are over an hour from St. Louis and even further away from Springfield, Illinois. There are qualified providers in our area, but the sheer number of cases and, in turn, parties needing these services, have put a strain on the availability of these providers. At times, the wait list for these services can be six (6) months or sometimes longer. In many cases, the need for prompt evaluation and treatment is essential and we just can't staff that need.

Jessica: Again, thank you for taking the time to sit down and answer my questions. It is encouraging to have someone in a position such as yours who has personal experience with this subject matter.■

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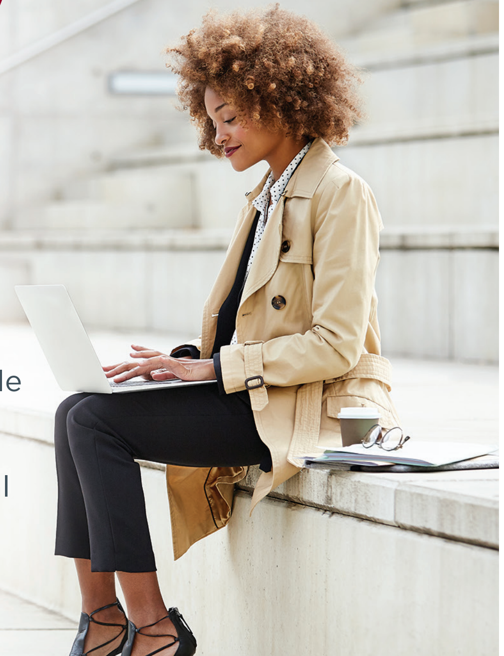

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