

EVIDENTIARY ISSUES IN FAMILY COURT CHILD ABUSE AND NEGLECT CASES

Presented by
Monroe County Assigned Counsel Program
and
Volunteer Legal Services Project
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Outline prepared by
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I. Family Court Act §1046: The centerpiece of Article 10 Evidence

- A. A good review: Besharov's Commentaries in McKinneys.
- B. This section summarizes the most distinctive evidentiary rules, generally aimed at easing the introduction of evidence presented by the Department of Social Services.

II. Proof of abuse/neglect of one child shall be admissible on the issue of abuse/neglect of any other child. FCA § 1046 (a)(i).

A Sometimes described as "derivative" neglect/abuse

- 1. A finding a neglect/abuse in the same case or a previous case must be considered by the court if so requested. It does not create a presumption of neglect/abuse of other children, but may be difficult for the parent to overcome unless the other children can be distinguished from the child already found to be neglected or abused.
- 2. Factors in "derivative" cases
 - a. "The derivative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct which formed the basis for a finding of abuse or neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists". Matter of Cruz, 121 AD2d 901,902-903 (1st Dept., 1986). Parent then will have the burden of showing that the condition does not exist. Matter of Cruz, supra, citing Matter of Kenya G., 74. Misc.2d 606.
 - b. Nature and duration of abuse/neglect as indicative of overall parenting ability. See, e.g., Matter of Ely P., 167 AD2d 473 (2nd Dept., 1990), Matter of Christina Maria C., 89 AD2d 855 (2nd Dept., 1982).
 - c. If parent suffers from a chronic condition, such as mental illness, retardation or substance abuse previous findings of neglect will often be cited on new petitions for after-born children.
 - d. While many decisions support a liberal application of this rule, where the neglected child is older and in different circumstances, a finding of neglect as to younger siblings will not be sustained. See, Matter of Jessica F. 175 AD2d 207(2nd Dept. 1991) where excessive corporal punishment as to a teenager was found to be insufficient to make a finding of neglect as to siblings.

III Proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts/omissions of the respondent shall be prima facie evidence of abuse/neglect. FCA §1046 (a)(ii).

- A. This section creates a rebuttable presumption of parental culpability in certain instances. This section is often compared to "*res ipsa loquitur*" in negligence cases.

- B. The burden of proof is not shifted by the statute and there is no legal requirement that the respondent present a defense. Matter of Philip M., 82 NY2d 238, 244 (1993); Matter of Nancy B., 207 AD2d 956 (4th Dept., 1994).
1. In Philip M., the Court of Appeals suggests that a respondent may attempt to overcome the presumption by establishing that the child was not in her care when injured, that the injury could have reasonably occurred accidentally without acts or omissions by the respondent or counter the proof that the child had the condition/injury in question. Matter of Philip M. at 244.
- C. Examples:
1. Unexplained sexually transmitted disease. Matter of Tania J., 147 AD2d 252, 259(1st Dept. 1989).
 2. Diastatic fracture of the skull and a bilateral subdural hematoma that inconsistent with mother's explanation of a fall from a bed. Matter of Marcus S., 123 AD 2d 703 (2nd Dept. 1986).
 3. A series or pattern of injuries may rise to the level of neglect even if the parent provides explanations. See, Matter of Briana R., 236 AD 830 (4th Dept. 1997); Matter of Cerda, 114 AD2d 795 (1st Dept. 1985).
- D. Expert testimony not required to establish prima facie case, but should be used where lay testimony would not be adequate, or where injuries appear to be those associated with typical childhood activity. See, Matter of Raymond C., 151 AD2d 388 (1st Dept. 1989); Matter of Christine F., 127 AD2d 990 (4th Dept. 1987); Matter of Eric G., 99 AD2d 835 (2nd Dept. 1984).
1. The court, however, may elect not to accept the expert's opinion. See, Matter of Christine F., 127 AD2d 990 (4th Dept. 1987) where neglect dismissed based on fracture of the child's left femur and the expert testified that "he could not conceive how the fracture could have occurred accidentally."

IV. Proof that a person repeatedly misuses a drug(s)/alcohol to the extent that it has or would have the effect of producing a substantial state of stupor or substantial impairment of judgment or a substantial manifestation of irrationality shall be prima facie proof of neglect except where the respondent is voluntarily and regularly in treatment. FCA §1046 (a) (iii).

- A. Positive toxicology report showing drugs in the blood of a newborn alone is not sufficient for a finding of neglect. There must be additional evidence showing physical impairment of the child or imminent danger of impairment. Matter of Denise J., 87 NY2d 73 (1995).
- B. Fact that the parent never had custody of the child or that the child was removed at birth may not avoid a neglect finding. See, Matter of Milland, 146 Misc. 2nd 1 (NY County, Family Court, 1989) which involved a child with special needs as a result of fetal alcohol syndrome.

V. Any writing, record or photograph relating to abuse/neglect maintained by any hospital or any other public/private agency shall be admissible as long as it is certified by the head of the agency/hospital or a designated person . FCA §1046 (a) (iv).

- A. Since most privileges are waived in neglect/abuse cases, FCA §1046 (a)(vii), confidentiality is generally not an issue (Sec, VIII below)
 1. Exceptions: mental health and substance abuse records are still protected, but may be released by the court on motion if need is demonstrated. Mental Hygiene Law §33.13; 42 USC §290ee-3; 42 CFR §2.1(b) (2) (c) and 2.13 (a).
 2. Substance abuse records are especially sensitive and required specific findings by the court to overcome the need for confidentiality with an eye toward limiting disclosure. An order may be made only if the information requested is not available from any other

source and the public interest outweighs the potential injury to the patient and the patient-physician relationship and the facility. 42 CFR §2.64(d).

- B. This section does not apply to records of private physicians, who are not employed by an agency or hospital. In those cases, the business record provisions of CPLR §4518 would apply.
- C. Best practice is to submit voluminous records to opponent(s) in advance. See, Matter of Leon RR., 48 NY2d 117 (1979) which addressed admissibility of a large Social Services Agency file.
- D. Entries in the records may be objectionable if they are not made in the ordinary course of business, the writer was not under a business duty to keep the records or the information recorded was provided by a person who had no business duty to impart it. Matter of Leon RR., 48 NY 2d 117,122-123; *see also*, Dept. of Soc. Services v. Waleska M., 195 AD2d 507 (2nd Dept 1993).
- E. Maker's lack of personal knowledge affects weight but not admissibility. FCA §1046 (a)(iv).
- F. Expert opinions appearing in the records are admissible even in the absence of a description of the basis for the opinions or the expert's qualifications. Matter of Harvey U., 116 AD2d 351 (3rd Dept. 1986).

VI Reports filed with the statewide central register of child abuse/maltreatment by a mandated reporter under Social Services Law §413 are admissible. FCA §1046 (a) (v).

- A. Generally these reports are submitted for the fact that they were made, not the truth they contain. If the report is being offered as proof that its contents are true, it may be subject to redaction.

VII. Previous statements by the child relating to the alleged abuse/neglect shall be admissible but if uncorroborated shall not be sufficient to make a finding of abuse/neglect. Corroboration may consist of any other evidence tending to support the reliability of the statement. FCA §1046 (a)(vi).

- A. Child's hearsay statements may also be admissible if they are otherwise exceptions to the hearsay rule.
 - 1. See eg., Matter of Lydia K., 112 AD2d 306 (2nd Dept. 1985), *aff'd.*, 67 NY2d 681(1986) [spontaneous utterance]
 - 2. No independent showing needed, as in criminal cases, that child would otherwise be competent to testify. *c.f.*, People v. Sullivan, 117 AD2d 476 (3rd Dept. 1986), Matter of Carol Ann D., 195 AD2d 460 (2nd Dept. 1993).
- B. Corroboration may be provided by:
 - 1. Child's unsworn *in camera* testimony, if materially consistent without-of-court statements and subject to cross-examination. Matter of Christina F., 74 NY2d 532 (1989).
 - a. *Note*: Fourth Dept. has held that child's *in camera* testimony needs no corroboration. Matter of Vanessa R.,148 AD2d 989 (4th Dept. 1989).
 - 2. Admission of respondent. Matter of Sandra S., 195 AD2d 1070 (4th Dept. 1993).
 - a. Admission need not conclusively establish sexual abuse to be corroborative. Matter of Karen BB., 216 AD2d 754, 755 (3rd Dept. 1995).
 - b. Admission which is later recanted may provide corroboration. Matter of Margaret W., 83 AD2d 557 (2nd Dept. 1981), *lv. denied*, 54 NY2d 609.
 - 3. Cross-corroboration by hearsay statements of other children.. Matter of Frances Charles W., 71 NY2d 112,124 (1988). Matter of Cindy J.J., 105 AD2d 189 (3rd Dept. 1984).
 - 4. Proof of the respondent's abuse of another child. FCA §1046(a) (1).

5. Medical proof. *See eg.*, Matter of Joli M., 131 Misc2d 1088 (New York County, Family Court, 1986) [pregnancy provided corroboration of sexual abuse].
 6. Child's statements to different persons may not cross-corroborate each other, Matter of Frances Charles W., 71 NY2d 112,123 (1988) but the consistency of statements made to different persons on different occasions may be considered. Matter of Starr H., 156 AD2d 1025 (4th Dept. 1989).
- C. Expert validation testimony in sexual abuse cases may provide corroboration. Matter of Nicole V., 71 NY2d 112 (1988).
1. A validator is generally a mental health professional] who has expertise in sexual abuse of children and who testifies that a child's behavior, statements and characteristics are consistent with having been sexually abused. Sometimes the validator will offer an opinion on the identity of the perpetrator. *See*, Matter of Melissa M., 136 Misc2d 773 (Family Ct., Suffolk Co., 1987).
 2. Expert need not be psychologist or psychiatrist. McWhirter vs. McWhirter, 129 AD2d 1007 (4th Dept. 1987).
 3. Testimony concerning the child's overall credibility is generally objectionable. *But see*, Matter of Brandon U.U., 193 AD2d 835 (3rd Dept. 1993).

VII. CPLR privileges are all waived with the exception of Attorney/Client [CPLR §4503] and Clergy/Penitent CPLR §4505) privileges. FCA §1046(a) (vii).

VIII. Proof of "impairment of emotional health" or "impairment of mental or emotional condition" as the result of the unwillingness/inability of respondent to exercise a minimum degree of care toward the child may include expert testimony or proof that the impairment lessened during a period when the child was not in respondent's care. FCA §1046 (a) (viii).

- A. FCA § 1012(h) defines impairment of emotion health and impairment of mental or emotional condition to included such conditions as "failure to thrive"(when an infant fails to gain weight and develop normally despite the fact that there are no identified organic causes), self destructive impulses, habitual truancy and substantially diminished psychological functioning, as long as the impairment is clearly attributable to the respondent's failures to exercise a minimum degree of care toward the child.
- B. Comes up often in failure to thrive cases, when the agency alleges that the infant gained weight while in the hospital or foster care home, but loses weight while in parent's care.

IX. Proof of neglect/abuse must be based upon a preponderance of the competent, material and relevant evidence. FCA §1046 (b).

- A. The preponderance of the evidence standard of proof is constitutionally satisfactory. Matter of Tammie Z., 66 NY2d 1(1985).
- B. If the case proceeds to disposition, the evidence need only be relevant and material. FCA § 1046 (c).