

“What is the Role of the Child Welfare System-Does it really operate on a Best Interest Standard?”

Some thoughts for Parent's Attorney

The only legitimate function of government is the protection of its citizens. Certainly, it should be a primary goal of government to protect minor children who generally are considered not able to protect themselves. Those provisions of the Welfare System for the benefit of children ought to operate on the basis of the best interest of the children to be served. In practice that may not always be the case as there is a natural tension between the governmental interest of the protection of children served and the interest of their parents to make decisions for their children. This is particularly true in the Juvenile Court arena concerning deprivation cases. In order for a child to be deprived be the child must be without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health or morals. [See, O.C.G.A. § 15-11-2 (8)(A)].

In other words, the parent has failed in some way either through inability or deliberate conduct to do what the law requires a parent to do or the parent has failed to refrain from doing what ought not to be done. The focus is on the needs of the child regardless of parental fault. (See, In Re: D.L.W., 264 Ga. App. 168, 590 S.E.2nd 183). However, when representing parents, lawyers often handle the cases as if the parent has been accused of a crime. To complicate matters, in many cases the parents conduct actually is criminal. But the Juvenile Court deprivation proceedings are civil not criminal matters and this is a distinction not without importance. Attorneys representing parents in Juvenile Court deprivation actions often find themselves on the horns of a dilemma. If the client is advised not to speak in the Juvenile Court proceedings in order to protect against use of their testimony against them in a criminal prosecution they increase the likelihood they will have their children removed from their custody. Why is that? It's because the proceedings are civil, not criminal. And in civil cases there is

effectively no privilege exemption to evidence. Yes, the privilege exists, but it is of little value. In civil cases when you refuse to answer a question based on a privilege, such as, Fifth Amendment, attorney-client relationship, patient-psychiatrist, etc., it is not impermissible for the court to draw an unfavorable inference from the privileged refusal to testify. (See, Ostroff v. Coyer, 187 Ga. App. 109, 369 S.E. 2nd 298). The court may use the refusal as substantive evidence on the issue before the court. If a parent is accused of physically abusing their child and they take the Fifth in the Juvenile proceeding, the court can remove their child even though there is no other evidence as their refusal can be used as substantive evidence of abuse. Many attorney's don't know this rule also applies to the attorney-client privilege and when the parent client is asked on the stand if they have told anyone including their attorney that they did what is alleged, the attorney will immediately object on the basis it is an attorney-client privileged matter. The court will accept (sustain) the objection, but the result is the parent has established a negative inference on the substantive issue of abuse and may have just lost custody of their child.

Perhaps the better practice would be for attorneys representing parents in deprivation cases not to treat them as if they were representing the parent in a criminal case. Certainly, advise the client of the dilemma, but let them make the decision. If they have not committed a criminal or wrongful act they have little to fear. But, what if they have had bad conduct. Even in those cases it may be best for the parent to cooperate in the Juvenile case. By “cooperate”, it is meant, “work together to resolve the problem that brought the matter before the court”, rather than deny it exists or deny that you did it. That approach will usually get a child returned to the parent faster and if there are criminal proceedings it will often lessen the punishment administered.

The “resolve the problem” approach may require the attorney representing a parent to operate in an unfamiliar way. The overwhelming number of deprivation cases enter the court process from third party referrals. For example, the police, a hospital, a teacher, etc. The Department of Family and Children Services' casemanagers do not seek out children to add to their already crowded caseloads. They have an ever ready and never ending supply. When a hospital refers a case to the Department for a new born child due to the mother's drug use, there is usually already some independent objective third party evidence that supports the allegations

as the mother has tested positive for cocaine or methamphetamines at the time of the child's birth. You can contest the drug screen or your client can deny using, but likely that issue is already pretty much a foregone conclusion. If your client's objective is to remain the custodian of their child, it is perhaps a better practice to stipulate probable cause at the 72 hour hearing, get the parent into a treatment program and cure the defective conduct. Tell the client that no one can take their child away as long as they function properly as a parent. You do not win custody cases by good conduct; you lose them by bad conduct.

The “cooperative” or “resolve the problem” approach requires the attorney to not only look at the allegations that immediately brought the matter before the court, but the attorney must look to the underlying causes. Why is the parent being evicted, why do they have no job, where is the father, what family resources exists, is there low mental functioning, does the child have special problems, was the drug use limited or is there an addiction, etc. Even casemanagers often do not make this analysis. You must do it and then apply oversight to see that the client corrects the problem. Very few parents' attorneys do that. Those that do, have a much greater chance of success for their client. Don't just tell your client to do better or get a job or quit using drugs. Make them go for drug screens, take them to the court to be tested if you have to. See that they get to counseling. Drive them to it or see that there is transportation. Ask them how many job applications they have actually filled out and get copies. Verify what they tell you. Tell them when you know they are lying or not doing what is required. Don't just show up at court and ask them how they have done since the last hearing. It is not the ability of the Department to prove what caused the matter to come before the court that you want to take away, it is the ability of the Department to prove it is continuing and has not been remedied. You may lose the initial battle, but you will win the war.

When you determine the underlying causes of the problem you must find resources to address those problems. The casemanager is not the enemy. Ask questions. Make them tell you what deficiencies they want your client to correct, make them tell you how such deficiencies harm the child, ask what resources are available, ask how can they be paid for, and where to find them. Casemanagers have an ever changing list of resources. If you don't get cooperation, go higher up. Ask for the supervisor, call the Child Advocate's office (Dee Simms at dsimms@gachildadvocate.org), call the

State Department of Family and Children Services, call the State Department of Human Resources, ask the court to appoint a CASA volunteer, be a part of the case plan process (attend the meeting where the case plan is established and is discussed with the client). Ask your client if they did what is alleged (e.g. did you hit Timmy in the head, did your boyfriend kick Susie in the stomach, did you use cocaine). Ask your client to explain how they pay their bills (that is, where does the money come from) for food, housing, utilities, clothes, transportation each month, it will be revealing. If what they tell you doesn't add up, confront them, then try to find a solution. Do a family tree (there may be some good apples there). If there is a citizen panel review process be at each meeting where your client's matter is discussed. Look on the internet for drug treatment facilities and other resources in your client's area. Call the DFCS lawyer. Some will actually answer questions that may assist in solving the problem. Ask permission to speak directly with the casemanager. Many parents' attorneys are not aware they can ask (and even demand) the court pay for services for the client's child, experts and travel for witnesses, etc. (See, O.C.G.A. § 15-11-8 and In Re: J.S. 283 Ga. App. 448, 641 S.E.2nd 682, February 6, 2007). Consider using a polygraph as an investigative tool in difficult cases. If you represent the mom, find the missing dad (a missing or non-performing dad is the most common factor in deprivation cases, bar none). Use child support recovery services (they have resources parents' lawyers do not have to locate a missing parent), ask the casemanager for help finding a missing parent or relative (they have a LexisNexis program called Accuint that is amazing, but some casemanagers don't even know they have that resource), take out an abandonment warrant, and make dad help your client provide for their children or put him in jail where he belongs if he won't do so. If he can't, see if social security disability benefits are available. Don't come to court and tell what your client intends to do, tell what they have already done. If nothing else, these things will demonstrate that your client is trying to do what a responsible parent ought to do.

Do not waste time with impossible objectives. If you have a client that has sexually abused and impregnated their 12-year-old daughter, don't expect that child to ever be reunited with that parent. If your client has an I.Q. of 60 don't expect them to be taught to be an effective parent. Look for solutions that are possible. For example, find a relative that may be a good placement and move on.

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Read the Juvenile Code. It's not that long. Read the advance sheets. There are several cases each week concerning parental rights and deprivation. Talk to lawyers that have handled deprivation cases. Give some thought as to what is the right thing to do. Ask your client what they really want. They just might want some help and actually appreciate it. Always, I say again, always, keep in mind the safety of the child. You will sleep better.

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