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## Working with the Courts in Child Protection

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### Chapter 6 Domestic Relations Cases and Other Court Proceedings

Families involved with child protective services (CPS) often face multiple problems and complex challenges, some of which require court involvement. Matters involving child maltreatment or juvenile delinquency typically are resolved in juvenile court. Other issues affecting families frequently are addressed in other court venues. CPS caseworkers who work with families struggling with divorce, domestic violence, and mental health problems may find these families involved in other court processes. As well as understanding the juvenile court process, CPS caseworkers also should be familiar with other court hearings that affect families and case practice.

This chapter provides an overview of three types of court hearings that may involve CPS families—custody and divorce, domestic violence, and mental health hearings. The chapter also discusses suits against CPS caseworkers and agencies and Federal class actions against agencies.

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#### Custody and Divorce Hearings

Allegations of child abuse or neglect may arise in custody and divorce cases, which result from the separation of married partners or the estrangement of unmarried parents. These also are known in some places as matrimonial or domestic relations cases.

Actions between spouses may include claims for the division of marital property, spousal support and, when the couple has minor children, custody, visitation, and child support. Actions between unmarried parents often are referred to as paternity cases and involve the issues of paternity, custody, and child support.

#### CPS Involvement in Custody Cases

Domestic relations, paternity, and domestic violence cases are civil actions, and unlike child abuse and neglect cases, they take place between private individuals. CPS may become involved, however, if allegations of child abuse or neglect are made against a parent or someone living in the parent's home. In these circumstances, CPS has the challenge of determining whether to substantiate a complaint made in the context of what often is an acrimonious battle between parents over their child. There is a temptation, therefore, to discount these complaints. CPS must be careful, however, to conduct a thorough investigation that considers the context and objectively evaluates other facts. Retaining a neutral, well-trained, experienced, and widely respected custody evaluator may be useful.<sup>45</sup>

If abuse or neglect is substantiated, deciding whether to try the case in the domestic relations or the juvenile court can be an issue. CPS should not file a petition alleging child abuse or neglect if the nonabusive parent is committed to protecting the child and if the court adopts an access and visitation plan that will keep the child safe. However, if CPS doubts that the parent or the court will protect the child from harm, it may choose to file a petition in juvenile court. In most States, the jurisdiction of the juvenile court to determine whether a child is abused or neglected will take precedence over a custody determination by the domestic relations court. Custody and visitation issues can be relegated to domestic relations or juvenile court upon showing that circumstances have changed substantially in ways that affect the child.

Motions to change custody or visitation frequently include allegations of child abuse as a basis for the motion. CPS needs to address these allegations as if they were new cases. For example, when a father is charged with a sex offense against his child and there is a pending custody proceeding, the domestic relations court, the criminal court, or both usually will order either no visitation or supervised visitation. If the father is acquitted or the charge is dismissed in criminal court, he may come to the domestic relations court requesting

unsupervised visitation on that basis. The court's decision about custody and visitation, however, is independent of the criminal process. The domestic relations court judge must hear evidence and decide whether the child was sexually abused by the father and, if so, what to do about visitation.

Caseworkers should keep in mind that the burden of proof in criminal cases is "beyond a reasonable doubt," a much higher standard than the "preponderance of or greater weight of the evidence" standard in custody cases. Criminal charges are dismissed for a variety of reasons including the age of the child, the trauma to the child testifying, or insufficient credible evidence to prove the charge. A dismissal or an acquittal on those charges is not necessarily a determination that the defendant was innocent of the charge.

In this scenario, if the domestic relations court allows visitation that, in the judgment of CPS, will result in abuse of the child, CPS can file a child abuse and neglect petition in juvenile court, which also would hear the evidence and make an independent decision as to whether the father had sexually abused the child. If it is determined that he did, the juvenile court could order either more restricted visitation or no visitation.

### Family Courts

The complex relationships among different courts and potentially conflicting decisions can cause confusion among practitioners and family members. These issues are some of the driving force behind the rising popularity and implementation of family courts. (See [Chapter 2, \*The Court System and Child Protection\*](#), for a description of family courts.) In a model family court, the same judge would hear the domestic relations, the domestic violence, and the child abuse and neglect cases. Family courts can offer multiple benefits:

- Minimizing the potential for conflicting orders and outcomes;
- Improving coordination among the court interventions;
- Reducing the number of court appearances;
- Enhancing the judge's familiarity with the issues and the parties;
- Bringing about a more successful end result.

While most courts are not organized, equipped, or legally able to achieve the "one family-one judge model," many are moving as far as possible in that direction. For example, some courts are making beneficial services, such as those listed below, more readily available and are committed to resolving family conflicts with minimal negative impact on the children.

### Case Management and Services

Domestic relations courts can provide essential case management and services to families appearing before them. While not the case in every State, well-resourced domestic relations courts use case managers to:

- Ensure that discovery, motions, requests for temporary relief (e.g., spousal or child support), or other pretrial issues are addressed and resolved on schedule;
- Monitor the completion of mandatory actions, such as parent education or mediation;
- Keep the case on track for a timely, final resolution;
- Identify and facilitate the delivery of services to children and parties (whether they are available through the court or elsewhere).

The following are services offered by some domestic relations courts:

- **Mediation**—a process focusing on how parents will share responsibility for their children in the future. Facilitated by a trained mediator, mediation can be effective in resolving custody disputes without a trial.
- **Custody evaluations**—evaluative services for parents and children that can be useful to the court in making custody and visitation determinations. These services sometimes are publicly funded and other times available only from private providers at the expense of the litigants.
- **Guardians ad Litem (GAL)**—lawyers appointed by some courts for the children in custody and visitation cases, particularly if there are allegations of maltreatment or domestic violence, or if the conflict between the parents is unusually high. These GALs typically are not associated with the GAL or CASA Program in the juvenile court.
- **Parent education programs**—courses for separating parents that can help them understand how their children may be affected by the separation and what they can do to minimize adverse effects.
- **Supervised visitation and exchange services**—programs that offer safe, comfortable settings and trained professionals to protect a child's safety during parental visits. In some programs, the supervisor will coach a parent on how to engage the child or on how to interact more appropriately with the child or with the other parent. They often will involve the use of intermediaries to transfer the child between the parents.
- **Parenting coordination**—a relatively new service, typically used in high-conflict cases, that employs a mental health professional to support and to assist parents in implementing a parenting agreement or court order. A parenting coordinator can help parents settle their differences and can enable them to avoid the time, emotional trauma, and expense of returning repeatedly to court.<sup>46</sup>

The above services also may be beneficial in some child abuse and neglect cases. CPS caseworkers will want to know how to access them, particularly when parents or family members are vying for custody or visitation of a child in a maltreatment case.

### Child Support

Many children in child abuse and neglect proceedings have unmet economic needs. Most live with one or neither of their biological parents, and of those, many do not receive any child support. CPS should, therefore, place a priority on locating biological parents, establishing paternity (if necessary), and pursuing child support and medical insurance from an absent parent. In fact, reasonable efforts requirements mandate that CPS do so.

Establishment of paternity and establishment and enforcement of child support and medical insurance obligations for foster children are by law the responsibility of Child Support Enforcement (CSE).<sup>47</sup> Every community has access to a CSE office, and in many places, they are co-located with, and operated by, the same agency as CPS. Caseworkers who are attempting to keep a family together need to help the family access CSE services.

Some courts establish paternity during child abuse and neglect proceedings, often at the initial hearing or the adjudication, provided the putative father is willing to consent to the entry of a judgment of paternity. When a putative father denies paternity or is not willing to acknowledge it formally, the case must be referred immediately to CSE. Genetic testing will be done, and in almost all cases, the results of that testing will be conclusive. CSE can initiate paternity establishment for putative fathers living in other States when requested to do so by CPS.

Support payments made by the parents reduce CPS's (or a relative's) costs for providing for the child. The amount of child support owed by an absent parent is determined in every State by the application of a child support guideline or formula. The guidelines are based on the assumption that one parent pays support to the other. Additionally, parents whose children were already receiving child support and have been placed in foster care often have difficulty regaining custody for financial reasons. They may need housing, furnishings, security and utility deposits, or other services. The amount of their child support payments should not preclude them from having the funds necessary to achieve reunification. In these circumstances, caseworkers may want to request that a reduction of the child support payments be considered. For the same reason, consideration must be given to suspending repayment of past public assistance or arrearages.

#### Federal Parent Locator Service

The Federal Parent Locator Service (FPLS) is an automated information system maintained by the Federal Office of Child Support Enforcement (OCSE). FPLS is a vast database that includes Social Security numbers, names of employers, and information on income and personal assets. It is used by CSE to locate persons who may be the father of a child or a parent who has a child support obligation. The Adoption and Safe Families Act (P.L. 105-89) requires that the resources of FPLS also be available to CPS for locating parents in its cases.<sup>48</sup> FPLS is an invaluable resource for caseworkers who need to find and serve a putative father or absent parent.

Some courts have developed working agreements or protocols with CSE and CPS to facilitate the establishment of paternity, as well as the establishment and enforcement of support obligations, and to speed access to FPLS. These strategies may include locating OCSE staff and computers near the juvenile court to serve the parent and to help identify the paternity and child support needs of the children and families in that court. Judges have to ensure that all has been done to locate the missing parent, not only for the enforcement of child support, but also for placement options or for termination of parental rights. Therefore, the courts may require documentation from the caseworker regarding utilization of this service. For more information about FPLS, visit <http://www.acf.hhs.gov/programs/cse/newhire>.

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### Domestic Violence Hearings

While children should not be removed unnecessarily, neither should they be left in environments that jeopardize their safety. This has been a particularly problematic issue in cases where children are exposed to domestic violence. As CPS caseworkers become increasingly aware of the high co-occurrence of domestic violence and child maltreatment and of the potential emotional impact of exposure to domestic violence on children, more communities are filing child maltreatment petitions in such cases and requesting removal of the children.<sup>49</sup> Research indicates that children exposed to domestic abuse are more likely to experience physical abuse or neglect than children living in nonviolent homes.<sup>50</sup> Studies estimate that there are adult and child victims in 30 to 60 percent of families experiencing domestic violence, and for adult victims who experience severe forms of domestic abuse, their children are in danger of suffering serious physical harm.<sup>51</sup>

CPS caseworkers should recognize that "[c]hildhood exposure to adult domestic violence should not automatically be defined as maltreatment." Instead, "[w]hat's needed are empirical and practice-based criteria for deciding whether or not a child is at a heightened risk of harm" before placing an undue burden on the victim by removing the child.<sup>52</sup> Once established, these criteria must be developed into effective screening and assessment instruments for use in the field. In addition, there is a dire need to develop greater expertise within child protection agencies about domestic violence, to collaborate with domestic violence programs, and to provide alternative forms of voluntary, community-based services for exposed children and their families, including specialized parenting and intervention programs for the perpetrator.<sup>53</sup>

The process for filing actions for protection against domestic violence is designed to accommodate persons

who do not have an attorney. Complaint forms are available, no filing fee is required, and most jurisdictions afford relatively prompt access to a judicial officer at any hour of the day or night. Litigants often request, and are able to obtain immediately, an *ex parte* order granting eviction of the alleged abusers from the parties' residence or other protective relief. Additionally, in best case scenarios, the time from filing to final hearing and conclusion of the case can be brief, ranging from a few days to a few weeks at most. For these reasons, claims for protection against domestic violence usually are filed as separate actions. [Exhibit 6-1](#) provides more information about protection orders.

CPS caseworkers with cases in which family violence is a significant problem will want to consider the efficacy of a protection order. This may involve encouraging the victim to take the actions necessary to obtain the order, or in some jurisdictions, CPS may request a protective order in the child maltreatment case. A victim should not be compelled, however, to choose between obtaining or abiding by an order and having the child removed by CPS. It is important to respect the victim's opinion of what would enhance the children's safety or would place them at greater risk. Protection orders can contribute to the safety of adult and child victims of domestic violence, but they do not ensure safety. Those orders often are violated, sometimes resulting in serious injury or even the death of the parent or children. Domestic violence victims' advocates can provide CPS caseworkers with recommendations to engage adult victims in the protection and safety of themselves and their children.

For more information on domestic violence and child maltreatment, see the *User Manual Series* publication [Child Protection in Families Affected by Domestic Violence](#).

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### Mental Health Hearings

Some children in foster care are committed involuntarily or are admitted voluntarily to mental health treatment facilities. The CPS caseworker should work with a supervisor and a mental health professional in deciding whether to pursue such a placement and likely will be the person to accompany and to admit the child to the facility. The caseworker also will need to attend the hearing and present CPS's position regarding the child's need for continued treatment. It is unlikely that a CPS lawyer will be present although there may be a prosecutor or a lawyer for the facility. The caseworker will want to communicate with facility staff to learn the child's diagnosis and recommendations for treatment and immediately begin work with staff on a discharge plan that will meet the child's needs. Every effort must be made to avoid extending confinement in the facility because of a lack of appropriate alternative placement.

Some State laws require court approval for the voluntary admission of minors to mental health treatment facilities or for the involuntary commitment of minors or adults. Whether the law applies to a particular placement usually depends on whether it is a locked facility, such as a psychiatric hospital or residential treatment program. Voluntary admissions to mental health treatment facilities are made by a parent, guardian, or CPS for a child. The court must determine whether the child is mentally ill and in need of further treatment. Some States also require that a child not be placed in such facilities if better alternatives are available. Many children object to being admitted, and, from their perspective, the admission is involuntary. While caseworkers need to respect the child's feelings and concerns, they also need to explain the reason for admittance, such as the child being a danger to herself (e.g., suicidal tendencies) or to others. Otherwise, the caseworker should continue to find the least restrictive facility that meets the child's mental health needs. Additionally, the court must decide whether the child is mentally ill or poses a danger.

Statutes governing voluntary admissions and involuntary commitments are intended to protect the liberty interests of patients. They help ensure that the decision to deprive them of their freedom is reviewed independently and objectively and that they will not be held against their will unless a court finds that there is a legally sufficient basis for doing so.

In some States, involuntary commitment and voluntary admissions are the only vehicles for forcibly placing a child in a mental health treatment facility. In others, juvenile court judges can order that children be admitted to such facilities as the disposition for a delinquent or status offense.

#### Exhibit 6-1 Domestic Violence Protective Orders

Claims for protection against domestic violence sometimes are brought in conjunction with a domestic relations case, but more often they are filed separately. These are variously known as protective orders, restraining orders, or orders of protection. These orders are available in every State and may require that the abusive partner:

- Be evicted from the parties' residence, not return there, or not go to where the victim works;
- Refrain from abusing the victim;
- Have no contact with the victim;
- Participate in substance abuse treatment or a batterers' intervention program;
- Pay support.

The order also may include protection for the children and may award custody of the children and child support. Not all of these remedies are available in every State, but statutes usually authorize the court to impose any additional terms or conditions it deems necessary for the

victim's protection. In most States, orders granting relief in domestic violence cases are limited in duration from 1 to 5 years.

Federal law also makes possession of a firearm illegal for anyone who is subject to an active protective order that meets specified criteria. Some States and judges go further and order defendants against whom a protective order is issued to surrender all weapons to a law enforcement agency and to not purchase or possess any firearm as long as the order remains in effect. Possessing a firearm also is illegal for any individual who has ever been convicted of certain domestic violence crimes.<sup>54</sup>

Domestic violence protection or restraining orders should be logged immediately into a State's central registry as well as the National Crime Information Center Protection Order File, which can be accessed by any law enforcement officer. These orders are enforceable across State lines.<sup>55</sup> Violation of the order is a separate criminal offense in most States and will result in immediate arrest of defendants who are caught violating it. If the defendants are not caught, but there is probable cause to believe they violated an order, a warrant for their arrests can be issued. Alternatively, violations can subject the offenders to being found in contempt of court and punished by fines or incarceration.

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### Confidentiality of Court Records

The Child Abuse Prevention and Treatment Act (CAPTA) of 1974 required that records of child abuse complaints and investigations be confidential and that court proceedings be closed to the public. CAPTA was reauthorized and amended by Congress, most recently as part of the Keeping Children and Families Safe Act of 2003 (P.L. 108-36). This amendment to CAPTA changed the confidentiality requirements so States now must share confidential information with any Federal, State, or local government entity or agency with a legal responsibility to protect children. In addition, States now can conduct court proceedings at which child abuse and neglect determinations are being made more open without jeopardizing eligibility for CAPTA funds.<sup>56</sup>

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### Suits Against Child Protective Services Caseworkers and Agencies

If CPS negligently fails to investigate or to intervene to protect a child when there is reason to believe the child is abused or neglected, and the child is harmed as a result, the child may be able to sue for damages through a GAL or a "next friend," the legal term for an adult who files suit on the child's behalf. A suit also can be filed for maltreatment that occurs in out-of-home care through CPS negligence or willful misconduct. An example is the physical or sexual abuse of a child by a foster parent.

The defendants in suits for damages are likely to be the CPS caseworker, the caseworker's supervisor, the agency director, and the county or State. It is difficult to generalize about the liability of caseworkers because the law on liability is defined largely by appellate decisions and is State-specific. CPS caseworkers will want to know:

- What the law regarding their liability is in the State where they work;
- Whether they have any immunity from liability and, if so, the extent of that immunity;
- Whether CPS insures them for liability and the extent of that protection;
- Whether CPS or any insurance carrier will provide legal representation for a caseworker who is sued.

Caseworkers should request this information from their agency which is frequently named as co-respondent in a suit. The National Center for Field Consultation can provide guidance on coping with child welfare litigation. Additional information on child welfare litigation is available at <http://www.cwla.org/consultation/litigation.htm> or by Emailing [nfc@cwla.org](mailto:nfc@cwla.org), or by calling 202.942.0287.

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### Class Actions Against Agencies

Under some circumstances, a group of individuals who are similarly situated may bring a class action against CPS for violations of Federal law or of the U.S. Constitution. These actions usually address inadequacies in agency services, staffing, or practices. Although individual claims for monetary damages may accompany the claim for class relief, the remedy usually sought is a declaratory judgment or an injunction. A declaratory judgment is a statement by the court about what the law requires of CPS. An injunction is a directive or order requiring CPS to take certain actions or forbidding it from engaging in specified actions.

A number of such lawsuits have been filed in recent years. Most have been settled by agreement of the parties, known as a "consent decree." The relief generally has involved a commitment by CPS to improve practice and service delivery in specified ways. In most cases, the court has appointed a receiver or, more commonly, a review panel to monitor and to assist implementation of the consent decree.

The type of court that hears the case determines who is affected by the decision. State court appellate decisions have the force of law only in the States in which they are issued. U.S. District Court decisions apply only in the district in which they are issued, and U.S. Court of Appeals (Circuit Courts) decisions apply only in the States of that circuit. U.S. Supreme Court decisions, however, have national reach. Appellate courts of all types often cite decisions from other State or Federal courts to support their own rulings in similar cases.

### Example of Class Action Lawsuit

One notable example of a class action lawsuit is *Nicholson v. Williams* in New York City. Unlike most other class action suits, it went to trial, and the result was an injunction against the city's Administration for Children Services (ACS). The injunction prohibited ACS from removing "...a child from the custody of the mother without a court order solely because the mother is a victim of domestic violence except in cases where the child is in such imminent danger to life or health that he or she must be removed and there is not reasonably sufficient time to obtain a court order." The injunction also required that petitions not be filed against a mother solely because she "engaged" in domestic violence in the presence of the children or refused to accept services unless the petition alleges with specificity how the child has been harmed. Due to the lawsuit, petitions are required to describe specifically any acts of domestic violence alleged and any harm suffered by the child as a result of such acts. Additionally, ACS was required to develop new materials and training regarding cases in which domestic violence is an issue, to employ domestic violence specialists, and to conduct a safety conference within 72 hours of the removal of any child from a mother who is a victim of domestic violence and has not otherwise abused or neglected the child.<sup>57</sup>

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