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Outside Counsel

CHILD SEX ABUSE ALLEGATIONS: RECOGNIZING ONE'S LIMITS AS A
PRACTITIONER

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AS A FAMILY law, matrimonial law or criminal law practitioner you may, at some time, be called upon by a client to represent him or her in a case involving civil allegations of child sex abuse in either Family or Supreme Court. If you have never handled such a matter your initial reaction may be that the defense can be approached like any other family, matrimonial or criminal law litigation. You should think again. Undertaking the defense of such allegations without a thorough working knowledge and understanding of the area can result in disastrous results for your client.

Allegations of child sex abuse may be initiated in several different ways, under several different statutes, and by various parties, all independent of each other. Each action carries its own distinct procedures (i.e. discovery, evidence, and burden of proof). Under existing law it is possible for an accused to be forced to defend himself in Family, Supreme and Criminal Courts at the same time.

In order to adequately represent a client accused of child sex abuse a thorough knowledge of the Family Court Act, Domestic Relations Law, Social Services Law, Penal Law, Criminal Procedure Law and the Civil Practice Law and Rules is required. In addition, you must also be well versed in psychology, medicine, child development and family dynamics.

Generally most cases involving allegations of child sexual abuse are won or lost during the discovery proceedings and preparation for trial. Preparation is the key to a favorable disposition of the allegations, regardless of the forum.

An allegation of child sex abuse may be initiated pursuant to Article 10 of the Family Court Act--Child Protective Proceedings, the statute governing child abuse and neglect. Article 10 "establishes procedures which are civil in nature to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well being 'and to determine when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.' " [FN1] Article 10 abuse petitions are initiated in Family Court, and are usually, but not always, commenced with a telephone call received by the New York State Department of Social Services, Child Abuse and Maltreatment Register, also known as the Child Abuse Hotline, located in Albany. Anyone can make an allegation of child sex abuse, and under

existing law, the caller may make such a report anonymously. Other reports of alleged abuse may be received by a particular county department of social services. The petitioner in Article 10 proceedings is usually the county department of social services, although the Family Court Act states that an Article 10 proceeding may be originated by "a child protection agency or a person on the court's direction." [FN2]

The Family Court Act defines an "abused child" as "... a child less than 18 years of age whose parent or other person legally responsible for his care ... commits, or allows to be committed, a sex offense against such child, as defined in the Penal law ..." [FN3]

Although the Family Court requires the same proof of sex offenses as in the Penal Law, the Family Court Act applies its own corroboration requirements. [FN4]

Article 10 abuse proceedings require that "... any determination that the child is an abused or neglected child must be based on a preponderance of the evidence. [FN5] The New York Court of Appeals, in *Matter of Tammie Z*, [FN6] held that this burden of proof was constitutional, and afforded the parties due process under the U.S. Constitution. In arriving at its decision, the Court looked to balance the parental interest involved against the need to protect the child from an abusive situation. Regardless of its reasoning, this minimal burden of proof, as upheld by the Court of Appeals, places a great deal of importance on an adequate, well prepared and vigorously litigated defense.

In Article 10 proceedings, young children are often the victims and the only witnesses to the alleged events. Recognizing this fact the Family Court Act specifically excludes the corroboration requirements as defined in the Penal Law, and replaces them with a more relaxed corroboration requirement. The FCA states that

... previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration. The testimony of the child shall not be necessary to make a fact-finding of abuse or neglect ...

[FCA 1046\(a\)\(vi\)](#)

The Court of Appeals stated that those liberal corroboration rules exist "to further considerations of public policy, and the amount of corroboration to be required varies with the policy sought to be served by the requirement." [FN7] In *Matter of Nicole V.*, the court held that due process requirements in child protective proceedings are met by permitting a finding of child abuse to be made on the basis of the child's out-of-court statement, providing that said statement is corroborated by any competent, nonhearsay, relevant evidence, which confirms that the child has been sexually abused and enhances the credibility of the child's statement as to its material elements. As a result of this decision the out-of-court statements of the alleged victim can be admitted, despite their nature as hearsay, through the testimony of the expert, providing that said hearsay testimony is properly corroborated.

Several different types of corroborative evidence have been accepted by the courts, including testimony from experts who have conducted validation interviews or behavioral assessments of the alleged victim of abuse. Validation has been described as the process by which an expert confirms or fails to confirm the existence of intrafamilial child sex abuse syndrome [FN8] and also determines the existence of other post-traumatic stressors. Other types of corroboration include, for example: medical evidence,

admissions by the alleged perpetrator; and in-camera interviews of the child by the court. [FN9]

Some, if not all, forms of corroboration are fraught with the potential of abuse and misinterpretation: for example, the brainwashing of the child to make statements to the Department of Social Services caseworker, the validator and or the court; or the misinterpretation of findings of physical examination of the alleged victim which can result in the introduction of apparently corroborative evidence.

Discovery in sex abuse cases is essential. [Family Court Act, § 1038](#), sets out some of the discovery procedures afforded to the respondent. Further, CPLR Article 31 is applicable to proceedings under the Family Court Act pursuant to [Family Court Act, § 165](#), which states, "... where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed, the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved." These discovery provisions may include the taking of depositions of the investigating caseworker, validator, examining physician, etc., and can be used to great advantage for the preparation for, and at, trial.

Under [Family Court Act, §§ 1022](#) and [1024](#) an allegedly abused child can be removed from home even before any decision as to guilt is made by the court if the child's life or health is in imminent danger. No court order of removal is necessary, provided certain delineated factors are met. [FN10] [Family Court Act, § 1028](#) entitles the respondent to a hearing with respect to the return of the child to the home. These sections of the statute underscore the need for experienced counsel to be retained immediately by a party upon any indication that sex abuse charges are being contemplated.

The procedural safeguards which protect a criminal defendant in a criminal proceeding alleging sex abuse do not exist in a Family Court Article 10 civil proceeding. There is no prohibition against unlawful search and seizure in an Article 10 sex abuse proceeding. [Matter of Dianne P., 110 AD2d 354](#), appeal dismissed [67 NY2d 918](#), holds that the exclusionary rule could not be used in a child protective proceeding to preclude the admission of relevant evidence seized during an illegal search, since the state's overwhelming interest in protecting and promoting the best interest and safety of minors far outweighed the rule's deterrent value.

Thus, counsel's immediate entry into these cases is crucial in order to protect the rights of the accused during the initial investigation, prior to any petition alleging abuse being filed.

Since Article 10 proceedings are civil in nature, upon a finding of abuse, the respondent is subject to several different dispositions (sentences). With one exception, the respondent is not subject to any period of incarceration. The most severe disposition is the initiation of a proceeding to terminate parental rights. Other possible dispositions include: an order of protection, ordering the respondent to stay away from the child or to be allowed to see the child only under supervised conditions; or mandated psychiatric treatment. If the court, after trial, finds a respondent has violated an order of protection, and has violated [Penal Law § 215.50](#), (Criminal Contempt), the respondent is subject to a sentence of incarceration of up to six months.

A conclusion of the Family Court matter may not end the proceedings against your client. Pursuant to [Family Court Act, § 1014](#), the Family Court "may transfer upon a hearing any proceedings originated under this article [Article 10] to an appropriate criminal court or

may refer such proceeding to the appropriate district attorney if it concludes, that the processes of the family court are inappropriate or insufficient." Since the Family Court proceedings are considered civil, an argument alleging double jeopardy will not be successful. Further, your client's testimony in the Family Court trial may be obtained, and used in any subsequent criminal proceeding. Thus, counsel is best advised to ascertain whether any criminal prosecution is contemplated as soon into the Family Court litigation as possible in order to better decide how to conduct the defense.

One unusual aspect of Article 10 proceedings is the ability to appeal intermediate orders. An appeal may be taken, in the discretion of the Appellate Division, from any order under Article 10. [FN11] An appeal from an intermediate or final order or decision in an abuse matter may be taken as of right to the Appellate Division and shall have preference over all other matters. However the timely filing of a notice of appeal under Article 11 does not stay the order from which the appeal is taken. [FN12] The Family Court Act only authorizes a judge of the Appellate Division to issue a stay of the Family Court Order. [FN13]

Article 8 Proceedings

Another manner in which an allegation of sex abuse is initiated is by the filing of a Family Court Act, Article 8--Family Offense Petition. This procedural route is used by one parent alleging child sex abuse against another parent. In some instances the petitioner is advised by the police or the Department of Social Services to file a family offense petition in order to obtain an order of protection barring the accused parent from all contact with the child. The Department of Social Services or the police then conduct an investigation which may result in the filing of an Article 10 abuse proceeding in Family Court, a criminal case in criminal court, or both.

Article 8 family offense petitions have the potential to be, and have been abused by a vindictive parent looking to gain an advantage in a custody/matrimonial action by portraying the accused parent of being unfit, through justified rationale or malicious intent, to have custody of the child(ren).

Unfortunately, just the mere allegation of sex abuse against a parent can affect that parent's chances for custody, presumably under the non-statutory presumption of "where there's smoke, there's fire."

No independent investigation is required to be undertaken before a petitioner can file a family offense proceeding alleging sex abuse. Family offense petitioners need not initially convince the Department of Social Services about the merits of the case, and therefore can get into court without the immediate intervention of the Department of Social Services.

The burden of proof in Article 8 proceedings is a "fair preponderance of the evidence." [FN14] The petitioner, the individual party, as opposed to the Department of Social Services, and the respondent have all the same opportunities as in Article 10 proceedings with regard to the production of evidence. Validation evidence can be allowed, and each party brings in their own experts.

"Only competent, material and relevant evidence may be admitted in a fact-finding hearing [trial] ..." [FN15] Article 8 is silent regarding discovery proceedings and the case law is relatively sparse as to how far a party should be allowed to go with respect to

pretrial discovery. However [Family Court Act, § 165](#), states that if the Family Court Act does not prescribe a method of procedure then the provisions of the CPLR apply "to the extent they are appropriate to the proceedings involved." [FN16]

If found guilty of the allegations contained in a family offense petition the court can order that the respondent be placed on probation for one year and require attendance and participation in an educational program, or issue an order of protection not to exceed one year. As in an Article 10 order of protection, a violation of the order carries a possible sentence of incarceration of six months. [FN17]

Supreme Court Actions

Child sex abuse has been alleged in matrimonial proceedings, actions for divorce, custody and visitation, for both bona fide reasons, and to gain advantage in custody/visitation issues. Since child sex abuse may be alleged as a ground to modify custody and/or visitation rights the Supreme Court may hear such allegations without following any of the procedures mandated under FCA Article 10. Such allegations should be carefully scrutinized in an effort to determine whether forum shopping is being attempted by the party bringing the allegations. Clearly, the CPLR and DRL apply in all actions within the Supreme Court alleging sex abuse. Again, complete, comprehensive and exhaustive discovery should be undertaken.

Criminal Actions

Complaints alleging child sex abuse can be made directly to police, reported to police by the Department of Social Services, or referred to the District Attorney's office by the Family Court. As a result of such reports, and subsequent investigation, the accused can be arrested and charged under Article 130 of the Penal Law. Such actions are obviously criminal in nature, and the Penal Law and Criminal Procedure Law apply.

Criminal actions can be initiated and be pending concurrently with a Family Court or Supreme Court action. When confronted with such a scenario counsel must work closely with criminal defense counsel to determine how to handle many serious and complex issues. Whether the client should testify in Family or Supreme courts, at trial or during pretrial discovery, is a difficult strategic decision, since as previously noted, the client runs the risk of self-incrimination in the criminal proceeding by testifying during the civil proceedings.

The burden of proof in the criminal proceeding is beyond a reasonable doubt--the highest standard. It is, of course, possible to be acquitted of criminal charges but still be found "guilty" in Family or Supreme Court because of the lesser standard of proof.

Corroboration in criminal proceedings differs from the Family Court civil corroboration standard. [Criminal Procedure Law, § 60.20\(3\)](#), states that "[a] defendant may not be convicted of an offense solely upon unsworn evidence ..." [CPL § 60.20\(2\)](#) further mandates that a child under 12 may not testify under oath unless he understands the nature of the oath. If a child does not understand that oath, he may still be permitted to testify, but the court will require corroboration of the offense for a conviction. Compare this with the Family Court which allows the introduction of the child's out-of-court statement, without requiring the child to testify, as long as it is corroborated.

All discovery procedures in any criminal prosecution are mandated by the Criminal Procedure Law. If convicted, a defendant faces probation, or possible incarceration, with the term to be determined by the degree of the crime of which he is convicted.

Other Implications

Actions for personal injury against respondents/defendants have been sustained as a result of convictions in Family and Criminal courts in child sex abuse cases. In a recent Appellate Division, Second Department decision, [Laurie Marie M. v. Jeffrey T.M., 159 AD2d 52](#), the court held that a woman who was sexually abused as a child by her stepfather was entitled to both compensatory and punitive damages. The court stated, Tragically abused children often themselves become child abusers, perpetuating continuing hideous damage to society from generation to generation. The deterrent value of punitive damages in such cases becomes important.

If a client has been convicted of a sex offense, in Criminal and/or Family Court, the client should be advised of the possibility of becoming a defendant in a personal injury action.

Conclusion

Providing a quality defense to a client charged with child sex abuse requires specialized defense skills. Practitioners not experienced in this specific area of practice are best advised to seek to associate with knowledgeable, experienced counsel.

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FN1 Family Court Act (hereinafter FCA), § 1011; and citing [Matter of Nicole V., 71 NY2d 112 \(1987\)](#).

FN2 [FCA, § 1032](#).

FN3 [FCA, § 1012\(e\)\(iii\)](#) and Penal Law, Article 130--Sex Offenses.

FN4 [FCA, § 1012\(e\)\(3\)](#).

FN5 [FCA, § 1046\(b\)\(i\)](#).

FN6 66 NY2d 1, [494 NYS2d 686 \(1985\)](#).

FN7 People v. [Daniels, 37 NY2d 624, 628 \(1975\)](#).

FN8 [Matter of Michael G., 129 Misc2d 186](#).

FN9 See, for example; [Matter of Cindy JJ., 105 AD2d 189](#) and [Matter of Tantalyn, 115](#)

[AD2d 799](#): proof of sexual abuse of an older daughter, supported by the father's admissions, was admissible on and corroborative of the issue of abuse of the father's younger daughter; [Matter of Tina H., 507 NYS2d 653](#): a child's in camera interview can supply sufficient corroboration regarding abuse. Independent statements requiring corroboration may corroborate each other, even in criminal prosecutions involving sex abuse; see [People v. Coleman, 42 NY2d 500](#), [People v. Jackson, 121 AD2d 743](#), affd. [70 NY2d 768](#).

FN10 [FCA, § 1024\(a\)\(i\) and \(ii\)](#), delineate the factors for removal without a court order. (a)(i) "... the child is in such circumstance or condition that his continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and (a)(ii) there is not time enough to apply [to the court] for an order under [§ 1022](#).

FN11 [FCA, § 1112\(a\)](#).

FN12 [FCA, § 1114\(b\)](#); c.f. [CPLR, § 5519](#).

FN13 [FCA, § 1114\(b\)](#).

FN14 [FCA, § 832](#).

FN15 [FCA, § 833](#).

FN16 C.f. *Kunz v. Kunz*, 199 Misc2d 80; see also CPLR Article 31.

FN17 [FCA, § 846\(a\)](#); [Penal Law, § 215.50](#).

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