

New York Law Journal
Volume 227, Number 58
© 2002 NLP IP Company
Wednesday, March 27, 2002
Outside Counsel

EXPUNGING ALLEGATIONS OF CHILD ABUSE

By Lawrence Jay Braunstein

You represent a client who has been accused of child abuse or maltreatment (neglect). After being investigated by the local Child Protection Service their case has been "indicated," but no proceeding, alleging abuse or neglect pursuant to Article 10 of the Family Court Act, is commenced in Family Court. As far as the child protective agency is concerned, the case is concluded, and no further action will be taken against them.

Does that mean that your client has been cleared of the allegations and that their "record" is clear? What if they are involved in a custody battle in a matrimonial proceeding? How will this indication impact upon their custody proceeding? What if they seek to adopt a child, or seek employment in child care or education?

In another scenario, your client was investigated by DSS based on false allegations of abuse or neglect, and the case was deemed "unfounded." Is their record immediately sealed or expunged?

In order to understand how to protect your client, and adequately represent them, an understanding of the child protection system in New York is necessary.

New York State, as well as every other state in the nation, has established a statewide Central Register of Child Abuse and Neglect (also known as the "Hotline"). All reports of child abuse and neglect must be made to the State Central Register in Albany ([Social Services Law, Section 415](#)). In situations where reports are directly made to a local Child Protective Services, the local CPS must relay the report to the Central Register.

Anyone can make a report of suspected child abuse or neglect, and can even do so anonymously. Certain persons however are mandated reporters, pursuant to [SSL, Section 413](#), and as such are legally obligated to make a report of suspected child abuse or neglect,

"when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child...."

Once a report of abuse or neglect is received by the State Central Register (SCR), the allegations and information are relayed to the County Department of Child Protective Services (CPS) where the child resides so an investigation can be commenced.

After an investigation regarding allegations of abuse or neglect is conducted, there are two possible outcomes of the investigation. When an investigation finds "some credible

evidence" sustaining the reported allegations of abuse or maltreatment the report is an "indicated" report. If an investigation does not find "some credible evidence" sustaining the reported allegations of abuse or neglect, the report is considered an "unfounded" report. The County CPS has 60 days, within which to determine whether the report is "indicated" or "unfounded." ([SSL, Section 424](#)).

Discovery

[SSL Section 422\(4\)](#) states that all information contained in the central register shall be made available to "any person who is the subject of the report or other persons named in the report". As a general practice suggestion, the client should authorize you, as their attorney, to immediately obtain the entire SCR file. This file will contain the exact nature of the allegations, the date and time it was reported, as well as other pertinent information. Pursuant to [SSL Section 422\(7\)](#) the Commissioner is authorized to prohibit the release of data that would identify the person who made the report "which he reasonably finds will be detrimental to the safety or interests of such person." The information contained in the SCR report may become useful in any future litigation, including actions for custody or visitation.

The fact that your client has an indicated report of child abuse or maltreatment against them can affect their ability to obtain employment by a child care agency, adopt a child, become a foster care provider, or obtain employment in an area which involves children. All information regarding an individual's indicated report of child abuse or maltreatment is confidential and must be maintained in a secure manner. Such information is only to be shared with the individuals it relates to, and those persons involved in the employment or licensing decision-making process.

[FCA Section 651-a](#) states that in custody and visitation matters only indicated allegations of abuse and maltreatment can be introduced into evidence.

In situations where a determination is made by CPS that the allegations are "indicated" CPS has several options with regard to how the matter is handled. If CPS determines that appropriate rehabilitative services are the appropriate course of action, and the family voluntarily agrees, then a legal proceeding does not need to be initiated in Family or Criminal Court. If however the subject of the report refuses to voluntarily cooperate, CPS has the option to initiate legal proceedings in the form of a Family Court Article 10, Child Protective Proceeding, or possibly to have a criminal complaint made to the District Attorney.

CPS can also take the position that despite their determination that the allegations are "indicated" that they have concluded that no services are needed, and no further CPS intervention is warranted. In this situation a request for an administrative review of the "indication" is strongly recommended, since the initial determination of "indicated", that is to say, that "some credible evidence" of abuse or maltreatment exists may not really have been the appropriate designation after the benefit of a full investigation.

The subject of the report of abuse or neglect has 90 days after they have been notified that they have been indicated to request that the commissioner "amend the record of the report" ([SSL Section 422\(8\)](#))

There are two possible "bites at the apple" with regard to a request for an amendment (expungement or sealing) of the SCR record. First, the SCR, after being advised of the

request to amend the record, shall request that the local CPS forward their case file to the SCR for an administrative review. The SCR has the option, after their review of the CPS case file, to change the "indicated" designation to "unfounded," in which case the file will either be expunged or sealed. An "expungement" removes the allegations from the record, a sealing only limits access to the records. An expungement is obviously the preferable disposition.

Expungement Hearing

If the administrative review by the SCR does not result in an amendment of the "indication" designation, the applicant has a right, pursuant to [SSL Section 422\(8\)\(b\)](#), to a fair hearing, conducted by the New York State Office of Children and Family Services, Bureau of Special Hearings (formerly known as the N.Y.S. Department of Social Services).

The burden of proof at the hearing shall be on the local CPS agency which investigated the report. In such a hearing the fact that there is a Family Court finding of abuse or neglect against the subject creates an irrebuttable presumption that said allegation is substantiated by some credible evidence. [FN1] See [SSL Section 422\(8\)\(b\)\(ii\)](#).

Pursuant to [Social Services Law, Sections 422\(8\)\(c\)](#) and [424-a](#), [Valmonte v. Bane, 18 F.3d 992 \(1994\)](#), [Lee "TT" v. Dowling, 87 N.Y.2d 699, 642 N.Y.S.2d 181 \(1996\)](#), [Walter W. v. New York State Department of Social Services, 235 A.D.2d 592, 651 N.Y.S.2d 726 \(3d Dept, 1997\)](#), mot for lv. to app. den [89 N.Y.2d 813, 658 N.Y.S.2d 243 \(1997\)](#), and Local Commissioners Memorandum, 97 LCM-58, the fair hearing determines (a) whether there is a fair preponderance of the evidence that the appellant (subject of the report) committed the acts of abuse or maltreatment alleged, and (b) if so, whether such acts are relevant and reasonably related to employment by a child care agency, to the adoption of a child or to the provision of foster care.

The conduct of an expungement is governed by 18 NYCRR Part 434, Child Protective Services, Administrative Hearing Procedure.

Discovery demands, for the County CPS case record, should be made well in advance of the hearing, so that a full review of the caseworker's notes and records can be undertaken. Generally the County CPS will call their caseworker as a witness, and depending on the nature of the allegations, may call other witnesses, perhaps even expert witnesses.

Counsel is advised to make a written demand for discovery and inspection, as well as a demand for expert witness information, pursuant to [CPLR Section 3101\(d\)](#) so that full preparation for the hearing can be undertaken.

Unfounded Reports

One would assume that unfounded reports would automatically be expunged since the allegations were not established by "some credible evidence." Such, however, is not the case. [SSL Section 422\(5\)](#) previously stated that "unfounded" reports would be sealed, and could only be made available, and unsealed, under certain circumstances ([SSL Section 422 \(5\)\(i-v\)](#)). The unfounded report would eventually be expunged 10 years after the youngest child named in the report turned 18 years of age.

[SSL Section 422 \(5\)](#) was amended on Nov. 1, 2000. The amendment provides for the

immediate expungement of an unfounded report based upon the fact that clear and convincing evidence exists that the incident giving rise to the report was based upon a non-existent injury or that the injury reported was the result of an event which was not due to any fault, misconduct or negligence by any of the subjects of the report. The new statute applies to reports of child abuse and maltreatment made on or after Feb. 12, 1996, and the act shall expire 18 months after having been signed into law. The question remains open as to how far this amendment will apply to other allegations of abuse or maltreatment such as inadequate guardianship.

With regard to false allegations of abuse and maltreatment [SSL Section 422 \(14\)](#) requires that the Department "shall refer suspected cases of falsely reporting child abuse and maltreatment in violation of [\[Penal Law Section 240.55\]](#), subd. 3 to the appropriate law enforcement agency or district attorney."

Conclusion

Providing a quality defense for clients appearing at an expungement hearing, or requesting that the SCR record be expunged, requires a specialized knowledge of the Social Services Law; Family Court Act, Article 10; Penal Law and 18 NYCRR Part 434. Further, knowledge of the above statutes will enable counsel to more effectively represent a client in custody and/or visitation actions where allegations of child abuse or maltreatment are involved.

Lawrence Jay Braunstein is a partner with Braunstein & Zuckerman in White Plains.

FN1. The standard of proof has been changed with regard to the expungement hearing from "some credible evidence" to a "fair preponderance of the evidence" and therefore it is questionable as to whether "some credible evidence" is still the appropriate standard in this regard.

3/27/2002 NYLJ 1, (col. 1)

END OF DOCUMENT