The DYFS Mine Field

October 11, 2011 | by Einhorn Barbarito

"Don't fall into the trap of providing information unless you have consulted with an attorney or have an attorney present during the interview".

On Thursday, September 22, 2011, Michael R. Ascher, Esq., a member of Einhorn, Barbarito, Frost & Botwinick, PC, spoke at a New Jersey Continuing Education Seminar entitled the Family Law/DYFS Overlap "What Every Family Lawyer Needs to Know". The information Mr. Ascher provided to attorneys is equally important to people who come into contact with the Division of Youth and Family Services.

Ascher spoke about the New Jersey child abuse statute which contains a definition of abuse and neglect which is quite expansive and extends far beyond actual or emotional abuse, or the failure to provide proper care or supervision to children. He further stated that the abuse/neglect statute presents issues which involve both DYFS proceedings, as well as criminal, domestic violence and divorce cases.

He also pointed out that the statute actually creates an absolute obligation on behalf of any individual to report instances of child abuse to the Division. He noted that the failure to make a report constitutes a disorderly persons offense subjecting a person to penalties.

He then explained the process when child abuse or neglect is reported to the Division. After a referral is received, DYFS is obligated to transmit copies of the allegations to the local County Prosecutor's Office for its review. DYFS then undertakes its own child protection investigation pursuant to specific timeframes and rules. The investigation may include removal of children from their parent's home the children are in imminent danger of harm.

Mr. Ascher also noted that during the DYFS investigation, a determination is made whether or not the allegations received are substantiated or unfounded. Any unfounded allegations are expunged from the Division's records. However, if the allegations are substantiated (founded true), the offending party is placed in a central registry. There exists a right to appeal from the substantiation which must be filed within twenty (20) days of the notice.

If the Division does substantiate allegations of abuse or neglect, the Division may propose a case plan to remedy the situation. Relying on his vast DYFS experience, Ascher noted that there is a little used "preliminary procedure mechanism" which is significant since any statement made by an accused individual during any such conference cannot be used against them in either a DYFS Trial or in a Criminal Court. He noted that the usefulness of the provision cannot be overstated since it permits an individual to provide information and engage in negotiations with DYFS without statements being used against that person. He stressed that this utilization of this procedure is especially important due to the required exchange of information between DYFS and the Law Enforcement Agencies. He also noted that even if the Division did not agree to enter into a Preliminary Procedure, an experienced DYFS attorney would want a Protective Order to be entered barring the later use of statements by DYFS workers or mental health professionals.

As his talk continued, Ascher observed the inter-relationship between DYFS proceedings and other matters such as criminal or domestic violence matters. He then addressed the issue of "dual representation". He indicated that in the past, there was a prohibition against a single attorney handling both a DYFS and criminal matter. However, the Courts have reversed their decisions and now one attorney can handle both the DYFS and criminal cases. Also, there exists no automatic disqualifying conflict if a single attorney assumes the tandem role of counsel for the same Defendant in a DYFS case and a parallel divorce or domestic violence case. This is incredibly important since having a skilled DYFS attorney involved is essential in presenting a proper defense in any DYFS matter. It is equally important since having a single attorney is economically efficient avoiding duplication of effort, legal fees or costs.

Ascher continued his seminar by stressing that an attorney involved in a DYFS matter must be aware of the provisions of both the statutes and the Administrative Code which governs abuse and neglect

proceedings. That is especially true since the DYFS proceedings are different than any other aspects of the law since the Division possesses an extraordinary advantage since it can present hearsay evidence, otherwise admissible under Court Rules.

He concluded his lecture by noting that whatever the outcome in the DYFS proceeding, both the client and the attorneys must be aware of the potential pitfalls which arise from the existence of parallel proceedings in either criminal, family or domestic violence Court. He stressed that if possible, a single attorney should be involving in all proceedings. However, if such dual representation is not allowed, an experienced DYFS practitioner should be retained in a team approach.