Analysis

Filing Interlocutory Appeals in Child Custody Cases

There are many considerations before making a decision to file an emergent appeal.

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Throughout a case, a court may enter interim orders. Unlike final orders, which are appealable as of right, interim orders are generally not appealable. An appeal of an interim, or, interlocutory appeal, is often referred to as an emergent appeal and can be filed during litigation where it meets certain stringent standards. While attorneys tend to be reticent to file interlocutory appeals because the standards to prevail are so stringent,

there are circumstances when failing to do so may foretell the ultimate loss of a final case in trial court.

There are many considerations before making a decision to file an emergent appeal, but there are generally four elements that are required in order to prevail: (1) There is no adequate remedy at law and that an emergency exists such that irreparable harm will occur absent the granting of relief; (2) There is a likelihood of success on the merits; (3) Granting relief will not do more harm than good; and (4) The equities favor relief, the law is well settled, and the public interest will not be harmed. *Crowe v. De Gioia*, 447 A.2d 173 (1982).

Before an interlocutory appeal is filed it is often required that the attorney file a Motion for a Stay of the offensive order in the trial court where it was entered, thereby creating the emergency need for appeal. Therefore, the original order and order of denial of a stay are the first two pleadings generally used when seeking an emergent appeal.

Emergent Relief

The first element is most critical—whether an emergency exists from which the litigant cannot recover if the relief is not granted. Absent the ability to show a true emergency, the likelihood of prevailing on an interlocutory appeal is slim.

What constitutes an emergency where child custody is concerned? One common scenario is when the plaintiff believes, based upon a child's disclosure, that the children are being hurt by the other parent. If this is occurring, Child Protective Services (CPS) can be notified and do an investigation. However, notification of CPS may not commence an investigation, and even if it does, CPS does always affirmatively protect children. Regarding the exact definitions of risk of harm, there may be differing standards for CPS than when the same issue arises in a custody case.

A litigant's "belief" of harm even after a disclosure by a child is usually insufficient to trigger either the granting of relief or winning on appeal. There must be more. If a motion for modification of visitation is filed based upon a belief of harm to a child, with or without a disclosure by a child, an expert opinion filed with the motion should be the basis for relief and has more likelihood of success. So, an expert opinion that an emergency exists that requires specific action on behalf of a child is essential before filing a potentially successful interlocutory appeal. Presumably, that expert opinion will have been presented to the trial court before the initial filing and for the Stay. If not, after an expert opinion is available, an attorney might consider a Motion for Reconsideration of the initial Motion. However, if the relief is denied by the trial judge when filed with an expert opinion, this expert opinion can be the child's basis of the emergency.

If an expert opines that a child is at risk in either the unsupervised care of a parent or having any contact with the parent that is deleterious to the child, a court should not ignore that expert opinion. This is true especially if it is based upon the expert's in-person interview. Sometimes courts refuse to have hearings or they deny the order pending a hearing, which may place the child at further risk. At times, a court will ignore the independent expert and seek a court ordered expert, again ignoring the opinion of the expert opinion presented and placing a child at risk. These are circumstances that can warrant emergent appeals. If the court makes a ruling based on its own assessment, but not based upon written affidavits, this may be a basis for appeal, including conflicting affidavits absent a testimonial hearing.

A child's therapist can also opine about risk to a child, and that opinion that a child is at risk in the other parent's care may be the child's best

friend in court. While it may be easy to critique a therapist as not being a neutral expert, their ethical requirement is to have only the child's interests in mind, so their opinion may be the only basis necessary for appeal. While the issue can be contested and fought over in court, an immediate protective order is more likely if the therapist or other expert opines that the child is at risk if he or she is in the care of one of the parents. Absent language of risk an emergency is unlikely to exist at law.

If the court does not grant protective relief, an interlocutory appeal is warranted. Even if there is a loss on appeal, a statement is made to the trial court by filing an appeal that both the litigant and the attorney take the issue seriously. The request for relief would be for the appellate court to hear the emergency as a trial de novo and to reverse or send instructions to the trial judge.

Likelihood of Success on the Merits

How does an attorney assess the likelihood of success on the merits? When it comes to children, safety should be paramount. There are several indicia to indicate the likelihood of success. First, the expert opinion is important. Second, the expert must be credentialed in the relevant issue. Third, the attorney must be able to present the relevant law. There may be research that can be presented strongly favoring the position of child protection which can be a part of an appendix to the attorney's brief.

Granting relief will not do more harm than good and the equities favor relief.

This determination involves a weighing of the equities, and is fact specific. Has the parent had regular visitation up to the filing? If so, what is the impact on the child of stopping that contact? It is helpful if the expert can address this issue in their written report. Judges are not inclined to

interfere with parental rights and visitation, so there must be a showing that stopping contact or having supervised contact is better for the child until a full hearing can be held. In this weighing of equities it is important to show that the impact to the parent in not having visitation, or having supervised time with a child, does far less harm—if any—to the parent than the risk to the child if the child is being hurt by that parent. It is essentially a risk assessment. The attorney can point out to the court that this is anticipated for a short period on an emergent basis and that a full hearing will show its continuing need.

The law is well settled and the public interest will not be harmed.

The public interest and safety of the child is paramount, and judges sit as parens patriae. Laws are replete with children's rights to safety. Under the Fourteenth Amendment's Equal Protection clause, no state has the right to deprive a citizen of equal protection under the law. Under the Fourth Amendment children have a right to be safe and secure in their homes. Once again, it is up to the court, in its role as *parens patriae*, to be cognizant of the child's safety.

Conclusion

In the event of an adverse ruling regarding the welfare of a child during a child custody proceeding, the attorney and client should consider whether the court's order may be appealed prior to the court's final order, and whether such an appeal is significant enough to justify the expense. As the Texas Supreme Court wrote: "Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake. But we cannot afford to ignore them all either. Like "instant replay" review now so common in major sports, some calls are so important and so likely to change a contest's outcome that the inevitable delay of interim review is nevertheless worth the wait." *In re McAllen Medical Center*, 275 S.W.3d 458, 458 (Tex. 2008). When it comes

to child safety in custody cases, truer words were never written.

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