

When To File an Emergency Appeal in Family Court

Where a child has disclosed abuse, the child needs immediate protection and the court is place to go, because unlike Child Protective Services, the court has the power to stop contact between a child and a parent. To succeed with an emergent appeal, however, one must understand the high standards to prevail. In their Family Law column, Toby Kleinman and Daniel Pollack examine the issues involved with these appeals.

By **Toby Kleinman and Daniel Pollack** | April 14, 2021 at 12:35 PM



“Judge, the bridge is going to collapse if you don’t enter an order to close it immediately.” That is the well accepted standard when an emergency exists when seeking an injunction. If a trial court hears such a plea but fails to enter an order

closing the bridge, an appellate court can and will overrule a trial judge's order and enter an emergency order to close the bridge.

Does that ever apply to family court orders and child protection? The simple answer is "yes." But it is a high bar to meet. An emergent appeal is also known as an interlocutory appeal. It means that the matter is in the middle of a case and no final hearing has been held. When a case has not been fully heard orders are considered temporary, but sometimes actions are required during the pendency of a case.

Because orders are temporary until a case is over, courts tend to maintain the status quo. That means that in family matters, if both parents share custody and decision-making before a court matter begins, the courts will most often continue that status quo for the entirety of the case, until there is a final hearing or there is consent of the parties.

Many divorce cases resolve amicably. People can put their differences aside, resolve financial issues, and put their own needs aside for the welfare of children. They agree to amicable schedules for kids to grow and thrive. This is often not true where there has been domestic violence. In over the vast majority of those non-amicable cases domestic violence was present.

Where there has been violence to a domestic partner there is an effect on the children, either by them being a witness to the abuse or by being abused themselves. Either case can create trauma for a child. Sometimes abuse of a child is the reason for the breakdown of the marriage. Sometimes violent partners use violence to children after separation in an attempt to control the partner who has left the marriage relationship; and, sometimes violence or sex abuse occurs to a child after the separation because the parent is a violent person and/or a child molester.

Regardless of when it occurs, if children make a claim of abuse by a parent, those disclosures must be dealt with swiftly. Part of dealing with claims of harm by a child may be filing an action with a trial court to stop or supervise an abuser's parenting time. The first determination to be brought to the court is a cessation of contact between the abuser and the child. Safety for the child must be held as the standard.

There are numerous considerations however. If a mother¹ brings the matter to court because a child disclosed abuse to her, she will likely get accused by the abuser as lying or trying to interfere in the parenting time or parental relationship. The abuser can easily deflect and accuse the victim mother of using abuse as an excuse to stop the father/child relationship. He may make accusations of alienation or improper gatekeeping. However, knowing there will be an attack should not deter bringing the matter to court.

There are some important considerations to have in place when going to court. Disclosures of abuse by a child, relayed by a mother to the court, may open the door to attack as described above. Among these is the fact that it's the court's duty to sort out credibility issues. Courts resolve disputes by determining the facts and applying the correct legal principles. When the wife is the messenger it can become her credibility that is placed on the line, rather than the child's disclosure of abuse. Therefore, wherever possible, an expert, rather than the mother, should present the matter as an opinion to the court that the child is a victim.

Having an expert opinion that a child has been abused helps make the case more appellate ready. "Appellate ready" means that if the trial judge does not protect the child then an interlocutory appeal can and should be taken to try to protect the child. An emergency exists that cannot wait to the end of a case if a child is being abused. To succeed with an emergent appeal, one must understand the high standards to prevail. There are no guarantees for success, but the odds of winning a protective order for the child are negligible without adequate preparation and information provided to a court.

Where a child has disclosed abuse, assume the child needs immediate protection. The court is the place to go. This is important, as many people assume that Child Protective Services ("CPS") will protect the child. The fact is CPS provides investigations but makes mistakes, and it doesn't have the inherent power to stop contact between a child and a parent. If contact between the abusive parent and the child continues the child may be frightened of repercussions if he or she tells investigators the truth, especially where contact between the parent and the child continues during an investigation. It is therefore advisable to take other actions even where CPS may be involved.

¹ For ease of writing and because most victims are women, this article identifies the victim of abuse as "she," the "wife," or similar terms. In like manner, we use the term "abused" rather than "alleged abuse."

To send a message of urgency to the court, an emergency motion will need to be filed. This is not to suggest violating orders of visitation, but it does mean that things need to be prepared and filed without delay. In the trial court filing, it is important to protect the potential for interlocutory/emergent appeal.

A beginning point is the preparation of an affidavit by the protective parent explaining the circumstances of the child's disclosure, whether or not the disclosure was to that parent. An expert report with an opinion that the child is abused, and explaining the risks to the child to continue contact with a person who the child has said abused them is critical to file with the court when asking for child protection against a parent.

While therapists may not think of themselves as experts, that is an error. Generally, in the eyes of a court, an expert is someone with more than a lay person's knowledge on a given subject. Certainly the therapist fits that definition. Therefore, the opinion of the therapist about the child's disclosure of abuse and its legitimacy should be given weight by the court no different than any other expert. The therapist is best positioned in many ways. They are trusted by the child and likely know how to assess the child's needs. Furthermore, they are permitted and trained to diagnose. If the child does not have a therapist bringing the child to their pediatrician and allowing the pediatrician to speak privately with the child is appropriate even if there are no visible physical injuries.

State laws vary, of course. If the child discloses what a mother believes is abuse by the other parent, and if the state does not require a parent to report the possibility of abuse to CPS immediately, then, before a disclosure of abuse is reported to CPS a therapist can meet with the child. The therapist can help assist the mother in determining whether the child's statements are at the level of concern she sees and believes. This can be an ordinary therapy session. A therapist can inquire about things the child may have told the mother as they would discuss anything a parent may have reported to them. The therapist is then the one to make a report if the child disclosed to them.

After a disclosure to a therapist a written report from the child's therapist is imperative. The therapist is a mandated reporter; accordingly, the therapist must report abuse to CPS. After reporting they should write up their concerns and what they believe the child needs for protection. Research indicates that where there is abuse a child should be allowed to heal before re-establishing contact. Where a pediatrician feels there is abuse and feels compelled as a mandated reported to

make a report to CPS their report should be followed up with a written report stating the reason for the report and their belief the child was abused and needs protection.

This raises the issue of already having a trusted therapist and pediatrician. A mother who has been a victim of adult interpersonal violence should select a therapist for a child after leaving an abusive relationship. A therapist with special knowledge of trauma should be selected. If the court is involved with the selection process a parent can object to anyone without the requisite training and experience. Whether the child has been a victim witness of a father's abuse of the mother or a victim themselves, trauma training is essential to properly treat a child. Critically, where a child later makes an allegation of abuse the therapist will be able to hear the disclosure and assist the child. If there was no adult domestic violence and no therapist, a pediatrician is an appropriate expert to see and write a report.

Following the written report of abuse to CPS, a copy of the report should be given to the mother. The report can be used in support of a request to the court for child protection. This court involvement can be done prior to CPS completing an investigation.

As an aside, sometimes, when CPS interviews a child, it allows the therapist to be present. There are also times the therapy session will be in lieu of a CPS interview. In so many ways, a therapist's involvement and opinion that a child is abused will have an influence on CPS.

Some therapists may be reluctant to put a recommendation for visitation in a report. They may express concern because they have not done a forensic evaluation, or they are concerned about their relationship with the child. Their ethical commitment is to the best interest of their client, so they are really best positioned to state an opinion regarding what they think is best for the child regarding contact with the abuser. If they believe the child can be traumatized by even seeing the abuser they should put that in writing. They need to state the potential negative outcomes to being triggered by seeing the abuser, explaining the risks and detriment to the child. This is part of the reason that a properly trained trauma therapist is so important.

Courts weigh the risks to the child versus the right of the parent to see the child. The protection of the child's safety should outweigh parental contact until the matter is fully resolved. However, a trial court may ignore the warnings in a therapist's report. This is a circumstance where an interlocutory appeal is likely to

have a possibility of success. The bridge would essentially be falling down if a therapist says the child is at risk for a psychological breakdown or further abuse if he or she has contact with the abuser and the court does not stop contact immediately.

Many interlocutory appeals are done by filing papers online. Others are done by filing forms with an appellate court or by filing with the appellate judge hearing emergent appeals. One critical piece, regardless of the requirements of the appeal, is the attachment of the court order denying adequate protection for the child, along with the therapist report. One should also ask the trial court to enter a temporary stay of any visitation order pending the outcome of an emergent appeal. Emergent appeals can be resolved within short period of time.

There is sometimes another dilemma. Therapists may be reluctant to write a report due to confidentiality. If so, the report to CPS can often be obtained by the parent and can then be used in court and on appeal, if necessary. In certain emergencies, psychologists are ethically permitted to see children forensically without the consent of parents, particularly if there have been threats of suicide or homicide. Thus, where a child does not have a therapist a forensic evaluation to show risk may be permitted before court and without permission of the other parent. This varies by state, and the laws, court rules, and applicable ethics need to be checked carefully.

Disclosures by children do not generally come out of the nowhere. There may be a history of a variety of disclosures. That context should include any earlier reports. In the case of physical abuse there are often no bruises, so therapists or forensics may be most helpful. However, if there have been previous disclosures and previous reports of abuse, the new ones may be discounted absent a professional stating their belief there is abuse. This makes a report to a therapist and CPS all the more critical.

In summary, in order to effectuate change with a claim of abuse a mental health report and/or pediatric report is essential to success in in the interlocutory appellate process.

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