New York Law Journal

Interplay Between Child Abuse Reporting System and the Courts

Stephen P. Forrester, New York Law Journal
June 8, 2015

Protecting children from the devastating consequences of abuse and neglect is of vital interest to the well-being of society and therefore a governmental function of the utmost importance and urgency. Since the enactment of the Child Abuse Prevention and Treatment Act in 1974, federal law has mandated that as a condition of receiving Title XX funding, states must establish child protective service programs that conform to a broad variety of standards and directives. Among these are a requirement that state programs include provisions and procedures for reporting and investigating cases of known or suspected child abuse and neglect. New York has incorporated these federal mandates primarily through the Child Protective Services Act of 1973, which is codified at Article 6, Title 6 of the Social Services Law.[1]

States must also ensure that their child protective programs provide for independent judicial review of various actions taken by state agencies providing investigative/child protective services, such as protective placement in foster care.[2] Courts, therefore, have a key role in state child protective systems. They serve as an independent forum where judges—compelled by legal mandate—ensure that the child protective system operates for the safety and well-being of children while respecting the due process rights of the family.[3]

This article will discuss the interplay between the child protective and the court systems in New York, focusing on child abuse and neglect reporting, child protective service investigations, and the use of child abuse and neglect reports in judicial proceedings. It explores the rules and procedures governing child abuse and neglect reports in the child protective system and in the courts, and how a firm understanding of these different rules can dispel confusion and misunderstanding among the various professionals—and the clients they serve—who regularly interact with these systems.

Reporting System

New York State has incorporated the federal mandates discussed above in its child protective statutory and regulatory scheme. The basic law underlying the New York scheme can be found in Article 6, Title 6 of the Social Services Law, which is titled "Child Protective Services." This title establishes the New York Statewide Central Register of Child Abuse and Maltreatment (SCR or Central Register), informally referred to as "the child abuse hotline" or "the hotline." The Central Register, administered by New York State's Office of Children and

Family Services (OCFS), is the mechanism by which "mandated reporters" make reports of suspected child abuse or neglect. A mandated reporter is any person whose professional title or function is listed in the social services law and who is legally compelled to report to the Central Register whenever they have reasonable cause to suspect that a child before him in a professional capacity has been abused or neglected.[4]

Reports can also be made by a concerned citizen, such as a friend, relative, neighbor, or onlooker, although reports from these sources are strictly voluntary. Title 6 also sets up the structure of the child protective system at the local level. Each county, denominated a "local social services district," must provide a local child protective service (CPS) to investigate reports accepted by the Central Register pertaining to children living within that county. New York City is considered a single district, and its child protective services are provided by the Administration for Children's Services (ACS).[5]

When a report is accepted and registered by the Central Register, it is immediately transmitted by electronic means to the local child protective service, which must make contact with the child's family within 24 hours and complete its investigation within 60 days. The investigation must determine whether the report is "indicated" (substantiated) or "unfounded" (not substantiated) using a standard of "some credible evidence," i.e., the report can only be indicated if the investigator determines that credible evidence exists to support one or more of the allegations made in the report.[6] CPS will make a safety assessment of the children involved in the report and take action it deems necessary to ensure that they are protected from additional harm. Such steps may include initiating a child protective proceeding in the Family Court for any appropriate reason, such as where the family refuses to cooperate with protective services.[7]

Review and Fair Hearings

An indicated report of child abuse or neglect has significant legal implications. For example, applicants for employment at a day care provider, or applicants to be certified as adoptive or foster parents, must be screened by the Statewide Central Register to determine if any indicated reports exist against them. Indicated reports remain in the Central Register until 10 years after the youngest child named in the report turns 18 years of age. Because an indicated report affects significant, constitutionally protected interests,[8] becoming an important—if not determinative—factor in such matters as employment or adoptive parent certification, the law provides a due process mechanism whereby the determination to indicate the report can be challenged through an administrative review and fair hearing process.[9]

The person against whom the allegations are made in the SCR report is referred to as the "subject of the report." Upon notification that the report has been indicated, the subject can request, within 90 days of receiving such notification, that Office of Children and Family Services administratively review the records of the child protective service investigation relating to the report and amend the records. The OCFS reviewer must determine, based on the review of the records, whether or not the subject committed the act or acts that gave rise to the indicated report by a fair preponderance of the evidence, a higher standard of proof than the "some credible evidence" standard used by CPS in conducting the investigation.

If upon review OCFS determines that the records support the indication of the report, it must schedule a fair hearing. At the fair hearing the burden of proof is on CPS to establish, by a fair preponderance of the evidence, that the subject committed the act or acts alleged in the

indicated report. The subject is entitled to an array of due process rights at the hearing, such as to be represented by counsel, to have witnesses testify and evidence presented on the subject's behalf, to cross-examine witnesses, and to offer rebuttal evidence.[10] If OCFS grants the subject's request to amend an indicated report to an unfounded report—either by administrative review or fair hearing—it is sealed, and is expunged from the Statewide Central Register 10 years from the date the report was received.

When OCFS upholds the indication of the report after the administrative review and fair hearing process, the subject may seek judicial review of that determination through a proceeding pursuant to Article 78 of the Civil Practice Law and Rules.[11]

State Family Court

The New York State Family Court is a court of original jurisdiction over a multitude of proceedings relating to children and families. Both substantive and procedural law governing Family Court proceedings are found in the Family Court Act. The court has exclusive jurisdiction over child abuse and neglect proceedings, denominated as "child protective proceedings" under Family Court Act Article 10;[12] these proceedings are designed to establish procedures ensuring the safety of children and to provide due process of law for determining when the state may intervene against the wishes of a parent so that a child's needs are properly met.[13]

Article 10 child protective proceedings are usually commenced by local CPS in circumstances where a parent refuses an offer of services to address safety concerns regarding a child, or where the child has been removed from the parent by CPS in circumstances presenting imminent danger to the child's life or health.[14]

The authority to file an Article 10 petition alleging abuse or neglect is explicit in the Family Court Act, and filing authority is restricted to CPS or "a person on the court's discretion."[15] Upon filing, the case proceeds through the various stages delineated in Article 10 and Article 10-A,[16] including preliminary hearings, the fact-finding hearing, the dispositional hearing, and various post-dispositional hearings as well as permanency hearings.

Admissibility of SCR Reports

Upon registration by the Statewide Central Register of the oral report of suspected abuse or maltreatment, the mandated reporter is obligated to prepare a written report containing the same information as found in the oral report. This report is prepared on a document entitled LDSS (local district social services) form 2221A. This form must be completed and forwarded to the local child protective services office within 48 hours of making the oral report—it is not submitted to the SCR by the reporter—and becomes part of the case file of the protective services investigator assigned to investigate the report.

The SCR report can be admissible into evidence where relevant to issues in a judicial proceeding under a statutory exception to the hearsay rule.[17] Its most common litigation use is in Family Court child protective proceedings under Article 10. It is admissible in these proceedings regardless of its nature as hearsay, so long as it is material and relevant to issues before the court.[18]The SCR report is admissible even at the fact-finding hearing (the hearing at which CPS must prove the allegations of abuse or neglect contained in the

petition) where hearsay is generally excluded.

Counsel representing parents sometimes argue that the report is not admissible for its truth, but is only admissible for the fact that the report was made. A deeper examination of the New York rules of evidence, however, suggests that the SCR report should be admissible for its truth as a business record, whether or not it is admissible under the statutory exception found in the Family Court Act. The firmly established business records rule permits records kept in the regular course of a business to be admitted for their truth.

"Business" is broadly defined to include entities that may not traditionally be thought of as businesses, such as government and private social-service agencies.[19] The records must be kept as a routine practice of a business, and the entries in the records must be entered contemporaneously with—or in close proximity to—the events or transactions referred to in the record entries.[20]In addition to these requirements, the entrant of the business record must be under a business duty to record the entry, and the informant must be under a business duty to report the information to the entrant.[21] Child protective services departments clearly qualify as a business entity under the business records rule.

They also have statutory and regulatory obligations to maintain records in the regular course of their operations.[22] This implies, of course, the business duty upon their personnel to make entries in these records. The final piece of the rule, the business duty of the informant—here the mandated reporter—to report the information, is fulfilled by the obligation (one more compelling than a mere business duty) to report child abuse and maltreatment as a legal duty, and to report under penalty of criminal and civil sanctions for the failure to do so.[23]

Because the business records analysis applies to the SCR report, statements contained therein are not admissible at a fact-finding hearing merely because they are contained in a document that receives a statutory privilege of admissibility. The admissibility of a statement in the SCR report, as is the case for any business record, turns on whether all persons in the chain of informants are under a business duty to report and are acting within the scope of that duty.[24]

If an informant is not under a business duty to report, the statement must come within some other statutory or common law exception to the hearsay rule to be admissible.[25] For example, an admission by a parent to an act constituting abuse or neglect that is contained in the SCR report of a mandated reporter would be admissible against that parent at the fact-finding hearing, whereas a statement by a non-offending parent in the report regarding acts of the offending parent would not be admissible against the offending parent.[26]

The SCR report may be admissible in other contexts, such as matrimonial[27] or child custody proceedings,[28] with the proviso that the report must have been "indicated" upon completion of the CPS investigation. An allegation in a report may be indicated only if it is supported by "some credible evidence," a standard of proof greater than the "reasonable cause to suspect" applicable to the initial report by the mandated reporter. If a report is "unfounded," that determination is not binding upon a court in subsequent proceedings.

Even though the unfounded report is inadmissible, a court may consider alternative evidence of events that were discussed or referred to in the report. After all, the administrative determination by a child protective services investigator should have no legally binding effect upon a judicial officer in a formal court proceeding.[29] Even if the report was originally indicated, but has been amended, unfounded, and sealed upon administrative review or fair hearing by OCFS as discussed above applying the higher standard of a fair preponderance

of the evidence, a court may still consider alternative sources of evidence notwithstanding the inadmissibility of the sealed report.[30]

Conclusion

The child abuse and neglect reporting system, child protective services and the courts each have a crucial role to play in ensuring the safety of children. These systems work most effectively when the professionals who operate in them understand the purpose and goals of each system, the rules governing their operations, and how their interrelationship serves to ensure child safety while respecting the rights of families. In addition, professionals also more effectively serve the families who are involved in these complex systems when they can apply their understanding in counselling and guiding those who depend on them for assistance.

Endnotes:

1. New York Social Services Law (SSL) §§411-428.

2. See, e.g., 42 U.S.C.A. §672(a)(2)(A)(ii) (judicial determination of the need to remove a child from the home and that reasonable efforts to prevent the removal were made or were not in the child's best interests).

3. See New York Family Court Act (FCA) §1011.

4. SSL §413 1.(a).

5. Administrative Code of the City of New York §§21-901--21-908.

6. SSL §412 7.

7. SSL §424 11.

8. See *Valmonte v. Bane*, 18 F.3d 992 (2d Cir., 1994).

9. SSL §§422, 424-a

10. 18 New York Codes Rules and Regulations (NYCRR) §434.8 (d).

11. See, e.g., *Bookhard v. Carrion*, 98 A.D.3d 914, 951 N.Y.S.2d 495 (1st Dept., 2012).

12. FCA §115 (a)(i).

13. Supra, note 3.

14. FCA §1024; FCA §1026 (c).

15. FCA §1032.

16. See, generally, FCA §§1011-1098.

17. FCA §1046 (a)(v); SSL §415.

18. FCA §1046 (c).

19. *In Re Baby Boy S.*, 251 A.D.2d 165, 674 N.Y.S.2d 338 (1st Dept., 1998); *Matter of Male G.*, 97

Misc.2d 283, 411 N.Y.S.2d 102 (Fam.Ct. N.Y. Cty., 1978).

20. *People v. Kinne*, 71 N.Y.2d 879, 527 N.Y.S.2d 754 (1988)(breathalyzer calibration tests admissible under rule although recorded seven days after tests conducted).

21. *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930); *Matter of Leon R.R.*, 48 N.Y.2d 117, 123, 421 N.Y.S.2d 863, 867 (1979).

22. SSL §372 (2.); 18 NYCRR §406.1 et. seq.

23. SSL §420; cf., *People v. Cratsley*, 86 N.Y.2d 81, 629 N.Y.S.2d 992 (1995) (outside psychologist's clinical report admissible in records of social services support agency).

24. *In re Omani O. (Marcus O.)*, 91 A.D.3d 466, 937 N.Y.S.2d 162 (1st Dept., 2012) (unattributed statement in police officer's SCR report inadmissible against respondent father).

25. *In re Nicholas C.*, 105 A.D.3d 1402, 964 N.Y.S.2d 806 (4th Dept., 2013); see, e.g., *Taft v. New York City Transit Authority*, 193 A.D.2d 503, 597 N.Y.S.2d 374 (1st Dept., 1993) (excited utterance of bystander to subway accident in transit employee's report admissible).

26. Cf., *In re Nicholas C.*, id (mother's out-of-court statements to police officer and case worker inadmissible against respondent father).

27. New York Domestic Relations Law (DRL) §240 1-a.

28. FCA §651-a.

29. See, e.g., *Lazich v. Perales*, 146 Misc.2d 831, 552 N.Y.S.2d 819, 822 (Sup. Ct., Westchester Cty., 1990).

30. *In Re Richard SS*, 55 A.D.2d 1001, 871 N.Y.S.2d 383 (3d Dept. 2008).

Stephen P. Forrester is the director of government relations and administration with The New York Society for the Prevention of Cruelty to Children. He was formerly an associate general counsel for New York City's Administration for Children's Services.
