David vs. Goliath

Defense Strategies for Litigating the Abuse and Neglect Trial Initiated by the Division of Youth and Family Services

by Allison C. Williams

Any family law attorney who regularly litigates contested custody matters understands that of all family court litigation, nothing engenders in our clients a greater passion for battle more than the possibility that they might lose custody of their child. This premise is all the more resounding in custody litigation initiated by the Division of Youth and Family Services (DYFS). Many family law practitioners have shied away from DYFS litigation due to the unfortunate reality that parents in need of representation may not have the resources to afford private counsel.

Additionally, due to the relative dearth of family law practitioners who understand and are willing to undertake DYFS litigation, these litigants are often left without skilled private counsel to represent them against an adversary (*i.e.*, the government) who has, for all intents and purposes, unlimited resources. This article will provide a procedural overview and practice pointers for defense counsel when defending against a Title 9 complaint filed by the Division of Youth and Family Services, seeking a finding of abuse or neglect against a parent.[1]

INITIATION OF LITIGATION

DYFS litigation is commenced with the filing of a verified complaint and order to show cause.[2] The division will be represented by the Attorney General's Office. The complaint will seek the appointment of a law guardian, an attorney assigned to represent the child, from the Office of the Public Defender. Parents who are unable to afford private counsel are assigned an attorney from the Office of Parental Representation, subject to verification of the parent's financial inability to afford private counsel.

The litigation may be commenced either before or after the child has been temporarily removed from a parent's care and custody.[3] A child can only be removed without a court order where the child faces "an imminent danger to" his or her "life, safety or health."[4] The division is required to make "reasonable efforts" to prevent removal of children from families.[5] The division is also required to make reasonable efforts to reunify children that have been removed, unless the court determines that the alleged acts qualify as an exception to this mandate to attempt reunification.[6]

After removing a child, the division must file a complaint within two days.[7] If the division does not remove the child, but merely asks the child's custodial parent to agree to keep the child away from a person accused of an act of abuse and neglect, including the noncustodial parent, then the division is not obligated to file a complaint within two days. In these circumstances, the parent being investigated would have to file his or her own application to compel production of the child and reinstitution of his or her parental access.

Often the accused parent is denied access to his or her child while DYFS is investigating. The division may ask that one parent sign a case plan, agreeing to keep the child away from the parent under investigation. The parent being investigated naively believes that if he or she just cooperates with DYFS employees, they will go away. This rarely occurs. If a parent is being denied access to his or her child pursuant to a case plan, strongly consider filing an application to force the production of the child. The longer the investigated parent waits, while being kept from his or her child, the longer the division has to make a case against the parent. When parents force the issue, the division usually accelerates its investigation, increasing the likelihood of the division's unauthorized deviations from the investigatory process required by the New Jersey Administrative Code.

The division has far-reaching power to remove a child from his or her parents. Removal can occur with a court order or, in certain limited circumstances, without a court order.[7] An order of temporary removal can only be obtained before a preliminary hearing, if: 1) the parent was informed of the division's intent to apply for an order; 2) the child appears to suffer from the abuse or neglect by his or her parent or guardian so much so that his or her immediate removal is necessary to avoid imminent danger to the child's life, safety or health; *and* 3) there is not enough time to hold a preliminary hearing.[8]

Once your client has been served with a complaint alleging

abuse and/or neglect, a decision must be made whether or not to file a formal answer. A formal answer is not required to be filed.[9] However, if your client presents as truthful and is certain as to the various facts contained in the complaint, you should seriously consider filing a very detailed answer specifically responding to the allegations, so your client takes advantage of every opportunity to persuade the trial court of his or her non-culpability and, most importantly, the needs of the child at issue to have substantial access to and contact with the parent pending resolution of the matter.

Orders to show cause filed in DYFS proceedings seeking interim relief are governed by Rule 4:52-1(a).[10] Thus, in order to obtain an order of removal of the child or restriction of parental access, the division must demonstrate that "immediate and irreparable damage will probably result to the [child] before notice can be served or informally given and a hearing had."[11]

In all practicality, it is exceedingly rare that the court will not find immediate and irreparable harm based upon the allegations contained in the complaint; however, it is possible to prevent the removal of a child when appearing at the first court appearance on the complaint by demonstrating that while the complaint may have, in fact, plead a *prima facie* showing of violation of the Title 9 statute (*i.e.*, an act of abuse and/or neglect), the division failed to demonstrate that the child would be immediately and irreparably harmed by remaining with his or her parents.

As previously noted, division caseworkers are vested with the authority to remove a child without a court order and without the parent's consent in certain limited circumstances.[12] Only upon a showing that "the child is in such condition that his continuance in said place or residence or in the care and custody of the parent or guardian presents an *imminent danger to the child's life, safety or health*, and there is insufficient time to apply for a court order" can the division remove a child.[13] This statutory authority also extends authority to a hospital to keep a child who fits the "imminent danger to life, safety or health" standard.[14]

Far too often, defense counsel attends the first court appearance and simply concedes removal or the restriction of parenting time based upon the allegations in the complaint, preferring to wait until the return date on the order to show cause to obtain more information to oppose the application. It is imperative that counsel never concede removal of the child or restriction of parental access or parenting time pending the return date on the order to show cause, absent extraordinary circumstances, such as the immanency of indictment on criminal charges or the division's pleading of allegations, which, if true, would lead to an application by the division to terminate parental rights. If the child is removed from the parent at the first hearing on the complaint, the judge is more inclined in subsequent hearings to validate his or her prior decision authorizing removal of the child and to keep the child out of the parent's care and custody.

If the child was removed without court order, upon notification of the division's action the parent can file an application for the immediate return of the child.[15] The parent is entitled to a hearing within three court days.[16] At the hearing, the court's paramount concern must be the safety of the child. Nevertheless, the statute mandates that the court return the child "unless it finds that such return presents an imminent risk to the child's life, safety or health."[17] Thus, in presenting testimony at a hearing seeking return of the child, it is paramount that defense counsel focus upon the imminent risk standard. Not all allegations in the complaint may rise to the level of imminent risk; therefore, it is possible that the court may find that the division has plead allegations that could constitute abuse and/or neglect, while finding that there is no imminent risk to the child to prevent return to his or her parent.

The division is required to supply to the court and to counsel all relevant DYFS reports, expert reports or other documents upon which the division intends to rely at trial.[18] These documents must be supplied on the first return date of the order to show cause if then available, or if not available, as soon thereafter as they become available.[19] Often the division will withhold documents from defense counsel that are beneficial to and exculpatory of the parent, under the guise that the documents are not 'relevant' to the division's case. For this reason, it is imperative that defense counsel inspect the division's file, which is expressly authorized by the Rules of Court.[20]

Other than the documents the division gives to defense counsel or defense counsel locates in the division's file upon inspection, further discovery is prohibited by any party, except upon leave of court.[21] This prohibition, though imposed upon all parties, serves a significant disadvantage to the parent. For the most part, the division already has its discovery, which is usually appended to its complaint. Conversely, the parent cannot depose division caseworkers, require the person who made the report to the division submit answers to interrogatories or produce documents, or demand a psychological evaluation of a child making allegations of abuse against his parent without express authorization from the court. Consequently, the division can obtain discovery to put forth its case without the parent's having any say regarding what information, if any, the division is entitled to collect, while the division has every opportunity to—and usually will—oppose any and all requests for discovery made by defense counsel.

At the return date of the order to show cause, if the child is not returned to the primary care of his or her parent, the division must ask the parent to provide names of family members and/or friends who can keep the child pending resolution of the case.[22] If the non-accused parent is available and willing to take the child, the division should place the child with that parent without the need for a lengthy investigation.[23] At the conclusion of the division's case, if the accused parent has been found not to have committed the alleged acts, or has addressed the issues prompting DYFS involvement, the parent is entitled to a hearing to determine whether custody should remain with the non-accused parent or should revert to the exonerated parent.[24]

If the division caseworker likes the parent, often he or she will have already requested this information from the parent, and the division will have begun its approval process of those persons named before the matter is even scheduled in court. Conversely, if the parent is accused of heinous acts, such as sexual abuse, the division caseworkers will often require incessant reminding of their statutory obligation to seek placement of the child with family or friends of the accused parent.

Before placing the child with any proposed caregiver, the division must perform a background check, including a criminal history background check for each resource family parent or applicant, each household member at least 18 years of age, each new household member at least 18 years of age, and each child who reaches 18 years of age post-placement.[25] Additional information is gathered on the proposed applicant, including his or her occupation, income, any history of domestic violence, and a home study to ensure person is fit to take the child.

It behooves defense counsel to speak with the parent prior to the removal hearing to obtain names of potential caretakers for the child, in the event the first hearing is unsuccessful. When asking your client for alternative caregivers, be sure to ask if the parent's family members or friends have ever been convicted of any criminal offenses, which would prohibit them from taking the child.[26]

DYFS hearings and trials are confidential proceedings in which only the division, its agents, the accused parent, any interested parties and all attorneys involved may be present.[27] Conferences are presumptively private; however, this presumption can be overcome.[28] Do not let the division caseworkers or the deputy attorney general convince defense counsel that the courtroom must be closed, and that no one can be admitted. The closing of the court is discretionary, not mandatory.[29] The parent's need for emotional support, particularly at the commencement of DYFS litigation, is certainly reason enough to argue that the court should allow his or her parents, friends or loved ones into the courtroom.

Within 30 days from the return date, the court must conduct at least one case management conference. If, prior to this conference, the court has ordered that the child remain out of the parent's primary care pending resolution of the matter, then defense counsel must begin preparing the parent to oppose the division's complaint.

The first step in preparing a Title 9 case for trial (known as a fact-finding hearing) is to read and dissect the Title 9 statute. Review each allegation to see if it meets the definition of abuse and/or neglect under the Title 9 statute. The law is written so broadly, that even seemingly innocuous acts or omissions may constitute child abuse or neglect under the statute.

N.J.S.A. 9:6-8.9 identifies six characteristics of an 'abused child,' the existence of any of which characteristics shall result in a finding of abuse or neglect against the parent, guardian or person responsible for the child's primary care when the act or omission occurs. These characteristics are broadly based, including both acts and omissions, and exceed that which the average person would likely conceive of as abuse or neglect.

Generally, a parent commits an act of child abuse or neglect by committing any one or more of the following acts or omissions:

1. Physically injures the child, or allows the child to be injured;
2. Creates or allows to be created substantial or ongoing risk of physical injury;
3. Sexually abuses a child, or allows a child to be sexually abused; or
4. Willfully abandons a child.[30]

If a child has been institutionalized inappropriately, or has been willfully isolated from ordinary social contact to the extent that such isolation constitutes emotional or social deprivation, this too may constitute abuse or neglect.

The final definition of child abuse or neglect is essentially a catch-all provision, encompassing any act or omission not covered by the other five definitions in the statute:

> [A] child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, or such other person having his custody and control, to exercise a minimum degree of care (1) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so, or (2) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment or using excessive physical restraint under circumstances which do not

indicate that the child's behavior is harmful to himself, others or property; or *by any other act of a similarly serious nature requiring the aid of the court.*[31]

The Administrative Code delineates a non-exhaustive list of acts that would normally constitute abuse or neglect:

(a) The allegations of the types of injuries or risk or harm that may constitute either abuse or neglect include:
1. Child death;
2. Head injuries;
3. Internal injuries;
4. Burns;
5. Poison or noxious substances;
6. Wounds;
7. Bone fractures;
8. Substantial risk of physical injury or environment injurious to health and welfare;
9. Cuts, bruises, abrasions, welts or oral injuries;
10. Human bites;
11. Sprains or dislocations;
12. Mental or emotional impairment; and
13. Risk of harm due to substance abuse by the parent/caregiver or the child.

(b) The allegations of the types of injuries or risk or harm that may constitute abuse include:
1. Torture;
2. Tying or close confinement;
3. Sexually transmitted diseases;
4. Sexual penetration;
5. Sexual exploitation;
6. Sexual molestation; and
7. Substantial risk of sexual injury.

(c) The allegations of the types of injuries or risk or harm that may constitute neglect are:
1. Inadequate supervision;
2. Abandonment or desertion;
3. Inadequate food;
4. Inadequate shelter;
5. Inadequate clothing;
6. Medical neglect;
7. Failure to thrive;
8. Environmental neglect;
9. Malnutrition;
10. Lock-out;
11. Medical neglect of a disabled infant; and
12. Educational neglect.[32]

Because the statutory and administrative definitions of abuse or neglect are so broadly defined, it is conceivable that even the most innocuous conduct could result in a finding of abuse or neglect against the parent, subjecting him or her to inclusion on the Child Abuse Central Registry. To defend against the agency's allegation, it is imperative that defense counsel carefully scrutinize each allegation of the verified complaint, as well as become intimately familiar with the contents of each document appended to the complaint.

Your first area of inquiry must be the 'facts' set forth in the division's complaint. Go through the complaint with your client, line by line. The complaint will almost always contain factual inaccuracies or distortions. Look for discrepancies between the 'facts' set forth in the complaint and the division contact sheets appended to the complaint. Every discrepancy discredits the investigation, and increases the likelihood that the investigator missed a key element in making an administrative finding against your client, resulting in the present litigation.

Holding the Division to Its Duty to Investigate

Your next area of inquiry should be the sufficiency of the initial investigation undertaken by the division. The investigating caseworker is required to interview the alleged child victim in person and individually, and if the child is nonverbal, to observe the child to detect victimization.[33] Additionally, the investigator must interview the child's caregiver and each adult in the home (preferably on the same day as the interview of the alleged child victim); the person who made the allegation (the reporter) and each other person identified in the current report or related information as having knowledge of the incident or as having made an assessment of physical harm, including, but not limited to, the physician, medical examiner, coroner, other professional who treated the alleged child victim's current condition, other than the reporter; the assigned permanency worker (if any), the youth services provider (if any), a private agency caseworker; and any other department representative working with the alleged child victim or his or her family.[34]

Importantly, the division is required to interview the alleged perpetrator, *in person*.[35] Often, when the accused parent retains an attorney, the division caseworkers will refuse to speak with the accused with his or her attorney present and/or will discontinue any efforts to speak with the accused altogether. This violation of agency procedure often accelerates the division's filing of the complaint, prior to its completing its investigation. When cross-examining division caseworkers, defense counsel should confront them with their failure to fully investigate the parent, which merely ensures that the caseworker failed to discover all relevant information about the case, such as other potential perpetrators or the existence of a legitimate defense on the part of the parent.

After completion of its initial investigation, if the caseworker has reason to believe that an act of abuse or neglect may have occurred, the division then proceeds with a formal investigation. In conducting a formal investigation, the investigator must:

1. Assess the strengths and needs of the caregiver;
2. Assess the strengths and needs of the alleged child victim;
3. Interview *at least* two collateral contacts who have knowledge of the incident or circumstances, if the alleged child victim, the alleged child victim's family, or *the alleged*

perpetrator identifies two or more of them;

4. Confirm childcare arrangements reported by the caregiver;
5. Interview a prior permanency worker who is the most knowledgeable about the family, if available, and if a service case is currently closed but had been open within the last two years;
6. Interview school personnel or a childcare provider, if any, with knowledge of the parental care provided to that child;
7. Interview each identified witness who is reported to have knowledge of the alleged abuse or neglect;
8. Interview each community professional who has first-hand knowledge of the alleged abuse or neglect;
9. Interview the following persons:
   i. Each person residing at the address of occurrence, at the time of incident; and
   ii. *Each witness offered by the alleged perpetrator who could provide evidence that he or she did not abuse or neglect the alleged child victim*;
10. Interview each investigative law enforcement officer working on the report if he or she is not involved in cooperative investigation of the report;
11. Interview each of the initial response law enforcement personnel called to the scene of the alleged abuse or neglect;
12. Interview each physician directly involved with the treatment of the reported injury or condition, such as the attending physician, radiologist, surgeon or coroner, if any; and
13. Interview each primary care physician who has seen the alleged child victim within the past six months, if any.[36]

The division caseworker is required to speak with *each* witness offered by your client "who *could* provide evidence that he or she did *not* abuse or neglect the alleged child victim."[37] Many times, this is not done. The caseworker has already made up his or her mind that the accused parent is a bad person and should be punished accordingly. Nevertheless, the statutorily mandated goal of the division during its formal investigation is not to make a case against the parent, but rather, to determine if a child alleged to have been abused or neglected requires protection. On cross-examination, the investigating caseworker should be questioned about each and every person identified by the accused parent to whom he or she did not speak.

Defending Against the Kitchen Sink Complaint

After you have analyzed the sufficiency of the division's investigation, and you have the parent's version of events, you must establish a strategy to defend against the complaint. Generally, there are two types of allegations—one type is an allegation predicated upon a single incident (*i.e.*, a physical assault, a sexual assault, an occasion of leaving a young child unattended overnight without supervision, etc.), while the other is an alleged pattern of abuse or neglect based upon a series of acts of omissions. The multi-act series of allegations presents the greatest difficulty to defend. When the division seeks to lump together a series of allegations to paint a picture of abuse and/or neglect, it is not uncommon that none of the acts viewed in isolation would constitute abuse or neglect. There is some support for the view that a multitude of acts or omissions, which are "synergistically related" can be viewed in totality to depict a pattern of abuse or neglect. The seminal case establishing the synergistically related standard is *Division of Youth and Family Services v. C.M.*[38]

In *C.M.*, the parent was accused of numerous acts that, when viewed in totality, were found to be neglectful. Those acts included removing the child from special education classes without cause, failing to interact with a baby and living in filthy, unsanitary conditions.[39] The court's conclusion, however, was not only that the acts had occurred, but that same had an adverse impact upon the children.[40] Thus, it is not simply the existence of the multiple acts or omissions, but the net effect of these acts, which gives rise to a finding against the parent. When refuting each of the alleged acts, it is important to create a running theme throughout your defense that the acts or omissions, whether viewed in isolation or in totality, did not have an adverse impact upon the children.

One way of creating this theme is to look to collateral events occurring during the same time period in which the alleged acts or omissions occurred and identify how those events impacted the child. For instance, if during the time period when the parent is alleged to have abused or neglected the child, division caseworkers continued to show up unannounced to the parent's home to interview the child and the child begins to act out in school, it may be the anxiety caused by the division's unwanted intrusion into the family's life—and not the alleged abuse or neglect by the parent—that caused the adverse impact (*i.e.*, the acting out at school).

Evidence Issues in Title 9 Proceedings

In the fact-finding hearing, all evidence must be relevant, material and competent.[42] The division may submit into evidence all reports of staff personnel and professional consultants.[43] Conclusions drawn from the facts stated in the reports are treated as *prima facie* evidence, subject to rebuttal.[44] These reports are generally admitted as a business record; therefore, they

meet a noted exception to the hearsay rule.[45] However, the fact the business record itself is admissible does not mean that all content of the record is admissible. First, to meet the business record exception, the document must be prepared on the first-hand knowledge of the DYFS caseworker or consultant, reasonably proximate in time to the facts asserted in the record.[46] Often, DYFS will submit to the court a large stack of division contact sheets, detailing numerous conversations between caseworkers and third parties. The recordation of these conversations is admissible; however, the hearsay contained within the contact sheet still requires a recognizable exception to the hearsay rule to be admitted into evidence. Further, the person testifying to the conversations must be the caseworker who actually had the conversation.

Additionally, the division will often record in its contact sheets the substance of conversations with law enforcement personnel, and will append to its complaint police reports and incident reports. (Police records are *not* kept in the ordinary course of business of the Division of Youth and Family Services.) Therefore, to rely upon police reports and incident reports for any reason other than to prove that the police were contacted, a police officer must testify to the contents of the report in order for it to be admissible in evidence.

Proof of the abuse or neglect of one child of the accused parent is admissible evidence on the issue of the abuse or neglect of any other child of that parent.[47] When defending against allegations made by the division against the parent, it is crucial that this evidence rule be kept in mind. If subsequent allegations surface, no matter how seemingly insignificant the first substantiated finding of abuse or neglect, that prior finding of abuse will be used against the parent.

Another quirk involves injuries found on a child that cannot be directly linked to the parent. Proof of the injuries sustained by the child or of the condition of the child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent are *prima facie* evidence that the child is an abused or neglected child.[48] In these instances the burden shifts to the accused parent to prove his or her non-culpability for the alleged abuse.

Discrediting the State's Mental Health Professional

During the discovery period, the division will almost invariably request and receive a court order for a psychological evaluation of the parent, upon which the division will seek to rely in the fact-finding hearing. Carefully review the psychologist's report. The division often caps the amount of time that the professional may spend with the parent and to prepare his or her report. Cross-examine the professional regarding how long he or she spent administering each and every test, how long he or she spent administering the clinical interview, as well as the time spent to draft the report. Conclusions drawn by a professional after only one session with a parent, with no less than 10-15 minutes spent administering complex, projective tests can easily appear suspect and unsupportable. Also, be sure to determine the date on which the report was drafted and transmitted to the division, juxtaposed to the time the evaluation is administered. It is not uncommon for a professional to be asked by the division to 'expedite' his or her report, *i.e.*, meet with the parent on Monday and prepare a report for the next court date that Wednesday. Conclusions drawn by the professional with little time to collect or reflect upon his or her thoughts are also easily subject to scrutiny.

Make sure to review professional reports for 'copy and paste' language drawn from form reports, such as "A person with this characteristic exhibits signs of ..." It is not uncommon to represent multiple parents who were seen by the same psychologist, all of whose psychological evaluations contain chunks of identical paragraphs!

Also, be wary of hearsay contained within the report. The professional is permitted to testify to hearsay, so long as it is of a type "reasonably relied upon by experts in the field."[49] However, bare conclusions about a parent's propensity to abuse or neglect a child remain inadmissible, as "net opinions."[50] Opinions must be based upon a reasonable degree of psychological certainty. Hence, if a mental health professional renders an opinion and notes that his or her opinion should be discounted if the facts turn out to be different from those upon which he or she relied, the opinion cannot be relied upon by the trial court.[51]

To attack the sufficiency of diagnoses contained in a professional's report, refer to the Diagnostic and Statistical Manual (DSM-IV). Make sure the professional is competent to make a diagnosis (*e.g.*, a psychologist making a psychiatric diagnosis without consultation with a psychiatrist is exceeding the scope of his or her expertise). Also, make sure the diagnoses meet the criteria set forth in the DSM-IV. It is not uncommon for mental health professionals to criticize the DSM-IV when that professional's diagnosis does not fit the criteria, relying instead upon the ICD-10 to support his or her findings. The ICD-10 (International Statistical Classification of Diseases and Related Health Problems, 10th Revision) is a coding of diseases and signs, symptoms, abnormal findings, complaints, social circumstances and external causes of injury or diseases, as classified by the World Health Organization (WHO). The ICD-10 is not a diagnostic manual and should not be used in lieu of the DSM-IV.[52]

Another key area of probing is the relationship between the division and the mental health professional who conducted the evaluation of your client. Generally, courts

are aware of 'the usual suspects,' who routinely perform psychological evaluations for DYFS. However, do not allow the professional's regular appearance in DYFS proceedings to sway defense counsel to consent to his or her qualifications as an expert or accede the validity or sufficiency of his or her psychological evaluation. A professional who derives half of his or her income from the division is vulnerable to appearing as a biased 'hired gun,' who will support whatever conclusion is sought by the division.

A professional's long resume may increase the likelihood that he or she will be qualified as an expert *in something*, but not necessarily in the specialized area pertinent to the division's case. A long resume also provides fertile ground for cross-examination. For instance, if the professional performed an evaluation of the child at issue in the case, spend a good deal of time *voire diring* the professional about his or her experience in diagnosing children. Look for biases in the professional's published articles. Confirm that the professional's license remains in good standing.[53]

Be Wary the Division's Offer to 'Help' the Parent While the Trial is Ongoing

During the trial of a Title 9 case, the division will often seek to have the court order 'services' for the accused parent. Until the court makes a finding that the accused parent did, in fact, commit an act of abuse or neglect, the court cannot order 'services.'[54] Services can, however, be ordered regarding the child. Those services often include counseling, normally a confidential process, which is routinely violated, so that the division can use the child's statements in counseling against the accused parent.

The division will also attempt to convince the parent not to wait to commence services because of the strict time periods contained in the Adoption and Safe Families Act (ASFA).[55] These ASFA time periods require the court to conduct a permanency hearing once the child has been in placement through the division for 15 out of the preceding 22 months. Notably, the court can extend these guidelines upon a showing of good cause.

If the trial is ongoing when this milestone approaches, defense counsel should file an application with the court requesting a finding that a good cause exception to the ASFA guidelines exists. This request should be made in writing, setting forth the reasons for the delay, particularly where the division's case in chief extends over a lengthy time period. Making an oral application may not be enough to preserve the record for appeal.

SETTLEMENT OF TITLE 9 LITIGATION

It is not uncommon for the division to request that the parent 'stipulate' to some allegation in the complaint to avoid a fact-finding hearing. This kind of 'settlement' rarely provides any benefit to the accused parent. If the parent stipulates to an allegation in the complaint, he or she can avoid a trial on the issue; however, the division's form stipulation does not provide that the division withdraws its complaint in all respects regarding the allegations to which the parent stipulates. Accordingly, although the parent stipulates to only some facts in the complaint, the court may accept as true all allegations contained in the complaint. This will substantially extend the services the parent can be ordered to undergo prior to being reunified with his or her child.

If the accused parent is asked to stipulate and is willing to do so, defense counsel should only agree to stipulate if he or she drafts the stipulation, identifying in very exacting language that the parent is agreeing has occurred. Further, defense counsel should include a provision in the stipulation that the division is withdrawing its complaint, except regarding the facts specified in the stipulation, in consideration of and as a condition precedent to the parent's voluntary stipulation. Defense counsel should also attempt in advance to agree upon the services to be provided by the division.

CONCLUSION

In the author's opinion, litigating against the Division of Youth and Family Services can be likened to battling a two-headed dragon while blindfolded with both hands tied behind your back. Employing a few of these practice pointers should help loosen the ropes. ■

ENDNOTES

1. This article does not address litigation commenced by the Division of Youth and Family Services pursuant to Title 30, which applies in guardianship/termination of parental rights cases.
2. R. 5:12-1.
3. N.J.S.A. 9:6-8.28.
4. N.J.S.A. 9:6-8.29.
5. N.J.S.A. 30:4C-15.1.
6. *See*, N.J.S.A. 30:4C-11.3.
7. N.J.S.A. 9:6-8.30.
8. N.J.S.A. 9:6-8.28 and N.J.S.A. 9:6-8.29.
9. N.J.S.A. 9:6-8.28.
10. R. 5:12-1(a).
11. R. 5:12(d).
12. R. 4:52-1(a).
13. N.J.S.A. 9:6-8.29.
14. N.J.S.A. 9:6-8.29(a).
15. *Id.*
16. N.J.S.A. 9:6-8.32.
17. *Id.*
18. *Id.*
19. R.5:12-1(e).
20. *Id.*
21. *Id.*
22. *Id.*; R. 5:12-3.
23. R. 5:12-4(a).
24. *New Jersey Div. of Youth and Family Services v. R.G.*, 397 N.J. Super. 439 (App. Div. 2008).
25. *New Jersey Div. of Youth and Family Services v. G.M.*, 398 N.J. Super. 21 (App. Div. 2008).
26. 37 N.J.R. 2807(a).
27. For a list of disqualifying

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offenses, *see* 37 N.J.R. 2807(a), specifically N.J.A.C. 10:122C-5.4 (a)(4) and (5).

28. R. 5:12-4(b).
29. N.J.S.A. 9:6-8.43(b).
30. *Id.*
31. *See*, N.J.S.A. 9:6-8.9.
32. N.J.S.A. 9:6-8.9(d).
33. *See*, N.J.A.C. 10:129-2.2.
34. N.J.A.C. 10:129-2.5(b).
35. N.J.A.C. 10:129-2.5(c)(5).
36. N.J.A.C. 10:129-2.5(c)(6).
37. N.J.A.C. 10:129-2.9.
38. 181 N.J. Super. 190 (Juv. & Dom. Rel. Court, Camden County, 1981).
39. *Id.* at 201.
40. *Id.* at 202.
41. N.J.A.C. 10:129-2.9(9).
42. N.J.S.A. 9:6-8.46(b).
43. R. 5:12-4(d).
44. *Id.*
45. *See* 803(c)(6).
46. *See In re Cope*, 106 N.J. Super. 336 (App. Div. 1969).
47. N.J.S.A. 9:6-8.46(a).
48. *In re D.T.*, 229 N.J. Super. 509 (App. Div. 1988).
49. N.J.R.E. 703.
50. *See generally, Matter of Yaccarino*, 117 N.J. 175, 196 *1989) and *Buckelew v. Grosbard*, 87 N.J. 512, 524 (1981).
51. *See Todd v. Sheridan*, 268 N.J. Super. 387 (App. Div. 1993).
52. For more information on evaluating the sufficiency of mental health diagnoses, see Ackerman & Kane, *Psychological Experts in Divorce, Personal Injury and Other Civil Actions*, Fifth Edition, Volumes 1 & 2 (2007).
53. To confirm that the license of any professional required to be licensed in New Jersey remains in good standing, you may perform an applicant search at www.state.nj.us/cgi-bin/consumeraffairs/search/searchentry.pl.
54. N.J.S.A. 9:6-8.51(a)(6).
55. Pub. L. No. 105-09, 111 Stat. 2115 (1997), codified in various sections of 42 U.S.C.

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