**Thoughts Re Family Court and Criminal Court Interrelation Issues**

By Margaret A. Burt, Esq. 11/07

The law allows and encourages "multi disciplinary teams" and "child advocacy centers" and that are allowed to share information that is gathered by anyone involved in the team - this can include pending investigations, indicated and even unfounded matters with no limited on how old the matter are. Generally caseworkers are not required to read "Miranda warnings" to clients but it can be argued that where they are used as agents of the police that the exclusionary rule should apply in the criminal prosecution. The caseworker is not automatically a police agent but the facts will have to be reviewed. There is currently no statute or case law that says caseworkers can't talk to clients after criminal arrests - including visiting them in jail - and admissions made to caseworkers in such situations have been used in criminal court and have been denied in other cases.
**SSL 423 (6), SSL 422 (4)(A)(g), SSL 422 (5)(a)(ii), SSL 423(a)**

Sometimes allegations result in proceedings against the individual in both criminal and family court - such as situations in which a child has been physically or sexually abused. Family Court has jurisdiction regardless of pending criminal action for the same factual allegations **FCA 1013(b)** Even less serious situations - "dirty house" - could result in both courts taking jurisdiction. The definition of EWOC - **PL 260.15**- includes the **FCA 1012** definition of neglect and abuse. A criminal conviction - even in situations that did not include children as victims - can mean summary judgment in family court case of abuse or neglect.
Family Court can transfer a case of abuse or neglect to criminal court, or "refer" a matter to the DA where appropriate **FCA 1014(a)** even while continuing the matter in family court.
Criminal court can transfer a criminal complaint to family court where the allegations in the complaint constitute child abuse or neglect. **FCA 1014(b)**

What if a respondent admits to actions in Family Court that could also constitute criminal actions? Such an admission could be used against the respondent in criminal court. In practice, it appears that unless there is already a criminal action pending, the DA does not "check" Family Court proceedings for any admissions - but certainly a DA could do this. There is an ability to provide "immunity" to the respondent who admits allegations in family court. **FCA 1014(d)** But the use of "immunity" in this statute is poorly worded - does it only apply to "transferred" cases?
If there are matters pending in both courts, there is no "rule" about which case goes first **Matter of Germaine B.,** 86 AD2d 847 (1st Dept. 1982), **Matter of Easter** 71 AD2d 762 (1979)
The Family Court action is not barred on collateral estoppel grounds or res judicata grounds because of the lower standard of proof **Matter of Katherine B.,** 126 Misc.2d 1085 (Family Court, Onondaga County 1985) The criminal action is not barred by a pervious adjudication in Family Court **Nelson v Duffey** 104 AD2d 234 (2nd Dept. 1984) The criminal matter is not limited by the dismissal or by a reduced finding that has occurred in Family Court. **People v Roselle** 193 AD2D 56 (2nd Dept. 1993), **People v Daniels** 194 AD2D 420 (1st Dept. 1993)

- A criminal conviction can be used in summary judgment motion in Family Court but a Family Court finding is not binding in any way on the criminal proceeding
- The Family Court action can be used to provide discovery to the defense both directly during the trial and in many processes before the Family Court hearing -**Matter of Brittini F.,** 193 AD2D 846 (3rd Dept. 1993)
- Resolution of the Family Court action may mean defense counsel could argue for a more favorable plea offer in criminal court "he is getting counseling and help - why incarcerate him?"
- Respondent may be called as a witness by the other party and if respondent takes the fifth his failure to testify will be used against him in the Family Court action- the client CANNOT require that the Family Court proceeding "wait" for the criminal court proceeding – the respondent who does not take the stand in the Family Court matter even where a criminal case is pending cannot use a 5th Amendment argument to prevent the negative inference from his failure to testify being invoked against him in the Family Court matter - **Matter of Jenny N.** 262 AD2D 951 (4th Dept. 1999), **Matter of Diane H** 5 AD3d 770 (2nd Dept. 2004) also the respondent cannot claim the 5th Amendment as protection in a violation proceeding that alleges his failure to follow a court order to cooperate with counseling services even when those services require him to admit the abuse **Matter of Kristi AA** 742 NYS2d 920(3rd Dept. 2002)
- The DA could get a little "discovery" as well - he can see how the case looks and can also question witnesses - including the respondent
- When same alleged act(s) result in both criminal and family court actions - there are some discovery options available. In Family Court actions, the civil rules of discovery apply defense counsel can obtain all sorts of records - including police investigation records. In an abuse case, the DA is a "party" to the action - **FCA 254 (b)** and therefore is subject to discovery processes - there have been some situations where this has resulted in counsel obtaining Grand Jury minutes months ahead of the criminal trial. However this can also be used against a respondent - for example the Family Court has the power to order nontestimonial evidence - such as blood, hair or semen samples before the abuse/neglect matter is tried.
- The defense attorney in family court can also use interrogatories, EBT's, demands for witness lists, demands for disclosure of expert witnesses and bills of particular to obtain an information about the investigation that may be used for the criminal court action.
- Convictions for homicide of spouse or child will almost certainly mean no visitation with surviving children. **FCA 1085** Convictions for incidents involving domestic violence are required to be considered in custody and visitation matters.
- The FCA and the SSL require the DSS to file to terminate the parental rights of parents whose children remain in foster care for more than 15 months. There are some exceptions to the rule but a prison sentence of more than 18 months or so may lead to a termination of parental rights - and adoption of the child by others - if there is no other parent who can take the child(ren) and the jailed parent has no relative or friend who can take the child(ren).
- A pending criminal trial or investigation is not a "compelling reason" to allow DSS not to file to terminate parental rights at 15 months of placement, if DSS holds back on proceeding in Family Court regarding a child who is in foster care due to a criminal

matter that is still not resolved at 15 months, they are in violation of the ASFA federal and state law.

- Certain criminal convictions regarding homicide and felony assault of children may mean that no services have to be offered to the family and that the child(ren) will be fast tracked to adoption. In situations where a parent is convicted of Murder 1st or 2nd or voluntary Manslaughter 1st or 2nd and the victim was their own child or the other parent of the child - or convictions for attempting, soliciting, conspiring or facilitating the above, or Assault 1st or 2nd or Aggravated Assault upon a person less than 11 and the victim was their own child or the other parent ; the DSS may bring actions to have any living children placed in foster care and may also bring actions that mean that the agency need not make any efforts or provide any services to help the family reunite (a “no reasonable efforts” motion) Further the agency can file to terminate parental rights of that parent immediately.