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CHALLENGING THE SOCIAL STUDY

By Paul Chill

I. Introduction

No disposition may be made in a neglect, uncared for or termination of parental rights case until the "mandated social study" has been submitted to the court. Conn. Practice Book. § 1043.1(1). The social study is a report prepared by a DCF social worker containing detailed allegations about the child's background, that of her parents and other family members, the reasons for the petition, the efforts by DCF to assist the family, and the Department's dispositional recommendation.

The social study can be a powerful tool for DCF. Because it relates to disposition, hearsay statements contained within it are generally admissible. See P.B. § 1043.1(1) (on disposition, "any testimony relevant and material to the issue" may be admitted); see also Tait and Laplante, Handbook of Connecticut Evidence (2d ed. 1991 Supp.) at 8. Moreover, the Practice Book makes the social study presumptively admissible: upon submission, it "shall be marked as an exhibit." P.B. § 1043.1(2) (emphasis added). These factors, combined with the sheer volume of information it may contain, makes the social study a highly effective means of presenting the court with potentially damaging information about parents.

2. Content of Social Study

The statutes and rules provide little guidance -- and place few restrictions -- on the content of the social study. The statutory authorization for the social study is unclear. It probably lies in Conn. Gen. Stat. § 46b-129(c), which requires DCF to "make a thorough investigation of the case" whenever a petition seeking commitment of a child is filed with the court. Apart from that provision, however, and the Practice Book provisions cited above, there are no other legal requirements.

The DCF Policy Manual contains detailed guidelines for preparing social studies. There are separate formats for neglect, extension of commitment, revocation of commitment, and termination of parental rights petitions. (See attached.) The reader should refer to these formats for a fuller understanding of the many kinds of information that may appear in a social study.

3. Use of Social Study for Adjudication?

Based on the language of the Practice Book, it has generally been thought that the social study may be used solely for dispositional purposes. See, e.g., In re Juvenile Appeal (84-AB), 192 Conn. 254, 259-60, 471 A.2d 1380, 1383-84 (1984) (assuming without deciding that social study is purely dispositional). A recent Appellate Court decision, however, contradicts this assumption. In In re Tabitha P., that court held that P.B. § 1043.1 "does not preclude [social] studies from

being . . . considered by the court . . . during the adjudicatory phase of the hearing" to the extent that "facts and events discussed . . . [therein] predate the filing of the petition." 39 Conn. App. 353, 368, 664 A.2d 1168, 1176 (1995). Whether this decision will affect the long-standing practice in most juvenile courts, and whether it will remain good law, remain to be seen.

Even if the court does not formally consider the social study in rendering an adjudication, however, the court may nevertheless be influenced by its contents. Evidence in juvenile court trials is typically presented in a single, nonbifurcated hearing. See P.B. § 1042.1(4) (bifurcation is within discretion of trial court). This means that the social study is usually submitted, and the DCF social worker who authored it is examined and cross-examined, before the court renders a decision either on adjudication or disposition. While judges are presumed able to segregate evidence relating to different issues, they are also human. Depending upon the nature and quantity of adverse information contained in a social study, it may be practically impossible for a judge to ignore such information in deciding whether the child at issue has been neglected or whether a ground for termination of parental rights exists.

4. Right to Cross-Examine Social Worker

The primary means of challenging the social study is through effective cross-examination of the DCF social worker who wrote it. Like any other aspect of trial advocacy, this requires

extensive and thorough preparation.

The language of the Practice Book seems to indicate that a social study could be admitted into evidence even if its author is unavailable for cross-examination. See P.B. § 1043.1(2) (study "shall be marked as an exhibit subject to the right of any party to require that the author, if available, appear for cross-examination") (emphasis added). This might raise constitutional problems, however, and there exists authority to the contrary. See In re Eduardo F. and Adaliz N., Docket Nos. 95-598 and 95-599, 1996 Conn. Super. LEXIS 1582 (Superior Court for Juvenile Matters, Child Protection Session at Middletown, June 18, 1996) (Foley, J.) (court refused to admit social study where only DCF social worker available to testify had not been involved in preparation of study).

The following sections contain practical suggestions for cross-examining the DCF social worker.

5. Importance of Obtaining DCF Case Narrative

An attorney must be thoroughly familiar with the DCF case file in order to effectively cross-examine the social worker. It is essential that the attorney obtain copies of all important documents in that file prior to trial. This can often be done informally by directing a request to the DCF social worker or the assistant attorney general. (Conn. Gen. Stat. § 17a-28, which governs the confidentiality of DCF records, appears to require a written request, but in practice that is not usually necessary.)

Sometimes a formal discovery motion is required. (A sample discovery motion is attached.) Occasionally, for example, an overburdened social worker needs the added impetus of a court order to find the time to photocopy documents from an especially voluminous file. An attorney should not hesitate to file a discovery motion if he is having difficulty obtaining documents or if he suspects that DCF is not providing full disclosure.

A crucial source of data in the DCF file is the DCF "case narrative" (also variously referred to as "case notes," "case activity notes," the "narrative log," or just simply the "narrative"). The case narrative "is intended to record all [of a social worker's] activities, observations, events and decisions" in a case. DCF Policy Manual § 31-8-8. (See attached.) This information is supposed to be documented on specially designed forms called "case activity notes forms." (Also attached.) An attorney should be sure to obtain a complete copy of the case narrative well in advance of trial.

6. Using Case Narrative on Cross-Examination

Sometimes an assertion made in a social study will be flatly contradicted by an entry in the case narrative (or by some other document contained in the DCF file). That entry can be used to impeach the social worker. All entries in the case narrative are statements by an opposing party, and therefore admissible under the "admission" exception to the hearsay rule. See, e.g., Bell Food Services, Inc. v. Sherbacow, 217 Conn. 476, 488-89, 586 A.2d

1157 (1991); see generally Tait & LaPlante, Handbook of Connecticut Evidence (2d ed.) §§ 11.5 et seq. An entry that contradicts an assertion made in the social study or in the social worker's testimony is also admissible as a prior inconsistent statement. See State v. Whelan, 200 Conn. 743, 748 n.4, 513 A.2d 86 (1986), cert. denied, 479 U.S. 994 (1986); see generally Tait & LaPlante, §§ 7.24.2 - 7.24.4.

More frequently, however, information recorded in the case narrative is insufficient to support one or more assertions made in the social study. Omission of data from the narrative that "should have been natural to mention" is itself an inconsistency that can be used to impeach the social worker. State v. Reed, 174 Conn. 287, 303, 386 A.2d 243 (1978).

This latter method of impeachment is particularly useful if it can be demonstrated that the omitted information was required to be documented in the case narrative. For example, social workers are required to document "whether visits with a child in foster care are taking place according to" the treatment plan. DCF Policy Manual § 36-15-1. (See attached.)[1] Suppose that a social study alleges that a parent missed 40 out of 50 visits during a one-year period. Further suppose that the case narrative documents only 15 missed visits during the same one-year period. The social worker might be cross-examined as follows:

Q: Isn't it true that you are required to document a parent's non-compliance with visitation?

A: Yes. [If answer is "I don't know," show judge relevant portion of DCF Policy Manual and ask her to take judicial notice of it.]

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[1] The DCF Policy Manual also requires that all of a social worker's "contacts" be recorded on case activity note forms, including all in-person contacts, telephone contacts, and written communications with parents, children, foster parents, and health care providers. DCF Policy Manual § 36-15-4. (See attached.) With respect to each such contact, "[r]equired documentation shall include" the following: the date and time; the person(s) involved; the method of contact; the purpose of the contact; and the outcome of the contact. Id.

Q: Keeping an accurate record of visitation is very important, isn't it?

A: Sure.

Q: What is the basis for the statement in your social study that Ms. Green missed 40 out of scheduled 50 visits with her son Michael between July 1995 and July 1996?

A: I don't know what you mean.

Q: Isn't it true that you compiled those numbers from your narrative log?

A: Yes.

Q: Let's take it month by month. How many visits did Ms. Green miss in July 1995? Feel free to refresh your recollection by referring to your narrative if you like.

A: According to my narrative, she missed one visit in July.

Q: [Etc.]

Q: So according to your own narrative, Ms. Green missed a total of only 15 out of 60 visits between July 1995 and July 1996?

There are many possible variations of this examination depending on the nature of the omitted information, the responses given by the social worker and the creativity of the examining attorney.

7. Other Methods of Cross-Examination

Many allegations in a social study will not be contradicted, either directly or indirectly, by the DCF case narrative. If such an allegation is damaging, and an attorney has reason to doubt its reliability or veracity, one option is to ask the social worker to delineate his basis for making the allegation. Asking an open-ended, non-leading question like this -- whose answer you may not know in advance -- is generally considered poor cross-examination technique. It may be necessary, however, in juvenile court cases, where the opportunity to conduct depositions (and other discovery) is restricted. Also, the risk associated with such a question is greatly diminished when the factfinder is a judge instead of a jury.

If the social worker is unable to specify clearly his basis for making the allegation, the attorney should ask the court to strike the allegation from the social study. If that is unsuccessful, the attorney should argue in closing that the allegation is unreliable and should be disregarded by the court.

Even if the social worker can specify the basis for the allegation, it may be so attenuated or unreliable as to be irrelevant. See State v. McClendon, 199 Conn. 5, 9, 505 A.2d 685 (1986) (relevant evidence is that "which logically tends to aid the trier in the determination of the issue"). Suppose, for instance, that a social study contains the following statement: "Father is reported to have a significant substance abuse problem." The social worker might be cross-examined as follows:

Q: What is the basis for that statement?

A: It was reported to DCF.

Q: What was reported to DCF?

A: That father regularly used crack-cocaine.

Q: Who reported it?

A: I think it was a neighbor.

Q: Which neighbor?

A: The narrative doesn't indicate that.

Q: Does the narrative indicate whether the neighbor actually observed the father using crack?

A: No.

Q: To your knowledge, has anyone ever observed the father using crack?

A: Not that I'm aware of.

Q: Did the father ever tell you that he used crack?

A: No.

That should be sufficient to persuade the court to strike the allegation in the social study, or at least not to give it much weight. Note that the proper objection here is not that the statement in the social study is based on hearsay -- hearsay is admissible on disposition -- but that it is irrelevant because of its unreliability. Note also that the attorney's questions more closely resemble the kind of interrogation that occurs at a deposition than in a typical cross-examination. Again, this may be inevitable in juvenile court cases.

8. Other Methods of Challenging Social Study

Perhaps the most obvious means of challenging the social study is to introduce affirmative evidence that refutes it. Needless to say, to the extent such evidence is available, it should be used liberally.

A final word must be added here about the importance of advising one's own client about talking with DCF workers. Careful counseling in this regard may go a long way toward obviating the need to challenge assertions made in a social study later on. Frequently, the most damaging information in a social study comes from the mouths of parents themselves. A parent must be free to speak to her DCF worker about certain matters, of course, (especially if her child is in DCF custody), and it is usually in a parent's best interest to develop a cordial and cooperative relationship with her worker. The parent must understand, however, that the DCF worker is not her friend. She should be specifically advised not to share anything with the DCF worker that conceivably could be used against her later on. The parent should also be counseled that, if she is not sure whether to disclose a particular bit of information, she should resolve her doubt in favor of non-disclosure, at least until she has an opportunity to consult with her attorney about it. Finally, the parent should be told that it is perfectly appropriate to say to the DCF worker that she would prefer not to discuss a particular subject without consulting with her attorney first.

9. Conclusion

The importance of challenging the social study should not be underestimated. Effectively doing so, however, requires a significant amount of preparation and forethought. A resourceful attorney should always be able to cast doubt on at least some of the allegations in any social study. In rare circumstances, it may even be possible to raise a sufficient number of questions to call into doubt the credibility of the entire study -- and thus the state's case itself.