

Discussing Some of the Dynamics that Occur in Child Custody Cases

Legal Eagles – Child custody battles. What do those three words do for you?

Add allegations of one former spouse that the other has sexually abused one of their children, and wants to modify the Court-ordered custody agreement accordingly. Add a vehement denial and aggressive defense by the accused. Add that law enforcement investigated the allegations and determined that the child molestation allegations were unfounded.

The criminal prosecution won't be going forward, but rest assured, there will be litigation in the civil arena in front of a judge who must decide whether to modify a previous order establishing the parameters of who takes care of the child (or children) and when. In this situation, one side is going to argue that there was insufficient evidence to move a criminal investigation forward.

Also, in this situation, a CAC forensic interviewer whose F.I. product was used during the course of the criminal investigation is going to be subpoenaed in the custody case. One might think there will be unique pressures brought to bear on the forensic interviewer by both sides. Stop, and be calm. Professionals, who happen to testify, are going to testify as to the facts and information as it came to them, and call it like they see it. Always.

After that, a judge or a jury is going to make a decision.

Today's case is a study in such a decision-maker, the judge in the custody case.

Hardin v. Hardin, Georgia Court of Appeals, Case No. A10A054 (Decided April 6, 2010.)

Facts: Following a divorce from her husband, the mother was granted sole custody of their three children, ages 4 ½, 2 and 1. The father was granted visitation rights. The divorce order was entered on February 13th. Shortly after, the 5-year-old and the 2-year-old allegedly told the mother that the father had inappropriately touched them, and on May 23rd, the mother filed petition with the Court to modify custody. (All dates are from 2006.)

Understand what this does, in Georgia. Based upon the allegations, the trial court issued an order suspending the father's visitation until the resolution of the abuse allegations.

A timeline is in order.

- Mother reports her children's disclosures to the County Department of Family and Children Services ("DFCS") on May 9th
- Mother's petition to modify custody is filed May 23rd
- A pediatrician with extensive training in child sexual abuse examined the children on May 24th, and found no evidence of sexual abuse, but found that the children's allegations of abuse were credible.
- A psychologist performed a psychological examination on both parents (date not reported in court of appeal's opinion), and determined that the children's allegations were "highly credible."

- Between May 9th and August 28th, DFCS completed its investigation. After a preliminary review, DFCS substantiated the allegations of child abuse. It then went to a panel review, and the department changed its findings to unsubstantiated and closed its file.
- Between May 9th and August 28th, law enforcement completed its investigation. It found the charges were unfounded because the father passed a polygraph test and there was no medical evidence of abuse.

The modification hearing was held August 28th. Both the psychologist and pediatrician testified as above, and the pediatrician testified that in her experience 4-year-olds do not fabricate such events. Evidence was introduced that the father had an “affinity” for pornography, and that he had acted inappropriately toward his 16-year-old stepdaughter. The guardian ad litem, noting the father’s “pornographic predilection,” recommended that the father’s visitation rights not be restored. The father testified, and denied touching the children inappropriately.

The father also testified that he recently married an 18-year-old woman, who was 20 years younger than him, and who had an 18-month old daughter. He testified that he thought his wife was 27 years old when he married her. He testified that she was “somewhere in Tennessee,” but had no contact information for her.

First Result: What do you think? How would you decide? You should know that the standard of proof in these kinds of cases in Georgia is the preponderance of the evidence standard, not proof beyond a reasonable doubt as in criminal cases. So, as we civil lawyers like to say, the mother just has to slightly tip those scales of justice ever so slightly in her favor – 50.00001% works.

The trial court concluded that the evidence was not “persuasive enough to establish a ruling denying visitation rights” to the father.

Good rule to know: The Court of Appeals is not going to re-weigh the evidence. Weighing the evidence is the function of the judge (in this case) or a jury, in a jury trial. The judge in this case or a jury is there to see and hear the parties, see and hear the witnesses, see and observe demeanor, and attitudes, and assess credibility. Courts of Appeals can’t do that by reviewing pages and pages of transcripts.

Further, ***“where there is any evidence to support the trial court’s finding, it cannot be said that the court abused its discretion. As the evidence of sexual abuse was not conclusive, we cannot say that the trial court abused its discretion in denying Mother’s petition.”***

Do I have to again tell you how difficult your jobs are?

One more point, regarding the outcome of this particular case. Following the hearing, but before the trial court entered its order denying the mother’s modification request, the mother’s lawyer located the father’s new wife. The lawyer wrote the Court seeking to re-open the evidence for the Court to consider in the form of supplemental evidence. The Court denied the request, stating that the evidence was closed.

Second Result: The Court of Appeals found that the trial court was in error denying this case, and reversed the trial court’s decision on this point and ordered that it consider the additional evidence.

Good Rule to Know #2: “Where the issue is a material change in conditions [such as alleged abuse of a son or daughter] it is error to refuse to hear any evidence which might have some bearing upon that issue. Where the welfare of a child is involved, relevant information must be received up until the very time that the court rules.” (Inserted words are mine.)

Best regards.

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