Legal Letters by Andrew Agatston – The Legal List 12/21/12

Advocating For Proper Child Depo Protections

Today we address depositions in civil cases. Depositions are question-and-answer sessions under oath, used as part of a state's civil discovery practice. Such depositions have the solemnity of the oath, just like trial testimony.

Depositions are used in the pretrial civil discovery period. When I prep folks for deposition, I tell them that the discovery process is designed in part to "discover" relevant evidence for use at trial. As plaintiffs, we have a good idea of the issues and the evidence at the inception of a case, but not a *complete* understanding. Discovery allows us to fill those gaps.

Likewise, civil defendants need discovery because they typically have an incomplete understanding of the plaintiff's theory of the case and the witnesses, documents, etc. that will be used to attempt to prove the plaintiff's case.

There are important distinctions between testimony obtained during civil depositions and testimony obtained at trial. At trial, generally only testimony that is relevant to the issues before the Court is admissible. So for example, an attorney should not try to elicit testimony or try to introduce exhibits that have no relevance. If she tries, the other advocate will likely stand up and object, and the trial judge will make the decision to sustain the objection (agree with the objection) or overrule it.

In civil depositions, lawyers have a broader-than-trial ability to ask questions. That means that if I am deposing a witness, I can ask questions that I might not be able to ask at trial so long as the question I ask the deponent *may lead* to the discovery of relevant evidence that can be used at trial.

For example, I may want to impeach a witness at trial if he has been convicted of a felony. But if he has only been convicted of a misdemeanor, Georgia law does not allow me to impeach him with the misdemeanor conviction at trial -- only evidence of felonies, with few exceptions, may be admitted at trial in civil cases in Georgia.

So if I ask a witness at trial, "Have you ever been arrested?" then my opposing counsel will jump up out of her seat and object like she was spring-loaded. Arrests are not convictions, and certainly are not felony convictions.

However, I can ask that question at deposition, because it may *lead to the discovery* of admissible evidence, i.e., the deponent may say, "Yes, I was arrested for armed robbery, and I was convicted."

So in civil discovery depositions involving CAC professionals and therapists in private practice, and others who have to sit for deposition, it can be disconcerting. I often have to discuss with them that lawyers will not only will be asking them about their involvement in a case, but asking about *them.* And this "asking about them," under a state's rules of discovery, may be very, very broad, and generally can occur so long as it reasonably may lead to the discovery of admissible evidence at trial.

There is much, much more to this which will not be discussed here. But I wanted to lay that groundwork in order to discuss today's case, which involves a defendant in a custody case who sought to depose a 13-year-old girl who he was accused of molesting.

Case: *Galbreath*, Georgia Court of Appeals, Case No. A12A1115 (Decided October 19, 2012)

Facts: The case involved a custody modification proceeding in which the trial grant granted a motion to quash and issued what is known as a "protective order" to prohibit the taking of the deposition of a 13-year-old girl. The girl, K.W., alleged that the Defendant in the custody case abused her.

In the custody case, the Defendant and the Plaintiff had joint legal custody of a son, but the mother filed a petition for modification of the custody agreement and a suspension of the Defendant's visitation rights based upon the abuse allegations. K.W. was not their child, but had been at Defendant's home when their son was sleeping over there. It was alleged that during the sleepover, the Defendant abused K.W.

Once the Defendant sought to depose K.W. (and videotape the deposition), K.W.'s parents through counsel filed a motion to quash and for a protective order. Thus, K.W. was a *non-party* to the case.

In support of the motion, K.W. tendered an affidavit from a LCSW who had treated K.W. in trauma-focused therapy sessions. The affidavit ultimately opined that K.W. "is at extreme risk for her psychological and emotional safety if exposed to any significant stressor," and specifically identified the Defendant as being such a specific stressor.

The trial court granted the protective order, and disallowed the deposition in total. The Defendant appealed.

Result: Trial court reversed, and case remanded with directions to trial court to make additional findings.

Discussion: This case illustrates an oft-discussed and very important consideration in law: the balancing of competing interests.

Here, we have a *non-party* child, brought into a civil custody case because she had the misfortune to allege abuse against one of the parties to the custody case. We had a CAC and therapy program in Georgia that properly and professionally advocated for her interests, ultimately executing an affidavit by a LCSW professional that laid out the potential harm in K.W. sitting for the deposition.

However, even the trial judge who granted the protective order and prohibited the deposition from proceeding specifically found that the child's testimony was both "relevant and highly important" to the Defendant in his efforts to defend the custody case.

Further, the trial court cited cases from New York, Louisiana, Colorado, and Massachusetts, all of which found that the children in those cases had to submit to depositions despite expert testimony that indicated that these children could be harmed by the taking of the deposition.

Thus, the Georgia Court of Appeals noted that it was aware of no civil case where a litigant was completely prohibited from conducting a deposition aimed at seeking information necessary to a party's case.

The competent and qualified attorney of your CAC's or organization's choice can easily provide you with the pertinent discovery rules and standards in your state. Georgia's are likely similar to your jurisdiction's, and provides that a party to a lawsuit *"may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."* Discovery rules are also liberally construed by courts, so that adversaries cannot have *"an effective veto of his adversaries' attempts at discovery."*

That does not mean a party, or a non-party like K.W., or a non-party like a CAC professional, a police officer, a doctor, a therapist, etc., cannot seek certain remedies regarding their proposed deposition. In fact, that was exactly what was done in today's case with the proper legal tools known as a Motion to Quash and a Motion for Protective Order.

We have often discussed Motions to Quash in past Legal Letters, and will not examine them now. However, a Motion for a Protective Order in is a request to the court to protect a party (or a non-party) from "annoyance, embarrassment, oppression, or undue burden and expense." The language may differ in your state, but the key is that it is a request that the judge either eliminate the need to respond to the discovery, or else limit it with specific restrictions.

However, the Court of Appeals found that today's matter was not a proper case to grant a Motion to Quash, but instead the trial court should have considered reasonable restrictions and protections in allowing K.W.'s deposition to proceed in the case. The rule in this regard applied by the Court of Appeals is as follows: *"Although the issuance of a protective order is a recognition of the fact that in some circumstances the interest in gathering information must yield to the interest in protecting a party, protective orders should not be awarded when the effect is to frustrate and prevent legitimate discovery."*

The Court of Appeals assumed that allegations of child abuse would weigh in favor of a finding that the Defendant was morally unfit to continue his visitations rights with his child. Thus, it found that K.W.'s testimony was clearly relevant to his efforts to defend the allegations against him. As such, the trial court's decision to deny the deposition "now and forever," in any form, frustrated the Defendant's legitimate discovery requests, according to the Court of Appeals.

How to advocate in this situation.

If your state adopts similar legal reasoning, then there are important legal avenues to explore on behalf of a child who is put in a similar situation.

I know a bit of the back story of today's case, and the CAC organization involved had an advocacy system in place to assist in the process of addressing the proposed discovery deposition of the child. A recognition by your CAC or its lawyer that there are legal protective procedures available for children who are subject to such a deposition can be of great assistance to a family. Connecting the family with a knowledgeable lawyer is often critical. That way, the lawyer can get involved, as the lawyer for K.W. was in this case, and seek to quash or alternatively limit the deposition.

This often comes up when young crime victims are plaintiffs in civil cases. The defense almost always seeks to depose the child, and rarely if ever bothers with suggesting limitations on the

depositions. That is why a lawyer must move to quash or limit the deposition immediately upon receipt of the Notice of Deposition, and always before the date of the scheduled deposition. Short of quashing the deposition in total, the restrictions (or protections) on the depositions that can requested are extensive, and also will vary from case to case.

In today's case, the Court of Appeals listed a variety of potential restrictions to consider: (1) where the deposition is held; (2) the length of the deposition; (3) who can be present, such as a counselor and K.W.'s parents; (4) breaks for K.W.; (5) an option to suspend the deposition in the event of emergency; (6) previewing the questions to be asked (which I think is a great idea); and (7) taking K.W.'s deposition remotely via audio-visual means. There are definitely others, such as restricting the deposition solely to discoverable factual matters, and not privileged matters.

Best regards.

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