

CONNECTICUT GENERAL ASSEMBLY

February Session, 2010

Raised Bill No. 5429

An Act Concerning the Burden of Proof in Juvenile Matters

Committee on Human Services

REMARKS OF ATTY. MICHAEL H. AGRANOFF

Law Offices of M.H. Agranoff

99 Stafford Road

Ellington, CT 06029

Tel: 860-872-1024

Fax: 860-871-1015

EM: AttyMikeA@agranofflaw.com

Web Site: www.agranofflaw.com

Thank you for the opportunity to testify. I have been a DCF defense lawyer since 1991. At present, ours is the only law firm in the State of Connecticut providing full-service DCF defense to private-paying adults on a full-time basis.

The present bill seeks to change the evidentiary standard for DCF and juvenile court adjudications in several situations to proof "beyond a reasonable doubt." I support portions of this bill, but not others. This testimony will present my views and the reasons therefor.\

DCF Investigations

Section 1 of the bill seeks to change C.G.S. Sec. 17a-101g(b), by requiring an administrative determination of child abuse or neglect to be made on a standard of beyond a reasonable doubt, rather than upon a standard of reasonable cause.

Since this is an administrative determination, not a criminal trial, and since the parents still retain considerable remedies to challenge this determination, it is not reasonable to change the standard to "beyond a reasonable doubt." Such a standard could result in the continuation of child abuse or neglect. It cannot be the public policy of Connecticut to take action on possible child abuse or neglect only upon evidence satisfying a high criminal court burden, since the alleged victim may often be unable to protect his or her rights.

However, the present standard of "reasonable cause" is far too vague, and in practice means that DCF will almost always find abuse or neglect, if for no other reason than to protect itself. Therefore, I recommend that the relevant sentence in C.G.S. Sec. 17a-101g(b) be changed to read:

After an investigation into a report of abuse or neglect has been completed, the commissioner shall determine [,based upon a standard of reasonable cause] whether it is more likely than not that a child has been abused or neglected, as defined in section 46b-120. If the commissioner determines that it is more likely than not that abuse or neglect has occurred, the commissioner or her designate shall clearly state the reasons therefor.

In my opinion, this change will protect children, and will provide far better guidance for DCF investigators than exists today.

Administrative Hearings

Section 2 of the bill seeks to change C.G.S. Sec. 17a-101k(d), by requiring that an administrative hearing for a substantiation or registry recommendation of child abuse or neglect to be made on a standard of beyond a reasonable doubt, rather than upon a standard of “fair preponderance of the evidence.”

Again, this is not a criminal trial, and the parents still retain the remedy of appeal to the Superior Court to challenge any adverse determination. It does not seem necessary to impose such a high burden on the administrative hearing.

Nevertheless, a finding of substantiation or registry recommendation has severe consequences for the individual, including possible denial of future employment. And, at present, there is no pardon or removal procedure from the registry. Therefore, the standard of “fair preponderance of the evidence” is far too light, since the parent may face consequences that are quasi-criminal in nature.

Therefore, I recommend that the relevant sentence in C.G.S. Sec. 17a-101k(d)(2) be changed to read:

The burden of proof shall be on the commissioner to prove that the finding is supported by [a fair preponderance of the evidence] clear and convincing evidence submitted at the hearing.

In my opinion, this change will protect children and sanction the guilty, while providing reasonable protection for accused persons, many of whom are of limited means. It must be noted that the State does not provide counsel for indigent persons subject to a DCF administrative hearing.

TPR

TPR is termination of parental rights, which is the permanent legal severance of a parent's constitutional right to family integrity regarding his or her child or children. It states that the parent is no longer legally the parent of the child. In a 2008 Connecticut Appellate Court case, Judge McLachlan noted, in dissent, that "[t]ermination of parental rights has been called the civil equivalent of the death penalty." *In Re Emerald C.*, 108 Conn. App. 839, 862, 949 A.2d 1266 (2008). Few practitioners would disagree.

Section 3 of the bill seeks to change C.G.S. Sec. 45a-717, by requiring that the TPR standard be changed from "clear and convincing" evidence to evidence "beyond a reasonable doubt." I am totally in support of this measure, for reasons to be explained.

However, there is a major problem with the bill. C.G.S. Sec. 45a-717 refers to Probate Court hearings for TPR. The vast majority of TPR hearings are conducted by the Superior Court for Juvenile Matters. Therefore, the bill would be virtually meaningless unless similar changes were made to C.G.S. Sec. 17a-112(j).

As a practical matter, changing the TPR standard of proof to beyond a reasonable doubt is a major undertaking. This office has been trying to implement that for years, and in fact has it planned for a future legislative session. It will be impossible to implement this change without serious detailed testimony. For now, in brief, the reasons supporting that a TPR require evidence beyond a reasonable doubt include the following:

1. Parents have a federally-protected constitutional right in family integrity. TPR destroys that right forever.

2. Many parents subject to TPR are indigent. They often get court-appointed lawyers being paid \$40.00 an hour, and are up against the almost unlimited resources of the

State. TPR takes months of preparation and hundreds of hours to win, and parents start at a severe disadvantage.

3. Appeals are nearly impossible to win, as most TPR trials are fact-based. Moreover, defeating a TPR has to start with neglect trial defense and serious DCF litigation, which often does not happen. By the time a TPR petition is filed, it is often too late.

4. Habeas proceedings are unavailable. A person sentenced to death has, in effect, 20 years to overturn the sentence, using habeas, Project Innocence, or other devices. A person whose is TPR'd has, in effect, only the standard civil appeal.

5. TPR often starts from a DCF investigation in which parents are not told of their rights, and are pressured by DCF to make statements and sign documents without a lawyer present. Further, there is a distinct shortage of lawyers who regularly litigate DCF contested cases. As a rule, public defenders and Legal Aid lawyers do not do this.

6. In the course of a Juvenile Court case, parents are required to speak to DCF social workers. Seldom is a lawyer present. Parents often try to defend themselves, or become agitated, which makes the situation worse. In fact, during the pendency of a Juvenile Court neglect case, most parents are unaware that TPR even exists.

7. There is no jury trial, despite the serious consequences of TPR. For most parents, the permanent loss of a child is worse than a year or two in jail. Yet parental rights may be terminated on a standard similar to fraud or adverse possession, and a standard less than that for shoplifting.

8. Hearsay evidence is far more prevalent in Juvenile Court than in criminal court or other civil courts.

9. At present, one state (New Hampshire) requires proof beyond a reasonable doubt for TPR. Also, cases involving Indian children require this standard. It is strange that non-Indians have fewer rights than Indians on a matter this severe.

10. At present, one state (Wisconsin) allows jury trials in TPR matters. The Connecticut constitutional provision requiring jury trials is simply ignored for TPR.

Additional case details are present on my web site: www.agranofflaw.com. The point is that TPR is a parental death sentence, the ultimate and virtually-irrevocable sanction of the Juvenile Court. And yet indigent parents with underpaid lawyers are often victimized by its draconian provisions. At the very, very least, a criminal standard should be applied for TPR.

This office is willing to answer any specific questions that any legislator may have. My EM is: AttyMikeA@agranofflaw.com.

OTC

OTC is order of temporary custody, which removes the child from the parents or guardians immediately, pending further court hearing. OTC is thus analogous to a restraining order, in which the court issues relief based upon an affidavit, subject to the right of the respondent to be heard shortly.

Section 4 of the bill seeks to change C.G.S. Sec. 46b-129(b), by requiring that the court issue an OTC based upon proof beyond a reasonable doubt, rather than merely having reasonable cause.

For the reasons stated under “DCF Investigations”, above, this standard would be too stringent, and likely to further child abuse or neglect. I recommend that the initial portion of C.G.S. Sec. 46b-129(b) be changed to read:

If it appears from the specific allegations of the petition and other verified affirmations of fact accompanying the petition and application, or subsequent thereto, that [there is reasonable cause to believe] the allegations and affirmations of fact establish that it is more likely than not that (1) the child is suffering.....

An OTC is extremely serious. Often it must be granted, but DCF has often requested OTC's on less than an immediate risk of physical injury to a child. Today, many more judges are rejecting OTC applications than was done formerly. This change clarifies that something as serious as an OTC requires something resembling probable cause to remove the child immediately.

COMMITMENT

Section 4 of the bill seeks to change C.G.S. Sec. 46b-129(j), by requiring that a child be committed by evidence beyond a reasonable doubt, rather than by the current Practice Book standard of preponderance of the evidence.

For the reasons stated in "Administrative Hearings", above, this standard would be too stringent. However, the current standard is too relaxed. I propose that the initial portion of C.G.s. Sec. 46b-129(j) be changed to read:

Upon finding and adjudging that [any] the petitioner has established by clear and convincing evidence in an evidentiary proceeding held under this section, that a child or youth is uncared for...

This change, in my opinion, balances the need for child protection with the requirement for due process for parents and guardians. Commitment often leads to TPR, and is not a step to be undertaken lightly.

UNEXPLAINED INJURIES

Section 5 of the bill seeks to change C.G.S. Sec. 46b-129a(4), by stating that unexplained injuries constitute sufficient grounds for an adjudication of neglect, but only if proved by evidence beyond a reasonable doubt. Today, there is no standard, and thus “preponderance of the evidence” is the de facto standard for such determination.

I support this section; or, in the alternative, clarifying the standard as “clear and convincing evidence.”

Our office has defended numerous cases in which a child was adjudicated neglected due to unexplained fractures, when only the parents had control of the child. The problem is that children may have one or more of the following diseases which make them susceptible to fractures: osteogenesis imperfecta (OI); rickets; osteomyelitis; copper deficiency; Menkes syndrome; scurvy; osteopetrosis; hypophosphatasia; congenital syphilitic periostitis; leukemia; vitamin A toxicity; kidney disease; and others. Pediatricians do not generally test newborn children for these diseases, and when children with these or other diseases show up with unexplained fractures, the inevitable result is a 96-hour hold, OTC, commitment, and often months of torture and tens of thousands of dollars in legal and medical fees for the parents.

Our office is currently preparing a major initiative to deal with the problem of unexplained fractures, which may include better awareness on the part of pediatricians. We have numerous learned journal articles and actual reports supporting us, but it will take time.

It is undoubtedly true that most unexplained fractures are the result of child abuse. However, many are not. In the meantime, an unexplained injury should not, ipso facto, support an adjudication, absent at least clear and convincing evidence.

FWSN

FWSN is a “family with service needs” petition.

Section 6 of the bill seeks to change the FWSN standard from clear and convincing evidence to evidence beyond a reasonable doubt.

I cannot support this provision. FWSN is an alternative to a delinquency petition. It seeks the court’s assistance in helping a child who is not yet delinquent, and is not yet the proper subject of a neglect petition. The “clear and convincing” standard should remain.

Similarly, Section 7 of the bill should remain as “clear and convincing” or “reasonable cause”, as presently exists.

Respectfully Submitted,

MICHAEL H. AGRANOFF

Attorney At Law

