

Safety and the Legal Process Part 2: The Adjudicatory Hearing

Introduction

Last month, January 2005, we began this two-part series concerned with using safety concepts to present and support CPS positions and decisions during legal proceedings. In the first article, we addressed the temporary custody hearing and focused on present danger. In this article, we move forward in the judicial process to consider the implications for using safety concepts during adjudicatory hearings. Here the focus for safety decision-making shifts from present danger, which is the primary safety standard used when “arguing for” emergency temporary custody, to the safety standard of impending danger.

We continue using the Delgado case example as we proceed to this discussion regarding the adjudicatory hearing. You are encouraged to return to the January article to acquaint yourself with how the Delgado family came to be known to CPS and what the initial intervention involved.

(Note: Last month we emphasized that our attempt in this series is in no way to fully explore all the complexities of CPS involvement in the legal process or to review legal concepts and practices. We mention it again here to show our full appreciation and respect for that area of work with families and to the court process.)

Jose is in Impending Danger

A brief excerpt of a video interview with Maria is available in our September 2003 safety article. Take a look.

This article picks up following the temporary custody hearing. The judge ratified CPS protective action involving removal of Jose to an approved foster home.

CPS promptly proceeded to engage and involve Maria in the initial assessment information gathering. After several attempts by CPS, Maria agreed to meet with CPS. She was openly hostile and aggressive with CPS. She threatened CPS in various ways and demanded CPS get out of her life. Within a week of the school's report to CPS, the initial assessment was completed. It included three interviews with Maria; one interview with Jose; one visit with Jose at the foster home; an observed visitation between Maria and Jose that was disrupted by Maria; an interview with Jose's school teacher; an interview with the school counselor and a phone interview with Maria's sister in a neighboring state. Maria refused to identify others who could provide information about her circumstances.

A brief and general summary of the information gathered during the initial assessment and the safety assessment findings is as follows.

Initial Assessment

What was the extent of maltreatment?

Physical abuse was confirmed. Jose's bruises resulted from being physically assaulted by Maria. The bruising on the arms and the face were a direct result of Maria grabbing Jose by the upper arms, shaking him, and slapping his face twice. Jose reported that the slap was so hard that it knocked him to the floor.

What are the circumstances that surround the maltreatment?

Maria admitted that she slapped Jose because he would not mind her and turn down the television. Maria sees Jose as disobedient, defiant and behaving in ways to torment her. She blames Jose for her life being difficult. She is provoked by Jose's physical resemblance and mannerisms to her ex-husband whom she says she

hates. While Maria denies that she has been abusive to Jose in the past, however, her perception and attitude toward him are such that it is believable that this current incident exists within a pattern. Jose and Maria's sister describe that this current abusive act happens often, even though most times without physical injury.

How does Jose function on a daily basis?

Jose is a shy, quiet, likeable, intelligent boy. He is small for his age and physically slight. He is fearful of his mother but does not appear frightened of other adults. He is troubled about being separated from his mother whom he loves but remains afraid of what she will do when he returns home. He feels responsible for what has happened. He does well in school and enjoys peer interaction. His adjustment in the foster home has been reasonable although he reportedly has periods of worry and withdrawal apparently related to his ambiguous feelings about being away from his mother and home. He cannot protect himself and is reluctant to seek help or assistance from adults in his life. He appears to have been socialized to being accepting of Maria's fits of anger and aggression.

How does Maria function on a daily basis?

Maria is an intelligent, strong-willed woman who has a history of employment and self-sufficiency. She has been a good provider for herself and Jose since her ex-husband deserted her when Jose was born. She is physically healthy and robust. Her anger and volatility are general and pervasive with respect to all aspects of her life. Her relationships with family members who live in another state are conflicted; she has no current friendships; she does not associate with neighbors and does not belong to any social groups. She has deep and bitter feelings about her failed marriage. She blames others for her difficulties. She feels misunderstood. Maria denies the seriousness of what is happening with regard to CPS involvement. She is highly impulsive, often breaking out in a hostile tirade over something appearing to be minor. Anger, aggression and hostile communication are her immediate problem-solving responses. She is socially

isolated and mistrusts others. She does not use substances and has no history of diagnosed mental disorders.

What are Maria's general parenting practices?

Maria blames Jose for her life circumstances in general and for daily challenges and stresses. Her negative attitude toward Jose is constant and pervasive. She describes feelings of wanting to hit him. She mentions wanting to be away from him. She does not individualize Jose and has extreme difficulty separating out her perception and feelings about Jose from her anger and resentment toward her ex-husband. Maria is dissatisfied as a parent. While she is intelligent enough to understand Jose's needs and capabilities and is able to perform necessary parenting skills, her current state of mind prevents her from doing so. Her parenting behavior is predominantly negative, abrasive and threatening. She does not demonstrate affection for Jose nor does she feel empathy toward him. She is forthright about wanting Jose returned to her saying that she is far better able to care for him than the state and explaining that he remains her responsibility. Her motivation for having Jose with her is not entirely clear.

What are Maria's disciplinary practices?

Discipline and socialization are not an objective in Maria's parenting behavior. Her physical reactions toward Jose are not for the purpose of teaching or managing Jose's behavior. The reactions are examples of Maria's explosive personality and her inability to respond to Jose in a controlled, purposeful manner. Maria does not view hitting Jose as directed at teaching him anything. Hitting is for hurting and occurs strictly as an unplanned, impulsive, emotional response. Maria expresses frustration regarding how to discipline Jose and, yet, she justifies the use of excessive physical disciplinary responses.

The Safety Assessment

Based on the information collected during the initial assessment interviews, CPS concluded from its safety assessment criteria that the following impending danger threats to Jose's safety were evident.

- There is no responsible adult in the home to provide Jose protection.
- Maria acts violently.
- Maria does not control her behavior toward Jose.
- Maria has an extremely negative perception of Jose that provokes her aggression toward him.
- Maria is not motivated to behave differently toward Jose.
- Jose is fearful of Maria.
- Jose is seen by Maria as responsible for her difficulties.
- Maria exhibits no remorse or guilt over what has transpired with Jose.

The Adjudicatory Hearing: Seeking Continuing Custody

The primary purpose of the adjudicatory hearing is to determine whether CPS (the state) has shown reasonable grounds for obtaining jurisdiction over Jose based on standards established in state law. CPS' purpose is to establish legal authority to continue to protect Jose out of the home while remedial intervention continues. The CPS initial assessment and safety assessment concluded that Jose is an "abused" child according to state statutory definition and is at threat of serious harm. The most significant testimony that can be offered at the adjudicatory hearing is evidence that establishes that Jose is unsafe. To be effective, CPS must transmit information about Jose's safety into legally acceptable evidence. The challenge is to present evidence in such a manner to convince a judge who is the sole decision maker. Depending on the state, either a preponderance of evidence or clear and convincing evidence must exist in order to meet the burden of proof that Jose is an abused child and is at threat of serious harm – unsafe. CPS must be

concerned with both the amount of evidence (e.g., preponderance) and the quality of evidence (e.g., credibility and persuasiveness) that support the presence of threats of serious harm to Jose.

Based on the initial assessment and corresponding safety assessment, CPS concluded that Jose is unsafe – is at threat of serious harm. Reasonable efforts concluded that Jose cannot be protected through the provision of in-home safety services. Through consultation with the agency attorney, CPS determined that it was necessary to seek an adjudication of child abuse and physical and legal custody of Jose in order to assure Jose's protection and to begin a remedial program with Maria. CPS was prepared to give testimony that would provide evidence for its conclusions.

CPS must testify to a number of things such as the nature of the report, the process for gathering information, who was involved in providing information, relevant documentation and reports and so on. Establishing that Jose is an abused child consistent with state statutory definitions can be based on testimony from Jose and school personnel as related to the nature of the bruises and Jose's statements. Maria's sister can provide an affidavit that places Maria's abusive act within a pattern of similar behavior which also can be verified by Jose. CPS can provide statements concerning observed injuries along with photos and a physician's statement.

In this article, our primary objective is to consider how CPS can effectively present information to the court that clearly supports the decision that Jose is unsafe and the family is in need of continued CPS involvement. To achieve this objective, CPS must be able to explain during testimony its approach to safety assessment. Workers can enhance their credibility with the court with respect to safety decision-making by carefully articulating the following four standardized steps to safety assessment:

1. Sufficient information gathering related to specific areas of study that is fundamental to assessing safety:
 - *Extent of maltreatment;*
 - *Surrounding circumstances associated with maltreatment;*
 - *Child functioning;*
 - *Adult/caregiver functioning;*
 - *General parenting practices; and*
 - *Disciplinary approaches.*

2. Information related to family conditions is analyzed and differentiated in terms of significance for decision-making and implications for CPS intervention by utilizing standardized safety criteria:
 - *Vulnerable Child;*
 - *Family conditions are deemed out-of-control;*
 - *Negative family conditions pose an imminent threat;*
 - *Implications for severe harm to a child; and*
 - *Negative conditions that pose an immediate threat of severe consequences to a child can be specifically described and justified.*

3. Negative family conditions that are consistent with the five safety criteria are applied against a list of standardized safety factors that are characteristic of the state-of-the-art of safety assessment models in use nationally.

4. Case information safety decision-making criteria and the applicability of safety factors are considered, discussed and analyzed in the context of supervisor consultation.

Based on the results of these safety assessment steps, during testimony, CPS can identify the eight safety factors that were concluded to exist during the safety assessment and therefore must be prepared to provide evidence that supports CPS safety assessment conclusions along with the sources of credibility.

The justification for the eight safety factors in the Delgado case is as follows.

- *Maria acts violently.*

Maria's behavior toward Jose has been described by Jose and Maria's sister as physically aggressive. Jose can testify to this. Maria's sister (from another state) can provide an affidavit verifying this conclusion. From each source, violent acts and physical aggression and assaults can be reduced to time, place, events and circumstances. CPS can testify that Maria admits to the incident of grabbing and slapping Jose and admits to having feelings of wanting to hit Jose.

- *Maria does not control her behavior toward Jose.*

CPS can testify as an eyewitness to the fact that Maria behaves impulsively by providing details about her behavior and communication during the initial assessment. Jose and Maria recount the same scenario for how the abuse occurred which provides statements from both about her impulsive, out-of-control reaction to Jose for a minor matter concerned with the television volume. Maria has informed CPS that she does not intend to behave differently toward Jose which is yet another expression of being out-of-control. Furthermore, CPS can testify to the fact that there are no other people within the home or associated with the family that can serve to manage or control Maria's outbursts and aggression toward Jose.

- *Maria has an extremely negative perception of Jose that provokes her aggression toward him.*

CPS can testify that Maria has been absolutely clear about her extremely negative view of Jose. By recounting interview results using Maria's words, CPS can elaborate on how Maria sees Jose as like her ex-husband whom she hates. That elaboration can establish how Maria's distorted perception serves to justify her aggression toward him and emphasizes her total intolerance for Jose. CPS can state that this safety factor is the predominant threat of serious harm to Jose in that Jose's very existence serves to provoke either physical attacks by Maria or total avoidance.

- *Maria is not motivated to behave differently toward Jose.*

CPS can testify that Maria has admitted that she often wants to hit Jose or not be around him and that she both demonstrates and says she will not and cannot feel differently. CPS testimony can state, according to Maria's words, that Maria blames Jose for all her difficulties including the CPS intervention, and that Jose is the person who will have to change.

- *Jose is fearful of Maria.*

CPS can testify in descriptive terms to having observed Jose's fear and can state what Jose said about being afraid of Maria. Jose represents an eyewitness to his own fear and may be able to describe the breadth, depth and influence of that fear. School personnel can provide collateral testimony regarding Jose's fear based on having observed Jose's fear at the time of the CPS report and generally as related to his functioning at school and subsequent to CPS intervention. The foster parents can testify to Jose's anxiety and apprehension related to visitation and generally. Maria's sister

can state in her affidavit examples of Jose being afraid in the past.

- *Jose is seen by Maria as responsible for her difficulties.*

CPS can testify that Maria stated that she blamed Jose for difficulties in her life and that she holds him responsible for CPS intervention. Maria told CPS that Jose creates stress and problems for her daily. CPS can explain that Maria's perception results in Maria feeling justified in being physically aggressive toward Jose which she admitted during the initial assessment.

- *Maria exhibits no remorse or guilt over what has transpired with Jose.*

CPS can testify that throughout the initial assessment Maria did not accept any responsibility for the physical abuse, showed no empathy toward Jose or his experience and demonstrated no remorse for Jose or guilt for what she admitted she did. Furthermore, CPS can state that Maria's lack of remorse is evident in her statements that Jose gets what he deserves and that her intention is to continue to behave toward him in similar ways.

- *There is no responsible adult in the home to provide Jose protection.*

CPS can testify that its initial assessment has established that there are no other adults in the home besides Maria and that there are no adults associated with the family that can act in a responsible way to assure that Jose is protected.

CPS is likely to be challenged as to why the court should accept the identification of these safety factors as being legitimate threats of serious harm. CPS must be ready to respond to such a challenge. The attorney representing CPS can provide direction as to how best to respond to such a challenge. Certainly, establishing the credibility of the safety assessment

model employed by the agency is important as mentioned earlier. But it may be necessary in certain case situations to be prepared to speak to how each safety factor represents a threat of serious harm. This may be particularly true for case situations where CPS has identified impending danger and determined that a child is unsafe, but a child has not received a serious injury as a result of maltreatment. For case situations where it is determined that a child is unsafe in spite of not having a serious injury, it is critical that workers have a clear understanding of the concept of safety. This includes the ability to speak to the difference between maltreatment and safety and risk of maltreatment and safety. Further, these three standards may help in forming a response: 1) Reasonableness, 2) Safety Threshold, 3) Expert Opinion.

Reasonableness

A standard that is common to courts is what a reasonable person would believe or do. Reasonable as described here refers to what one would accept as a logical and prudent judgment based upon clear justification and rationale. The question, simply stated, is, "Would an ordinary, reasonable person believe that a particular safety factor as clearly and specifically described represent a threat to a child's safety?" In the Delgado case, for example, is it reasonable, sensible, rational and logical to conclude that Maria's distorted perception of Jose could provoke Maria to seriously harm Jose?

Safety Threshold

Family behavior and circumstances become a threat to a child's safety when they pass over the safety threshold. Therefore, safety factors within the CPS safety assessment model and those described for the court in the Delgado case are family behavior and circumstances that have passed over the safety threshold. The safety threshold is based on the safety criteria mentioned earlier.

Behaviors, emotions, perceptions, intent, motives, attitudes and/or situations are determined to be out-of-control, and nothing within the family can manage or control the safety factor.

The safety threat is likely to result in severe effects for a child because of the out-of-control nature of the threat coupled with the vulnerability of the child.

The safety factor is imminent; with a degree of certainty there is a professional judgment that the threat is likely to become active within the near future. Again this judgment is predicated and supported by a worker's ability to clearly describe family conditions that are out of a caregiver's control.

We'll use the same case example to illustrate application of the safety threshold:

Maria's perception of Jose as an adult man who Maria hates can be judged to be distorted and out-of-control. That perception arguably provokes Maria as well as justifies her aggression toward Jose, and it is the physical assaults (including to the head) that could result in severe effects. Maria's distorted perception of Jose is vocalized by Maria in vivid and demonstrative ways which validate its existence and continuance. It is currently active and stimulates Maria's reactions toward Jose. Jose is vulnerable. He has come to expect and accept Maria's behavior, so he does not seek to protect himself. His very presence provokes Maria. He is physically defenseless.

Expert Opinion

In many places, CPS caseworkers are considered experts and can be qualified as such. These days it certainly makes sense that CPS staff should be considered experts in safety intervention. We say this because CPS is supposedly the bastion of safety intervention state-of-the-art within communities where children are unsafe

as we are considering that concept here. It is our contention that it is reasonable that one way that CPS can justify that safety factors are valid is expert opinion. The value and qualification of expert opinion can be based on four factors:

- Whether the subject matter of testimony (i.e., safety factors) is outside the average judge's knowledge or experience;
- Whether the state-of-the-art (of safety assessment) permits an expert opinion;
- Whether the CPS caseworker qualifies as an expert on the subject matter (i.e., safety assessment); and
- Whether the basis of the expert's opinion is reasonably reliable.

While it is true that most any average citizen believes that he or she knows when a child is unsafe, average citizens do not base their judgment on conceptualized, formulated models of evaluation and intervention. Judges make decisions every day about child safety and likely would be offended if their knowledge and experience were brought into question. However, we know from having worked with nationally recognized family court judges that, when faced with what they know about specific concepts and processes related to safety assessment, they admit that their knowledge and experience is not fully developed.

The state-of-the-art in safety assessment and safety intervention has evolved during the past 15 years such that one can be expert in it. Forty-five states now have a safety intervention model and each is notably similar. However, despite the development of the state-of-the-art in this area, it cannot be concluded that every CPS caseworker and supervisor is an expert. Such expertise must be developed based on extensive training, supervision and experience. Such expertise must be directly related to one's particular state or agency safety assessment/intervention

model.

A caseworker representing CPS in court concerning witnessing to the presence of impending danger to a child's safety should be an expert in his or her agency's approach to safety assessment. Therefore, he or she should be able to be qualified as an expert by the agency attorney. What are the implications if a person who has conducted the safety assessment and represents CPS' position in court cannot be qualified as an expert in safety assessment and intervention?

The reliability of a CPS expert's position concerning safety factors can be established by reference to the consistency of the expert's position with the state-of-the-art and other experts, even nationally recognized experts. That a CPS caseworker's position is reliable and reasonable can be the direct result of the quality of his or her testimony as well.

Final Comments

It has been a worrisome task writing this series on safety and the legal process. The use of legal intervention by CPS is complicated and, in preparing this article, we have contended with not oversimplifying the subject matter as if our focus on presenting safety concepts and how they contribute to the rationale for the safety assessment is the whole of the matter for CPS to build credibility in the judicial process. On the other hand, we do not apologize for our expression of how critical effective communication of safety concepts to the court is with respect to the mission of CPS for protecting children. In our attempt to give this attention to communicating safety assessment findings to the court as the basis for seeking physical and legal custody of children who are not safe, we recognize that we have not given equal attention to other challenges to safety intervention when working with the courts such as safety intervention analysis criteria, reasonable efforts and conditions for return. You will have to look for those safety intervention practices in previous or future monthly articles.