PART II:  
Dealing with DCF - Understanding the Basics and Interplay of DCF with Family Law  

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Your client receives the dreaded call or letter from the Department of Children and Families (DCF) that he/she or another caregiver for their child is being investigated for abuse or neglect. What does this mean? What comes next? How, as attorneys, can we assist our clients in navigating the DCF maze? Can a supported decision be appealed? How, if at all, is this going to affect their case in Probate & Family Court?

While no one case is the same, DCF workers must follow a set of extensive policies and regulations (all of which can be found online) in how they go about doing their job. While reading hundreds of pages of dry, legalese might not be your idea of a fun afternoon, the following is a summary- based off of the regulations/policies themselves and experience working on behalf of clients with DCF- that can hopefully make the letters D-C-F seem less daunting when next uttered by your client.

In the previous newsletter, Part I walked through the initial intake, DCF investigation, and DCF decision/requesting reports from DCF. Part II, here, will discuss the grievance process/fair hearing process and the interplay of DCF with Family & Probate Court.

Post Decision: Grievance Process/Fair Hearing

If there has been any clerical error or mistake made with regards to DCF’s investigation, you may request an administrative review as part of DCF’s grievance process. A real-life example of this is a situation where a child was mistakenly included in the investigation, and DCF reached a decision to substantiate concern associated with that child, but the child was not actually the child of my client and my client was not responsible for caring for that child at all. When I brought this to the attention of the DCF response worker, I was instructed to draft a letter to the Area Office Director requesting an administrative review and explaining the basis for the request. This is a more informal process than a fair hearing, and included a few e-mails/phone calls with the Area Clinical Manager and a written decision reached within several weeks. The decision is a final one; any further recourse or remedy is only based on what is available by law.

The second page of the decision letter from DCF contains information on how to formally appeal a decision; you may request something called a “Fair Hearing.” Keep in mind that the request has to be made both to the Fair Hearing Office and the to the director of the area office.

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1 Available at: https://www.mass.gov/dcf-policies.  
2 110 CMR 10.36.  
3 110 CMR 10.38(1).  
4 110 CMR 10.38(4).
Once a Fair Hearing is requested, the Director of Areas or his/her designee at the respective area office, shall review the request and the decision upon which it was based within 15 business days.\(^5\) The need for a Fair Hearing may be eliminated if, upon this review, the designee decides to reverse the underlying decision, as they have the authority to do so.\(^6\) Alternatively, the Director of Areas or his/her designee may refer the decision to the Clinical Review Team, who may take action to support, reverse, or remand the decision to the area office.\(^7\)

The more likely result is that the Fair Hearing will be scheduled for a hearing in front of a Hearing Officer. The Fair Hearing is supposed to be scheduled within 65 business days from receipt of the request; in reality, DCF is backlogged with requests, and the Fair Hearing may very well not be scheduled within 65 business days.\(^8\) The person requesting the Fair Hearing will receive notification of when the hearing has been scheduled for within 20 days of receipt of the request for Fair Hearing;\(^9\) the notification provides information about the date, time and location of the hearing, what is allowed at hearing and that a request for rescheduling is allowed for good cause.\(^10\) Of note, the Hearing Officer who oversees the Fair Hearing is a DCF employee, but they are tasked with being impartial.\(^11\)

At the Fair Hearing, the “appellant” may appear on his/her own behalf or be represented by any authorized representative. If you are representing the appellant, you must submit an appearance to the hearing office containing your name, address, telephone number, signature and date.\(^12\) The appellant has the right to request/examine copies of the DCF records, can bring witnesses, and

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\(^5\) 110 CMR 10.08(2)(a).
\(^6\) 110 CMR 10.08(2)(c).
\(^7\) 110 CMR 10.08(3)(a),(c).
\(^8\) 110 CMR 10.10(1).
\(^9\) 110 CMR 10.10(2).
\(^10\) 110 CMR 10.10(4).
\(^11\) 110 CMR 10.03.
\(^12\) 110 CMR 10.11(1),(2).
can request an interpreter or request a reasonable accommodation.\textsuperscript{13} The appellant also has the right to issue subpoenas to require the attendance of a witness (with whom can serve as a witness subject to limitations), so long as it is done at least 15 calendar days prior to the scheduled hearing.\textsuperscript{14} A DCF representative will also likely be present at the Fair Hearing; it can be a DCF attorney or another representative (possibly the response worker or the response worker’s supervisor).\textsuperscript{15}

The Fair Hearing is conducted more informally than court, but the hearing is recorded, there is an opportunity to file motions, present evidence, have the appellant/witness(es) testify/be cross-examined and ask questions of the DCF representative.\textsuperscript{16} The rules of evidence are not strictly followed, but the Hearing Officer must observe privilege, and anyone who testifies must do so under oath.\textsuperscript{17} The 51A and 51B reports shall automatically be admitted into evidence if the Fair Hearing is challenging a supported report of abuse or neglect or to list a person’s name on the Registry of Alleged Perpetrators.\textsuperscript{18} DCF proceeds first and the Hearing Officer determines the order of presentation for all other parts of the hearing.\textsuperscript{19}

The appellant bears the burden of proof at Fair Hearing. The standard is “preponderance of the evidence” that:

(a) the Department's or Provider's decision was not in conformity with the Department's policies and/or regulations and/or statutes and/or case law and resulted in substantial prejudice to the Appellant; or (b) that the Department's or Provider's procedural actions were not in conformity with the Department's policies and/or regulations, and resulted in substantial prejudice to the Appellant; or (c) if there is no applicable policy, regulation, or procedure, that the Department or Provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the Appellant; or (d) if the challenged decision is a supported report of abuse or neglect, that the Department has not demonstrated there is reasonable cause to believe that a child was abused or neglected; or (e) if the challenged decision is a listing on the alleged perpetrators list, that there is not substantial evidence indicating the person is responsible for the abuse or neglect of a child.\textsuperscript{20}

A strong suggestion is to read the 51A and 51B reports with a fine-tooth comb and then review DCF’s policies and the regulations/statutes that govern DCF. The strongest point at a Fair Hearing will be how DCF did not conform with a policy, and then to explain how that prejudiced the appellant. Additionally, attacking the credibility of any claimant of the abuse or neglect and/or attacking the strength of the evidence that the child was abused or neglect is important to demonstrate there was not sufficient “reasonable cause” to reach the supported decision that the child was abused or neglected.

\textsuperscript{13} 110 CMR 10.10(4).
\textsuperscript{14} 110 CMR 10.13(1),(2).
\textsuperscript{15} 110 CMR 10.11(4).
\textsuperscript{16} 110 CMR 10.20(1)-(10); 110 CMR 10.26.
\textsuperscript{17} 110 CMR 10.21(1),(2).
\textsuperscript{18} 110 CMR 10.21(6).
\textsuperscript{19} 110 CMR 10.22.
\textsuperscript{20} 110 CMR 10.23.
According to DCF policies, the Hearing Officer is to render a written decision within 60 business days after the Fair Hearing, unless an extension of an additional 30 business days is granted.\(^{21}\) In reality, the wait for a Fair Hearing decision is likely going to be far, far longer than that— in one case of which I am aware it was 5 months, in another case it was over a year. The Hearing Officer may affirm the decision, reverse the decision or remand the decision to the Area Office to provide additional information to take further action.\(^{22}\) If the Hearing Officer recommends to reverse the decision, the Commissioner or his/her designee has 21 business days to review the Hearing Officer’s recommendation, which the Commission or his/her designee may accept, overturn or take no action (in which case the Hearing Officer’s recommendation will become the decision).\(^{23}\) The appellant will be notified when the Hearing Officer has submitted the decision to the Commissioner or his/her designee.\(^{24}\) The Hearing Officer’s written and signed/dated decision will be sent to the appellant once final; it will contain: a summary of the issues considered, clear and concise findings of fact including credibility determinations, the reasons for the decision reached on each issue, the statute, case law, policy, practice and/or regulation, if any, on which the decision is based; and an order for relief if appropriate.\(^{25}\) It will also contain that the appellant has the right to seek review under M.G.L.c. 30A.\(^{26}\)

**DCF’s Interplay with Probate & Family Court**

DCF’s involvement with a family and DCF decisions often come up in Probate & Family Court matters, especially in those cases that involve tensious custody battles. There is a big difference, however, in how this affects married parents v. unmarried parents (in how quickly a parent might be able to obtain a temporary order of custody if there is no case already pending between the parties).

In an unmarried parents situation, the mother has statutory custody of the child pending any court order otherwise.\(^{27}\) The simplest way that DCF can dispose of an investigation is if only the mother has custody rights related to the child and the father is the one being accused of abuse and/or neglect; DCF may require that the mother agree to keep the child from the father or only allow father to have supervised time with the child and, if the mother complies, DCF will simply close their case. If there was never a case between the parents of a child born out of wedlock before DCF became involved, and DCF is advising the father to take action to have the child, the father will have to take immediate action to file a case in Probate & Family Court. If there was never a prior acknowledgement or adjudication of paternity, before he can obtain any sort of custody, the father must file a Complaint to Establish Paternity and file a Motion for Genetic Marker Testing to try to expedite obtaining a judgment of paternity. If there was at least an acknowledgement of paternity (father listed on the birth certificate), then the father will need to immediately file a Complaint for Custody-Support-Parenting Time and file an Emergency

\(^{21}\) 110 CMR 10.29(1).
\(^{22}\) 110 CMR 10.29(2).
\(^{23}\) 110 CMR 10.29(3).
\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) Id.
\(^{27}\) M.G.L.c.209C, §10(b).
Motion or Motion for Temporary Orders with a Motion for Short Order of Notice before he can obtain any sort of custody.

In a married parents situation, the parents have joint custody pending any court order otherwise. If there was never a case between the parents, then the parent needs to file a Complaint for Separate Support or Complaint for Divorce and an Emergency Motion or Motion for Temporary Orders with a Motion for Short Order of Notice before he/she can obtain any sort of temporary sole custody determination or supervised parenting plan.

In any situation, it is important to counsel a client that the mere existence of a 51A being filed that includes an allegation of abuse and/or neglect by the other parent of the child does not necessarily provide a basis for rushing into Probate & Family Court for an emergency motion to suspend custody, suspend parenting time or to require that a parent only have supervised parenting time. However, if DCF is counseling your client to go into court to obtain an emergency order, it signifies that DCF has cause for concern about the safety and/or welfare of the child if the child continues to be in the care or custody of the other parent, and that is usually grounds enough for the Court to at least entertain hearing an emergency motion. If that is the situation, then make sure to speak directly with DCF to ensure they will be available to communicate with court staff and/or the judge, if necessary, to verify that they are advising your client to seek an emergency order and why they are recommending this.

One party to a case, or both parties may, upon motion or even joint motion, ask a judge to order production of DCF records so that the Court can examine the records to assist in making a custody decision. Alternatively, the Court can issue an order sua sponte. Probate and Family Court Standing Order 2-11 explains the situations where the Court may need information from DCF and the requirements if production is ordered. The following form is completed and signed by a judge as an Order of the Court:

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28 M.G.L.c. 208, §31.
DCF records may come into play at an evidentiary hearing or trial and may also give rise to the need for a Guardian Ad Litem (GAL) or Attorneys Representing Children (ARC) attorney in a case. Further, a DCF employee may be subpoenaed to testify at an evidentiary hearing or trial and can be subpoenaed to produce documents.

Even if DCF is encouraging and supporting one parent to take emergency action against the other in Probate & Family Court or has supported an allegation of abuse or neglect against one parent, this does not mean that the “accused” parent has automatically lost their case in any way. It is our job as an advocate for our “accused” client to show the judge why that should not necessarily happen or why DCF is incorrect. Some arguments to consider are:

- it is premature to order any custody determination when an investigation is not yet complete;
- it is premature to order any custody determination when there has been not been an opportunity to examine the validity of the investigation/review records;
- the supported decision that was reached is being appealed as there is a strong basis for why the decision is incorrect; or
- the supported decision does not rise to a level for concern that warrants limiting the rights of a parent to their child.

You may also want to request an evidentiary hearing on behalf of your client to refute whatever claim is being made about them.

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<th>Documents to be Produced</th>
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<td>[ ] Records or reports of investigations or assessments of allegations of child abuse or neglect</td>
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<th>Personal Information to be Removed from Produced Documents</th>
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<td>[ ] my residential address and telephone number</td>
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<td>[ ] my workplace address and telephone number</td>
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<td>[ ] the school name, address and telephone number of myself and/or children</td>
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Signed of Party

Order for Production

The Court requests that the above referenced documents be produced by [ ] pursuant to G.L. c. 119, § 51B during the period ________ to ________.

Reports of child abuse or neglect pursuant to G.L. c. 119, § 51A which are currently being investigated.

Covering the period ________ to ________

[ ] my residential address and telephone number
[ ] my workplace address and telephone number
[ ] the school name, address and telephone number of myself and/or children

Signature of Party

Date

Probate and Family Court