

# Holding Child Protective Services accountable

## The CPS system is broken but there are strategies to bring justice to its victims

By Wyatt Vespermann

California's Child Protective Services (CPS) system is broken. Social workers are overworked and undertrained; financial incentives rather than the children's best interests drive decision making; and governmental immunities often thwart accountability.

A recent case experience gives insight on strategies that can be successful in bringing justice to the victims of CPS's negligence. In *J.G. v. County of Tulare, et al.*, a settlement of $32 million dollars was obtained by Panish | Shea | Boyle | Ravipudi LLP for an infant who was allowed to nearly starve to death due to the negligence of a county child welfare agency.

This article serves as a roadmap for litigators seeking to take on CPS when they fail to properly investigate allegations of abuse and neglect of the most vulnerable amongst us.

### Statutory framework

The California CPS system is a fragmented patchwork of county-based agencies charged with child abuse intervention. The county agencies each maintain their own policies for performing this vital function. However, they are all subject to certain mandatory duties codified in the Welfare and Institutions Code and Department of Social Services Division 31 regulations.

Specifically, the Child Abuse and Neglect Reporting Act (CANRA) creates a comprehensive reporting scheme aimed toward increasing the likelihood that child-abuse victims will be identified. Once an allegation of abuse or neglect has been reported and taken by CPS as an "Emergency Response Referral," a social worker must be assigned to conduct an investigation and to classify the referral as either "substantiated," "unfounded," or "inconclusive." (Pen. Code, § 11165.12.)

Relatedly, Welfare and Institutions Code section 16500, et seq., created a statewide system of "Child Welfare Services." Section 16501, subdivision (c) mandates that each county "provide child welfare services as needed pursuant to an approved service plan…." The system uses the child-abuse reports made under CANRA to identify children who may need "child welfare services."

These services include "Emergency Response Services" in response to CANRA reports. (Welf. & Inst. Code, § 16501, subd. (f).) Counties must establish a response system providing in-person response, 24 hours a day, seven days a week, to reports of abuse, neglect, or exploitation. The stated purpose of this



emergency response system is to conduct an investigation and to determine the necessity for providing crisis intervention to protect the safety of the child. Counties must respond to such reports immediately if the child is in imminent danger and to all other reports within 10 calendar days. (*Ibid.*)

### Case intake and getting the documents

These cases usually begin with a call from a concerned grandmother, aunt, or other family member. They have learned that a child of a relative has been injured in their home by a parent or caretaker and now CPS is involved. They may share that CPS has come out before, or otherwise knew it was a problematic household. But that information is of limited utility to the litigator. It begs more questions than it answers: Who

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called? How many times? How recent in time to the injury?
How did CPS respond? The answers to these questions will make or break liability.

Due to strict confidentiality laws, not even a lawsuit will get you the answers. This is because the answers lie in a body of records known as the "Juvenile Case File." These records are only accessible in limited circumstances.

The Juvenile Case File is a statutory term defined in the Welfare and Institutions Code and further defined in the Rules of Court. It broadly includes all documents "relating to" a child that are maintained by the child welfare services programs. We are talking about interviews with the juvenile and people in their life; reports of their endangerment by bad actors; accounts of abuse, neglect, and exploitation; mental and physical evaluations; and even photographs.

However, these records are considered highly confidential as a matter of law. Welfare and Institutions Code section 827, subdivision (a)(1) therefore dictates who sees these records. This code section provides that the file can be inspected by a limited number of individuals such as court personnel, county counsel, the parents, and a few others.

Fortunately, section 827(a)(1)(Q) provides a catch-all category, permitting access to any person designated by court order of the juvenile court upon filing a petition. Upon petition, a civil litigant's right to access relevant records in a Juvenile Case File is well established. This stems from the 1986 case *Navajo Express v. Superior Court*, 186 Cal.App.3d 981. The *Navajo Express* court suggested guidelines for the juvenile court to follow under these circumstances.

The starting point is filing with the juvenile court a *Request for Disclosure of Juvenile Case File*, which is judicial council form JV-570. In this form, you should specify the type of information and documents you seek from the records. Key documents would include:

- Emergency response referrals;
- Delivered service logs;
- Investigation narratives;
- Safety plans;
- Case plans;
- Case histories;
- Referral histories; and
- All structured decision-making tools.

CPS, who serves as the custodian of these records, may try to obstruct your access to these critical documents. If they are successful, Welfare and Institutions Code section 827 provides that the Juvenile Case File order is immediately reviewable by the appellate court via an extraordinary writ.

In *J.G. v. County of Tulare, et al.*, we filed such a writ which led to us getting the records we needed to prove our case. So, depending on the facts and circumstances of your case, it may take going to extreme lengths to get the necessary records and information.

## Developing theories of liability

Once armed with the Juvenile Case File, you can then assess potential liability. The two causes of actions generally available in an action against a county child protective services agency are 1) Failure to Perform Mandatory Duties (Gov. Code, § 815.6) and 2) Negligence/Negligence per se (Gov. Code, § 820). Both claims are essentially mirror images of each other, with the former asserted against the public entity directly and the latter against its employees. To be viable, both claims must be predicated on a statutory or regulatory duty for which CPS and its employees enjoy no discretion. The Division 31 Regulations are the primary source for mandatory duties imposed on CPS.

These regulations mandate how and when County welfare departments must respond to any report of danger to a child (Welf. and Inst. Code, § 16501, subd. (f); California DSS Child Welfare Services Manual § 31-101.3, 31-120, 31-125, and 31-125.2), the conclusions that must be drawn (Pen. Code, § 11165.12), and the remedial action that must be taken (California DSS Child Welfare Services Manual § 31-125.5 and 31-200).

The duties include the following:

- To timely respond to child-endangerment referrals either immediately or within 10 calendar days;
- To assign a social worker "skilled" in emergency response to investigate the endangerment referral;
- To determine whether the child-endangerment referral concerning the child was either "substantiated," "unfounded," or "inconclusive;"
- To conduct an in-person investigation in response to the child-endangerment referral; and
- To determine the potential for or the existence of any condition which placed the child at risk and in need of services and which would cause the child to be a person described by Welfare and Institutions Code section 300, subdivisions (a) through (j).

It is important in crafting the government claim form and complaint to cross-reference the facts of your case with these duties and the others contained in the Division 31 Regulations. If, for example, there was a delay in responding to the child-abuse report (beyond 10 days) or an untrained social worker was assigned to investigate, then the case may have merit.

## Establishing liability through depositions

After identifying any violation(s) of CPS's mandatory duties, then depositions are in order. The primary target is going to be the social worker assigned to investigate the child-abuse report. Other targets will include his or her team leader and supervisor, as well as a PMK deposition regarding CPS's mandatory functions.

In *J.G. v. County of Tulare, et al.*, we began each defendant employee deposition with a review of the Division 31 Regulations which each CPS social worker is (or should be) trained on. In pop quiz fashion, we created a chorus of testimony from these CPS employees confirming the mandatory duties forming the basis of our claims. For example, much of the questioning went as follows:

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- There are administrative codes that govern the conduct of CPS staff. Are you aware of that?
- And CPS is required under a statutory obligation to respond to child abuse reports in-person within 10 days?
- That means a social worker skilled in emergency response must put their eyes on that child within 10 days?
- And if a social worker fails to put their eyes on that child timely, they are violating the statutes that are enacted to protect the child?
- And so, it's not discretionary, the social workers have no discretion to say: I'm not going to follow those rules. Correct?

This testimony allowed us to then demonstrate with the documents from the child's Juvenile Case File that those exact duties were violated.

Once the mandatory duties were established with testimony, in *J.G. v. County of Tulare, et al.*, we proceeded to file an affirmative Motion for Summary Adjudication. Code of Civil Procedure section 437c, subdivision (f)(1) allows a plaintiff to move for summary adjudication as to "issues of duty." We put forward the witness testimony and requested judicial notice of the applicable Division 31 Regulations to confirm as a matter of law that our case was actionable, notwithstanding governmental immunities.

Along with nailing down duty, the depositions are an opportunity to substantiate causation. The primary source for favorable testimony on causation is Welfare and Institutions Code section 300, subdivisions (a) through (j).

The Division 31 Regulations require the responding social worker to assess whether the child's circumstances would cause the child to be a person described by that code section. Meaning the social worker is required to assess, for example, whether there is a substantial risk that:

- the child will suffer serious physical harm inflicted nonaccidentally;
- the child will suffer serious physical harm as a result of a failure to adequately supervise or protect the child;
- the parent or guardian will fail to provide the child with adequate food, clothing, shelter, or medical treatment;
- the parent or guardian will fail to provide regular care for the child due to mental illness, developmental disability, or substance abuse;
- the child is suffering serious emotional damage;
- the child has been sexually abused;
- the child has been subjected to acts of cruelty; and/or
- the child's sibling has been abused or neglected.

Eliciting testimony in this regard connects the dots between the investigator's duties and the child's damages. In *J.G. v. County of Tulare, et al.*, the undisputed testimony was that a timely investigation would have required an assessment as to whether the child was being provided adequate food. Unfortunately, the child in that case was not being fed adequately and a timely response would have revealed that.

## Protecting the child

Litigators must be mindful of the relationship between CPS and the client. After a child is detained from his or her home due to abuse and neglect, they become a ward of the county. That is to say, the county is now in charge of the child's care, custody and control. But what happens when the child also has a tort claim against the county-controlled CPS agency for the same harm?

The consequence is a conflict arises. However, no provision under the law compels CPS to relinquish control of the child despite the conflict. In *J.G. v. County of Tulare, et al.*, we were compelled to bring a highly contested motion in the juvenile court to disqualify that CPS agency from any further role in the child's life. This decision was the product of numerous unscrupulous attempts by CPS to abuse their power over the child to obstruct the civil action.

Litigators must be prepared to protect their flank and keep a close eye on the dependency proceedings. Certain CPS agencies have shamelessly shown a willingness to use the powers vested in them over the child against the child.

## Conclusion

There is no dispute that screening these cases for liability is challenging and time-consuming. The confidentiality and immunities afforded to CPS often seem insurmountable. But these children desperately need our help.

The result in *J.G. v. County of Tulare, et al.* shows that these cases can be viable. With the proper work-up and relentless pursuit of justice, trial attorneys can do their part to help fix this broken system.


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