

COMMENTARY

Pennsylvania Emergency Child Custody: What Is an Emergency Anyway?

The attorney's decision to characterize a set of facts as an emergency and to seek emergency relief for the client may have strategic value to an ongoing case and may provide substantive or (more likely) procedural benefits to the case.

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Family Law

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Few things in family law (in child custody specifically) appear so straightforward to clients and so unclear to their attorneys as does emergency child custody. It is easy to quip that, "to a client in a custody battle, everything is an emergency." However, the very question of "what constitutes an emergency?" may have consequences on numerous aspects of a child custody case. The attorney's interpretation of a set of facts as a nonemergency may affect the attorney's relationship with a client who is looking for an attorney to "fight for them." The frequency of a particular practice or attorney filing emergency petition after emergency petition could have an effect on the attorney's reputation with judges and with their staffs. More importantly, the attorney's decision to characterize a set of facts as an emergency and to seek emergency relief for the client may have strategic value to an ongoing case and may provide substantive or (more likely) procedural benefits to the case. It could also act in the opposite and wind up being the filing "that cried wolf." In counties that have adopted or that strive for "One Judge One Family," you don't want to file a specious emergency petition to appease the client and allow themselves to damage their own case from the get-go.

Let's start by attempting to answer the most obvious question, "What is an emergency?" You may be surprised to learn that there is not only no definition in the code, but in the whole of Chapter 53 the word "emergency" never actually appears. In the procedural rules pertaining to custody, Chapter 1915 only makes passing reference to an "emergency" when considering the appropriate venue and then makes reference to emergency jurisdiction found in UCCJEA.

Pa.R.Civ.P. 1915.4(e) does provide for "emergency relief" but still nothing close to a definition of what constitutes a custody emergency. Indeed, the only thing that comes close to approaching a substantive definition of what could be an emergency appears in the Child Protective Services Law, Section 6375(f) which details the types of emergency services that must be provided by each county for "alleviating conditions that present a risk to the safety and well-being of a child." That's it. No requirement of blood needing to be shed, no broken bones, or evidence of threats, name calling or mental abuse.

In preparation for a panel discussion on multi-county child custody procedure I was involved in many years ago, I polled various judges and hearing officers for a definition of what they thought was an emergency, or, what they looked for to find that there was an emergency. As you can imagine, when you ask a bunch of different folks the same question, you get a bunch of different answers. The best answer, by far, approaching anything that could possibly ever be considered a definition of an emergency was provided by a Philadelphia County custody master, and went something like this: "An emergency is when something just happened which caused physical harm to a child, or, something is likely to imminently occur that places a child in danger of physical harm." Simple, right? Well ... no! Now come the clients and the allegations. As you can imagine, the situation of what may constitute an emergency first comes in the eye of the parent client ... on the phone with you ... on a Friday. While everyone surely can agree that evidence of a child who had suffered bodily injury at the hands of a neglectful or reckless parent, or a parent who is likely to cause physical harm to a child, is clearly an emergency, it is rarely that clear cut when you are requested by a client to immediately get them in front of a judge. Clients are passionate about their particular circumstances. We understand this as family lawyers. Many times, however, that Friday phone call and the set of facts you are hearing add up to no more than a situation presenting exigent circumstances, like scheduling issues, passport issues, vacation issues, school issues—things that may be moot by the time a normal custody hearing is scheduled. Clients also routinely consider "nonaccess" issues as an emergency (when one parent refuses to give the child to the parent who is scheduled to get the child) and may be rightly not satisfied when they learn that it could take months for a contempt proceeding to come to conclusion.

We hear other facts too. Facts that, with a bit of lawyering, might rise to the level of you getting a hearing and relief on short notice or even ex parte. How about the client that requests that you file an emergency petition for an order allowing them to keep the child because the other party won't buy or transport the child in a car seat? Is an allegation of marijuana being smoked in the home of the other parent an emergency now that the legality of marijuana is common and personal usage is becoming normalized? How about an allegation of child or sexual abuse with absolutely no supporting facts, no witnesses, and no credible evidence even leading to a suspicion—at least none that can be produced by the time of an ex parte or otherwise quickly scheduled hearing. What if the party alleging physical or sexual abuse is known to plead that routinely when they were once rewarded with an order that vested sole custody in them for months until the whole case could be decided and that there was no abuse? Should any of the above constitute an emergency such that the nonfiling parent's rights can be suspended even temporarily? Instead, should emergency relief be granted sparingly so as to not invite petitions that allege any of the above?

One can imagine that with the myriad of situations that could constitute an emergency, or not, such interpretations necessarily can vary judge by judge, or perhaps, county by county, based upon the history and custom of each county's procedure for emergency custody. I actually recall during the panel discussion I referenced earlier, one participant jokingly remarked that in their county, "there are no emergencies." Every joke contains some aspect of truth. It appears then, that any attempt at defining or codifying what specific factual circumstances might constitute an emergency and immediately go straight to an emergency judge or hearing officer, is futile and may allow too much to slip through the cracks.

Maybe a better way to provide guidance to the bar and to the public on how to navigate an emergency situation would be to standardize the county-by-county procedure for dealing with more minor issues like Philadelphia County did so many years ago with the expedited listing procedure. The Philadelphia expedited listing procedure establishes a special list that can quickly provide interim relief for issues that just can't wait until the normal listing months away, but don't immediately strike one as an emergency. Nonaccess, scheduling, vacation, passport, and other issues are heard on the expedited custody list and are instituted with a special petition developed for same. Directing nonemergencies to a specific place might help to demonstrate just what a real emergency looks like. Clarification of what constitutes an emergency may come from tinkering with procedure rather than adopting a one-size-fits-all definition.

Attorneys are paid to grapple with such situations, but more and more custody filings are commenced by pro se parties and can choke courts just because the case follows an incorrect or unnecessary track. Until a more uniform county by county, and judge by judge, practice for treating emergency filings and less than emergency filings is adopted, we will all struggle with the question of what an emergency is and when it is appropriate to file.

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