AGENTS FOR CHANGE

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Gada v. Dedefo

Best Interests Findings Required in OFP Hearings where Child Custody is Contested

On August 3, 2004, the Minnesota Court of Appeals issued a brief, seemingly uncontroversial, opinion in an order for protection case, *Gada v. Dedefo*, 684 N.W.2d 512 (Minn. Ct. App. 2004), available at: http://www.lawlibrary.state.mn.us/archive/ctappub/0408/opa031441-0803.htm. While the *Gada* case may initially appear unremarkable, its holding promises to have significant implications in order for protection hearings where child custody is at issue.

In *Gada*, the Hennepin County District Court issued an order for protection to petitioner-mother Bontu Gada, finding that her husband, respondent-father Nuro Badaso Dedefo, had committed domestic abuse. The district court awarded temporary sole legal and physical custody of the parties' two older children to Dedefo and awarded sole legal and physical custody of the parties' infant child to Gada. The court also awarded Dedefo parenting time with the infant every other weekend. Dedefo appealed, arguing that: (1) the district court's decision to grant the order for protection was not supported by sufficient evidence and (2) the court erred by awarding temporary custody to Gada without making findings as to the best interests of the child.

The court of appeals affirmed in part, upholding the issuance of the order for protection. However, the court of appeals reversed the district court's order awarding temporary custody of the parties' infant child to Gada and remanded for findings as to the child's best interests, holding that the district court erred in awarding custody of the child without making the requisite best interests findings. In reaching this conclusion, the appellate court analyzed the language of subdivision 6(a)(4) of the Minnesota Domestic Abuse Act, which states that a district court may "award temporary custody … with regard to minor children of the parties on a basis which gives primary consideration to the safety of the victim and the children. *Except for cases in which custody is contested, [best interests] findings … are not required.*" Minn. Stat. § 518B.01, subd. 6(a)(4) (emphasis added). Focusing on the latter language, the appellate court concluded that the plain language of the statute mandates that best interests findings are required in domestic abuse cases where custody is contested. Here, custody of the parties' youngest child was disputed, so the district court erred in awarding custody without making the requisite findings as to the child's best interests. Thus, the temporary custody award had to be reversed and the case remanded back to the district court for such findings.

In order to grasp the impact of the *Gada* decision on the OFP hearing process, one must understand that developing a record on which to base best interests findings is a time intensive, often complex process for both parties, their attorneys (if they are represented), and the judge. The best interests analysis requires a judge to consider

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Upcoming Events at BWLAP

- **Aug. 16** — DV and Homelessness in Moorhead with MCH.
- **Aug. 24** — DV and Homelessness in Mankato with MCH.
- **Aug. 25** — DV and Homelessness in St. Cloud with MCH.
- **Sep. 9-10** — New Laws Carlton hosted by Rural Women's Advocates.
- **Sep. 13-14** — New Laws Crookston hosted by Migrant Health Services.
- **Sep. 16-17** — New Laws Fergus Falls hosted by Someplace Safe.
- **Sep. 20-21** — New Laws Princeton hosted by Pearl.
- **Sep. 23-24** — New Laws Metro hosted by OutFront MN.
- **Sep. 27-28** — New Laws Windom hosted by SW Crisis Center.

BWLAP Welcomes New Board Members

BWLAP would like to introduce our new board members, who bring fresh energy and perspectives to BWLAP's Board of Trustees. This past summer, we welcomed the following new board members to the BWLAP team: Joleen Jones of African-American Family Services, Linda Foster of Family and Children's Services, Liz Kuoppola of Minnesota Coalition for the Homeless, and Melanie Suarez of PRIDE/Family and Children's Services. We thank these talented women for donating their time and energies to serving on BWLAP's board!

We would also like to announce the recent election of our board co-chairs, Candy Bakion and Linda Foster.

BWLAP's Board of Trustees is currently undergoing a board development process, one goal of which is to increase the size and diversify the talents of BWLAP's board. BWLAP's board is actively recruiting new members. Individuals with financial/accounting knowledge and non-profit management experience are especially encouraged to apply, although we welcome applicants from all backgrounds. Women of color, survivors of domestic abuse, and members of other under-represented communities are also encouraged to apply. Please contact Gloria Fressia at 612-343-9846 or e-mail staff@bwlap.org if you are interested in applying. Please join us!

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In early September, the Minnesota Court of Appeals released its opinion in *State v. Wright*, a case which has significant implications for domestic assault victims. Battered women's legal advocates have been anticipating the *Wright* decision because it resolves an issue left in doubt since the United State's Supreme Court's decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), earlier this year.

At issue in *Crawford* was whether it violated the Confrontation Clause of the U.S. Constitution to admit into evidence a statement made to police at the time of the crime, when the provider of the statement, usually the victim, was not available to testify at trial and therefore could not be cross-examined by the defendant. An earlier Supreme Court case, *Ohio v. Roberts*, had held that the admission of an unavailable witness's statements against a criminal defendant at trial did not violate the Confrontation Clause, provided that the statements were sufficiently reliable. To meet the reliability test, the statements had to either: (1) fall within a firmly rooted exception to the hearsay rule; or (2) bear "particularized guarantees of trustworthiness." The *Crawford* court rejected the *Roberts* reliability analysis. Under *Crawford*, the Confrontation Clause analysis now turns on whether a particular statement is "testimonial" in nature. If it is testimonial, the Confrontation Clause bars the prosecution from using it at trial against the defendant unless the witness is available to testify or the defendant previously had an opportunity to cross-examine the witness. Thus, even if the statement falls within a hearsay exception or the circumstances suggest it is reliable, it will be excluded if it is deemed "testimonial."

So what kind of statements are "testimonial" under *Crawford*? The Supreme Court did not provide a comprehensive definition of "testimonial" evidence, but it did say that it would include at least: (1) prior testimony, whether at a preliminary hearing, a former trial, or a grand jury proceeding; (2) formal testimonial material, such as affidavits, depositions, or sworn confessions; and (3) statements made to government officers or statements taken during police interrogations. The Court also stated, more broadly, that testimonial evidence includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." In other words, if at the time the statement was made, the person making that statement could reasonably expect that it would later be used at a trial, it is likely that the statement will be deemed testimonial and excluded under *Crawford*.

In the absence of a more concise definition, the nation's state courts were left to grapple with the issue of what other forms of evidence could be deemed "testimonial" under the *Crawford* analysis. Prosecutors and crime victim advocates wondered whether a victim's statements to the police, given shortly after the commission of a crime, would be deemed testimonial, as statements that the speaker could reasonably expect to be used at trial by the prosecution. If so, then emergency calls made during the course of a crime or statements made to the police at a crime scene would be inadmissible against a criminal defendant unless: (1) the witness was "unavailable" (not merely unwilling) to testify, and (2) the defendant had a prior opportunity to cross-examine that witness. Such a result would pose a severe obstacle to effective prosecution of domestic assault cases, as assault victims are often too afraid or traumatized to testify against their abusers, but are not "unavailable," as that term is defined under evidentiary rules.

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a lengthy list of statutory factors, to hear evidence on each factor, to make detailed written findings on each factor, and finally, to explain how the factors led to the court's conclusion as to the child's best interests. This is a process which typically takes place over several hours, if not several days, of evidentiary hearing. An order for protection hearing, on the other hand, is designed to be a rather succinct process, focusing narrowly upon the issue of whether domestic abuse has occurred, and if so, what relief is appropriate. The Domestic Abuse Act contemplates that orders for protection are necessitated by exigent circumstances, and thus the process should be expedited ("[a]ctions under this section shall be given docket priorities by the court") (Minn. Stat. § 518B.01, subd. 3) and kept as abbreviated as possible, as evidenced by the fact that the Act does not require hearings unless more complex relief is requested. OFP hearings are designed to be concise, focused upon the issue of domestic abuse, and thus are not to be combined with other family law proceedings, such as divorce, custody and paternity actions. (For example, Minn. Stat. § 257.541 provides that an action to determine custody and parenting time pursuant to chapter 518 "may not be combined with any proceeding under [the Domestic Abuse Act].")

Precisely because most family law attorneys and domestic violence advocates assumed that the kind of full-scale custody hearings that the best interests analysis entails were not suited to the OFP context, they argued (as *Gada*'s counsel did on appeal) that the proper standard in OFP hearings was the "safety of the victim and the child" standard, rather than the "best interests of the child" standard. This was not an errant assumption, but rather, was based upon the Minnesota Supreme Court's decision in *Baker v. Baker*, 494 N.W.2d 282 (Minn. 1992). In *Baker*, the court held that "safety of the victim and child" was the proper standard to apply in ex parte and temporary order for protection cases. The court reasoned that in this emergency context, it was unrealistic to develop the full factual record desired prior to making a best interests finding. As the *Baker* court explained:

> This is a wholly inadequate time for the parties to prepare testimony and other evidence in support of a best interests analysis … the effect of [requiring best interests determinations] is to force trial courts into making findings on a completely inadequate record, to delay order for protection hearings … Because the application of a … "best interests" analysis is impossible to execute in the context of a hearing on a domestic abuse order for protection, we hold that it does not apply here.

494 N.W.2d at 290.

Despite its seemingly precedential value, the *Gada* court concluded that *Baker* was not controlling because the *Baker* court interpreted the 1990 version of the statute, which did not include the later-enacted exception for cases involving contested custody. In 1992, the legislature amended Minn. Stat. § 518B.01, subd. 6(a) to provide that: "[e]xcept in cases in which custody is contested, findings under Minn. Stat. § 257.025, 518.17 or 518.175 are not required." However, this legislative change was not entirely overlooked by the *Baker* court. In fact, footnote 11 of the *Baker* opinion notes that the legislature amended the statute to add the language excepting contested custody cases. The *Baker* court, while interpreting the 1990 statutory language, clearly took note of the 1992 amendment. Nevertheless, the *Baker* court concluded that, in the OFP hearing context, a best interests analysis was not practicable and a "safety of the victim and child" standard was more appropriate, in light of the public policy concerns underlying the Domestic Abuse Act.

Although the legislature arguably never intended for order for protection hearings to encompass full-scale custody proceedings, that is effectively what the *Gada v. Dedefo* decision mandates. How domestic abuse court judges will handle the increased burden that making best interests determinations will necessarily entail remains to be seen. However, family law attorneys and legal advocates working in the field should begin educating the women they serve about the *Gada* case. If you are assisting a battered woman with filing an order for protection and she plans to ask the court for temporary custody of her child(ren), ask her whether the respondent is the child(ren)'s father and whether custody is likely to be disputed. If so, you can assist her with preparing for a hearing where the judge will conduct a best interests analysis by asking her to think about the evidence, both testimonial and documentary, which will be relevant to the judge's consideration of each statutory best interests factor. (The thirteen best interests factors are found in Minn. Stat. § 518.17, subd. 1.) For a more complete discussion about contested custody hearings and the best interests analysis, consult the following Technical Assistance Packets, available on our website (www.bwlap.org): "OFP Hearings: Contested Custody" and "Custody Determinations: Best Interests Factors."

Headline

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CHECK OUT OUR WEBSITE!

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BWLAP is a Minnesota-based, statewide, non-profit organization that provides legal information, consultation, training, litigation and legal resource support, and policy development assistance to battered women and to criminal justice, legal, and social service systems.

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Date
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We are taking applications. If you are interested, please e-mail:
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