Perspectives on Removing Children: The Interplay Between Child Protective Services and Law Enforcement

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Child Welfare Services Administration

STATE-ADMINISTERED - Most states

COUNTY-ADMINISTERED (9 States)

California, Colorado, Minnesota, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Virginia

HYBRID STATES -Nevada and Wisconsin

Child Welfare Information Gateway, U.S. Dep't of Health & Human Servs., State vs. County Administration of Child Welfare Services (2018), https://www.childwelfare.gov/pubs/factsheets /services/

Removal of Children from Parental Custody

Across the country, child welfare professionals remove children from their parents more than 250,000 times per year.

(National Data Archive on Child Abuse and Neglect (NDACAN), Cornell University, Ithaca, N.Y., Federal Fiscal Years 2009-2017)

Removal of Children from Parental Custody, Cont.

Government's *parens patriae* (father of the people)

authority to protect children from harm

versus

A parent's fundamental constitutional right to family integrity.

Removal of Children from Parental Custody, Cont.

The Supreme Court has recognized the right of a parent to direct the care, custody and control of their children in numerous decisions:

- *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)
- *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925);
- *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923)

The 14th Amendment of the US Constitution

The Supreme Court has recognized this fundamental right of parents under the Due Process Clause of the Fourteenth Amendment

Santosky v. Kramer, (1982) 455 U.S. 745, 753

The 14th Amendment of the US Constitution, Cont.

A child's interests include a welfare interest to be free from abuse and neglect, **and** a due process right to remain with their natural parents free from unnecessary third-party intervention.

Smith v. Org. of Foster Families for Equal. & Reform, (1977)431 U.S. 816. 844-45

Circuit Splits:

The **Second** Circuit has held that a parents' procedural due process rights require consideration of whether there is sufficient time to obtain a court order prior to an exigent removal. *Tenenbaum v. Williams*, (2nd Cir. 1999) 193 F.3d 581.

The **Third**, **Fifth** and **Ninth** Circuits have held that a parents' procedural due process rights require parental consent or exigent circumstances to remove a child in the absence of a court order.

Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth, (3d Cir. 1989) 891 F.2d 1087, 1089–90, 1095; *Calabretta v. Floyd,* (9th Cir. 1999) 189 F.3d 808; *Roe v. Texas Department of Protective and Regulatory Services*, (5th Cir. 2002) 299 F.3d 395, 398, 403.

Circuit Splits, Cont.:

- The **Seventh** Circuit has found that social workers could enter a child's home or school and examine a child's body without a warrant based on the state's legitimate interest in protecting children from child abuse. *Darryl H. v. Coler*, (7th Cir. 1986) 801 F.2d 893, 901–02

- The only other circuit to favorably view a warrant exception for child abuse investigations is the **Fourth** Circuit. *Wildauer v. Frederick Cnty.*, (4th Cir. 1993) 993 F.2d 369, 372–73.

Circuit Splits, Cont.:

- **Eleventh** Circuit has held that whether an exigent removal comports with due process does not hinge solely on whether there was time to obtain judicial authorization, but on a variety of relevant factors presented in the case. *Doe v. Kearney*, (11th Cir. 2003) 329 F.3d 1286.

- **First**, **Sixth**, and **Eighth** Circuits have yet to address the issue.

Who Can Remove *Without* a Court Order?

- Most states authorize **law enforcement officers** to remove children (e.g., AL, CO, MI, ND, NM,…)
- In most states, **child welfare agency staff** can remove children (e.g., AK, MT, NC, TN, CA,…)
- A few states authorize **private citizens** (doctors, prosecuting attorneys, nurses or nurse practitioners) to separate a parent from their child. (e.g., IA, KY, WY.)

When Can Removal Occur?

Federal Law requires states to make reasonable efforts to prevent or eliminate the need for removing the child from the home prior to the placement of the child in foster care.

42 U.S.C. § 671(A)(15)

Legal Standards for Emergency Removal

EXIGENCY defined:

- State-specific
- Generally, when there is insufficient time to seek a warrant due to the circumstances and removal is required when immediate (continued) harm is likely to occur without removal.
- Examples: drug bust, sexual assault

Legal Standards for Emergency Removal

- Some states allow removals whenever an authorized individual has reason to believe that a child is a victim of abuse or neglect (e.g., FL, N.C.)
- Some states mandate a demonstration that no service or program could be delivered that would obviate the need to remove the child. (e.g., CO, MI)

Legal Standards for Emergency Removal, Cont.

- Some states demand evidence that a child is in imminent danger of serious or substantial harm. (e.g., AL, CT, KY, CA)

- Some states require a particularized showing that immediate removal is absolutely necessary because the delay in proceeding to court and obtaining an order would create the risk of significant harm to the child. (e.g., IL, IN, N.J.)

Warrants

Without exigency or parental consent, a caseworker needs probable cause and a court order to detain a child.

The 4th Amendment of the US Constitution

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...

The 4th Amendment of the US Constitution

…and no Warrants shall issue, but upon **probable cause**, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Burden of Proof

Probable Cause:

A reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true.

(Ballentine's Law Dictionary)

Social Worker's Role

- Identify children at risk of abuse and neglect.
- Bring case forward to the Juvenile Court. Social workers serve as eyes/ears of Juvenile court.
- Social workers have a hybrid function serving the Judicial and Executive branches.
- Social workers should be a disinterested party – their reports should show objectivity and expertise.

Social Worker's Role, cont.

Social workers are often named in civil suits for causes of action related to

- unlawful seizure of a child,
- unlawful entry into home,
- failure to investigate,
- negligent investigations,
- failure to remove*,
- violations of 1st, 4th and 14th constitutional amendments – liberty, seizure and due process

Qualified Immunity

The Eleventh Amendment:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

*note: *Monell* liability required for agency

Qualified Immunity, Cont.

Under Qualified Immunity, government officials are immune from suits for damages unless:

(1) They violated a statutory or constitutional right, and

(2) That the right was "clearly established" at the time of the challenged conduct.

Ashcroft v. al-Kidd, (2011) 563 U.S. 731, 735.

Qualified Immunity, Cont.

- "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." (*Anderson v. Creighton*, (1987) 483 U.S. 635, 640.)

- Protects "all but the plainly incompetent or those who knowingly violate the law." (*Malley v. Briggs*, (1986) 475 U.S. 335, 341.)

Qualified Immunity, Cont.

- Even if a state official violates a plaintiff's constitutional rights the official is still protected if the law is unclear. (*Wilson v. Layne*, (1999) 526 U.S. 603, 615.)

- This is critical in child abuse investigations given the conflicting court decisions.

Qualified Immunity, Cont.

- Include all material facts, avoid judicial deception.
- Follow mandated state procedures.
- Don't rely on statements that are known to be probably false.
- Disclose all exculpatory evidence.
- Do not include evidence obtained by fraud or duress.
- Never act with malice or conscious disregard of the rights of others.

Qualified Immunity, Cont.

- For qualified immunity to be a defense to civil liability, the social worker must discharge their mandatory duties designed to prevent injury to a child.
  - If the social worker keeps their qualified immunity, the county (or relevant employing entity) is responsible for the defending the worker.
  - If the social worker loses their qualified immunity, the social worker could become personally liable for a resulting judgment.

Information Sharing Between CPS and Law Enforcement

- 26 States require CPS to report suspected child abuse to local law enforcement.
- 9 States, the District of Columbia, American Samoa, and Guam require that all reports filed with a CPS agency be shared with law enforcement, and vice-versa.
- In 16 states, CPS and law enforcement agencies are required to coordinate investigations and share information to reduce the number of times children are interviewed.
- 7 states require information sharing among multidisciplinary teams.

Working with Law Enforcement Agency

- Local police and deputies are frequently involved.
- LE may be first on scene and contact CPS to remove

E.G. LEA driven Warrantless removals may result when arrest of caregiver, death, violence in the home.

Working with LEA- Understand Foundational Principles & Training

- Constitution include limitations on police power
- understand lawfulness of an action or encounter is only the beginning
  - ensure subsequent actions are necessary
  - avoid seizure if persuasion & negotiation possible
- seek legitimacy, practice equity & respect in every encounter to preclude escalation

Differing Roles Law Enforcement vs CPS

DSS initiates Removal

- State-mandated – statutes & administrative code
- Supervisor sanctioned utilizing procedures for shared decision making and consultation
- Judicial NSCO when time permits OR
- Emergent circumstances where obtaining court order not possible
- LE assist

LEA initiates

LEO discretion to

- enforce criminal laws/keep peace
- Deescalates tense domestic violence situations
- rapid decisions without supervisory consultation
- LEO analyzes direction to take, whether to charge disruptive individual or take into custody, through warrant(less) arrest
- LE regularly contacts other agencies: EMS, Animal Control, CPS when need assistance

Working with LEA- Understand Differing Roles

When CPS is initiating agency, needs LEO on scene with SHIFTED ROLE

- LE decisions begin AFTER decision to remove
  - Very little leeway
- No LEA judgment call to leave status quo
- RARELY WITHOUT DRAMA OR RESISTANCE
- CPS workers do not relish the encounter
  - State-dictated, Judicially-mandated

Working with LEA- Assist LEA to Understand CPS Role

- CPS workers liable for **NOT** removing children
- Children not removed at risk every day left in home exposed to serious neglect or abuse
- CPS processes in place (state-mandated): detailed investigation FOLLOWING removal – then placed before judge for more-permanent decision-making (due process)

Working with LEA to Understand CPS Role

CPS initiates	Law Enforcement initiates
• CPS removal is made Early in investigation • With or without judicial involvement • NO PROBABLE CAUSE ANALYSIS REQUIRED BY LAW ENFORCEMENT FOR ASSISTANCE TO CPS	• LE warrant for arrest occurs after full investigation • Can have warrantless arrest • PROBABLE CAUSE REQUIRED

Working with LEA- Assist LEA to Understand CPS Role

CPS needs LEO support TO PROTECT the CHILD

- Emotionally hard, dangerous for SW & child
- LE presence –stand alongside CPS in unpopular situations
- Removal of children may result in criminal charges - but not always

Other Roles of LE in Removing Children

Protective Custody Warrant (a/k/a NSCO)

- CPS involvement
- Warrant to take physical custody of Child(ren)
- Court order - MUST comply MANDATED by Judge
- FOR THE CHILD's protection
- only LEO can make physical entry into home

Private Party Custody Transfers

- No CPS involvement
- Parent initiated child custody violation
- NOT CHILD safety issue
- signed by judge but not mandated
- LEO take possession of child and turn over to parent
- Read warrant carefully as differs from case-to-case
- If fails – then show cause order is issued

Working with Law Enforcement Agency, Cont.

Other scenarios where LEA maybe contacted:

- After-hours report and investigation requires immediate warrantless removal
- Known or threatened violence concerns
- Family may have history with LEA

- Failure to utilize resources to de-escalate may be evidence that is actionable.

Working with Law Enforcement Agency, Cont.

- Sometimes CPS caseworkers must visit isolated, dangerous locations and deal with mentally unstable, violent, and/or substance-controlled individuals.
- Caseworkers generally do not have on-site communication (radio, car phone, etc.), weapons, or special training in self-protection.

Working with Law Enforcement Agency, Cont.

- LEA has training in De-escalation techniques
- CPS benefits from communicating early with LEA to develop plan for safe removal
  - Utilize family/friends
  - Discover routine
  - Establish plan of action
- May need LEA on-scene or nearby

Working with Law Enforcement Agency

County/City Legal staff can assist with communication between CPS and LEA

- CPS mandate to protect child
- Removal is temporary
- LEA role is to assist in removal not to analyze decision to remove
- CPS Warrantless removal decision differs from LE warrantless entry/seizure/arrest

Improving Collaboration

- Establish **formal teams** within each agency for effective communication.
- Establish investigative and warrant execution **protocols** that clarify expectations.
- **Joint training** so both sides have an opportunity to learn skills and share philosophical perspectives and concerns.

Questions?

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