

TO: Supreme Court of Georgia Committee on Justice for Children
FROM: Alyssa Parsons, Legal Intern
DATE: July 10, 2008
RE: Nationwide Removal Statutes

Over the last few years, J4C has spent more and more time looking at the variability of removal rates across the state. As shared with this committee in the past, at times removal rates in Georgia's counties have varied by a factor of more than 20; meaning that in some counties a child is 20 times more likely to be removed from their home than a similar child who simply lives across a county line.

Recently, the news has been filled with coverage of the Texas Yearning for Zion case, bringing to light questions about removal rates and standards of removal on a national scale. As a result, J4C decided now is an excellent time to look into Georgia's removal statute and compare it to removal statutes across the country. Do we have a national standard of removal? Should we? Should Georgia's statute include the word "imminent" in order to further limit unnecessary removals of children from their homes?

Influenced by a recent article written by Donald Duquette, Director of the Child Advocacy Law Clinic at the University of Michigan Law School, we took a look at nearly all 50 states', and the District of Columbia's, statutes regarding standards of removal of children from their homes. Ultimately, we hope that this research will lead to an open discussion about the questions posed above, and we welcome any thoughts or opinions. We will be emailing the complete list of statutes to each of you. In the meantime, we have highlighted below some of the key features of statutes that may be worthy of discussion.

- Unlike Georgia, twenty-two states require that the child be at risk of imminent danger for removal from the home.
- Currently, **Georgia** does not require that the child be at risk of imminent danger for the court to take the child into temporary custody, but it does require that for a *physician* to detain a child in temporary protective custody, the physician must have reason to believe that there is imminent danger to the child's life or health.
- **Colorado, Indiana, Nebraska, South Dakota, Washington, and Wyoming** use the phrase "seriously endangered."
- **Kentucky's** statute includes a subparagraph that refers to "imminent death or serious physical injury" and a subparagraph that refers to "immediate danger"
- **Michigan** has a broad statute, stating that any child may be taken immediately into custody if his/her "surroundings are such as to endanger his or her health, morals or welfare." The article referenced above specifically addresses MI's standard for removal and the author, a professor of child welfare, argues that MI's statute is overly broad, leading to easy abuse.
- **North Carolina** has a list of circumstances that may warrant a need for removal, but does not contain the word "imminent" or "immediate."
- **Tennessee** includes a statement that says "there must be no less drastic alternative to removal of the child from the custody of the child's parent, guardian, or legal custodian."
- **Texas**, perhaps surprisingly, has a very restrictive statute, but it was not followed at the trial court level in the Yearning for Zion case.
- **Utah** has one of the most detailed statutes, addressing the parent's constitutional rights, the long-term impact on a child, and including a long list of what conditions would lead to a necessary removal (including imminent danger).
- **Washington** provides concrete examples of what exactly constitutes "imminent harm."

June 11, 2008

**PROTECTING OUR CHILDREN – AND OUR LIBERTY:
Striking the Balance in Child Protection Removals**

by

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INTRODUCTION

The dramatic removal of 460 FLDS children in Texas and the intense media attention to the story highlights a greater and more general tension in America's child welfare world. Taking children away from their Moms and Dads in the face of reports of suspected child abuse or neglect is one of the most delicate steps in the child protection process. Critics charge that more and more children are being unnecessarily removed from their parents on an emergency basis, before a full court review, overloading the foster care system and harming large numbers of children the child welfare system is supposed to protect. Probably no other stage in the child protection process is as poignant and difficult with so much riding on the skill and good judgment of the professionals. *What is the proper balance between aggressive action to protect children from abuse and neglect -- and undesirable over-reaction resulting in erosion of civil liberties and imposition of unnecessary psychological harm on children and their families? What is the law? What is required for the physical and psychological well-being of the children?*

For decades America's child protection system has been criticized as being both *under-inclusive* and *over-inclusive*. That is, CPS is *under-inclusive* because families and children who should be receiving child protective services are not -- resulting in children remaining at risk, suffering additional harm and even death. At the same time CPS is *over-inclusive* because many families that are currently in the system should not be -- imposing an enormous cost on children and their families -- and on the system itself. Are our current laws adequate for this delicate and important balancing act? *What does the U.S. Constitution require? Are CPS policies appropriate? Is the workforce capable of making the fine judgments required? If not, what has to be done to ensure that the police, caseworkers, lawyers and judges are competent to make these subtle discriminations?*

This paper is intended to set up an ABA/APA teleconference on July 9, 2008 on this topic. Our goal is to draw what lessons we can from some recent and high profile cases. But we also must be cautious not to over-react to the alleged CPS over-reaction in these few cases. CPS is charged with an important mission -- to protect children from abuse and neglect. (I know how hard it is to be a child protective services worker; I used to be one myself.) Life, death or serious injury can hang on CPS decisions. But the seriousness of their work and their good intentions do not excuse them from the duty to be

“The existence of the FLDS belief system as described by the Department’s witnesses, by itself, does not put children of FLDS parents in physical danger. It is the imposition of certain alleged tenets of that system on specific individuals that may put them in physical danger.” (Opinion, p. 7) “Evidence that children raised in this particular environment may someday have their physical health and safety threatened is not evidence that the danger is imminent enough to warrant invoking the extreme measure of immediate removal prior to full litigation of the issue as required by section 262.201.”(Op. p. 8)

The court also found that the record did not reflect any reasonable effort on the part of the Department to ascertain if some measure short of removal and/or separation would have eliminated the risk. (Opinion. p. 9). The COA directed the lower court to vacate its orders regarding placement but did not order immediate return of the children to the parents.

The Texas Supreme Court reviewed the COA decision and upheld it on May 29, 2008:

Having carefully examined the testimony at the adversary hearing and the other evidence before us, we are not inclined to disturb the court of appeals’ decision. On the record before us, removal of the children was not warranted. (Texas S. Ct. Per Curiam Opinion, 08-0391, p. 5)

As of this writing the Texas FLDS children are gradually returning to the Yearning for Zion Ranch.

THE WRONG LEMONADE?

On April 5, 2008, two days after the FLDS children were taken into custody, a Michigan child, seven year old Leo Ratte, spent two nights in foster care after his father, University of Michigan archeology professor Christopher Ratte ordered lemonade for his son at a Detroit Tiger’s baseball game and was given a bottle of Mike’s Hard Lemonade. Professor Ratte did not know the beverage contained alcohol. In the ninth inning security personnel confronted Ratte and told him the beverage was alcoholic. “You’ve got to be kidding”, he said. Police officers questioned father and son closely, took the boy to a hospital for a full check-up, and then placed him in foster care even though he was observed by the examining physician to be fine and he had no trace of alcohol in his blood. CPS refused to release the child to his father -- or to his mother, who had been at a concert with their twelve-year-old daughter for the day. Two aunts drove overnight to Michigan from Massachusetts after being told the boy could be released to them, but Michigan authorities ultimately refused to release the child to his aunts, one of whom had been a licensed foster parent in Wisconsin and had adopted a child. No amount of persuasion could get the boy released over a weekend. The following Monday, after two days in foster care, the court returned the child to his mother’s custody, but only after the

She was forced to spend nearly two weeks at the foster care facility in Hyattsville. The injured sister, after her recovery, was kept in the hospital awaiting test results. Afterward, she was in foster care for five days. Both sisters were then reunited at home under their grandmothers' care, but on condition that the Caplans move out of their own house.

The Caplans raised \$75,000 for legal fees for their fight to get their children back. A court agreed with them and found no legal basis to keep their children in custody. But even after the court found for the Caplans, the city offered to end its investigation only if the parents submitted to counseling, anger management classes and unannounced visits from social workers. The Caplans declined the deal. Six months later, the Caplans remain on the DC list of child abusers. The *Washington Post* article continued:

The Caplans reject the idea that the city is only doing its job well by being on hair-trigger alert. "Do you believe innocent families have to get caught up in this?" Greg asks. "This is a false choice. What has to happen is not overreaction, but competence."

The Caplans plan to sue the District, seeking reforms in the child welfare system and reimbursement of what they spent fighting the allegations. The twins are happy and playful children now, but the daughter who spent two weeks in foster care "freaks out if I leave the room," Julianna says. "Before, she would let anyone hold her. Now, she screams."

COMMUNE AS A "HOUSEHOLD"; LACK OF INDIVIDUALIZED TREATMENT

There are precedents in which state child protection authorities have treated communes with allegedly abused or neglected children as a single family or household- and courts have generally criticized the lack of an individualized, child-by-child, parent-by-parent, intervention. In 1953 authorities raided a polygamist community called Short Creek (now Colorado City, AZ) and Hildale, Utah, taking 160 children into custody. The custody ruling was overturned on appeal in 1955. In 1984, Vermont officials took custody of 112 children whose families belonged to the Northeast Kingdom Community Church in Island Pond, Vermont. The Vermont trial court refused to accept a generalized petition covering all children in the community. It rejected the state's petition for jurisdiction as "defective on its face" because it "made no attempt to allege facts constituting any of the children to be children in need of care or supervision. *** [The petition] is essentially a collection of generalized assumptions as to these children." The court was concerned that the state's group approach might violate the parents' constitutional rights of freedom of association and religion.

In July 1983, in rural Allegan County, Michigan, at the compound of the House of Judah religious camp, a woman beat to death her twelve-year-old son. The authorities took the boy's five siblings into custody. At the first hearing regarding the five children in

emergency seems to be that the child be in “imminent danger”. *Mabe v. San Bernardino Co*, 237 F.3d 1101, 1105 (9th Cir. 2001); *Tenenbaum v. Williams*, 193 F.3d 581, 588-89 (2d Cir. 1999). *Is this an acceptable legal standard? Does it serve the physical and psychological well-being of the children?*

2. Statutory Standards for Ex-parte Emergency Removal

Texas statutes governing emergency removal on their face seem to fully meet the constitutional standard. Under Texas statutes, before a child may be taken into possession without prior notice and hearing, a person with personal knowledge must file an affidavit that (1) “there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child’s welfare;” (2) there is no time for a full adversary hearing; and (3) “reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child.” (V.T.C.A. Family Code § 262.101) Texas statute also provides for the alternative removal of the alleged perpetrator so long as, “the child is not in danger of abuse from a parent or other adult with whom the child will continue to reside in the residence of the child.” (V.T.C.A. Family Code § 262.1015) With a statute as clear as this, what explains the over-reaction in the FLDS case? Is it a matter of inadequate professional training of police and caseworkers? The court, presumably an independent judiciary, later affirmed the emergency removals. Why would that have happened?

Other state statutes do not meet the constitutional standard. In my home state of Michigan, for example, the police may take a child in custody, “...whose surroundings are such as to endanger his health, morals, or welfare...” There is no definition of “health, morals or welfare” and no requirement of “imminent danger.” The court, acting ex parte pending a hearing, may continue the child in custody if “home conditions make immediate removal necessary.” No state has a more relaxed standard than Michigan’s. *What is your state’s test for emergency removal? Does it protect the civil liberties of children and parents by meeting the constitutional standard? Is the legal standard such that children in danger can be protected and not exposed to continued harm?*

3. Court-ordered Pretrial Removals

The next step in removing children from their parents is at the first hearing, commonly called a “preliminary hearing”, “first hearing”, or “shelter hearing”. The state authorities must provide some evidence in support of their petition and the question of placement of the child pending trial is revisited. Although this hearing is typically held within a day or so of a child being removed from parents, there is generally more information available about the conditions leading to the CPS concern, whether the danger to the child at home may be controlled, and about alternative placements for child, such as with a familiar relative.

Many state statutes employ a common legal standard for court ordered removal of children suspected to be abused or neglected. This standard, taken from the federal

act between removal and not-removal, use the refrain, “Damned if you do, damned if you don’t. “Either way we get criticized.”

What is the state of professionalism in your CPS? Are they well trained? Are caseloads manageable? Do they receive the support and recognition they deserve for such a difficult job? Or are they treated as fungible bureaucrats who must only follow procedure, as in the Michigan lemonade case? CPS is an inherently high risk venture. Mistakes will be made. Some cases will be misdiagnosed. Risk to the child will be over-rated, as in the Michigan lemonade case, or under-rated, as in the myriad of front page stories about child death or abuse after reports to CPS. Who carries the blame in your state or community? Does the individual caseworker serve as scapegoat and get fired following a mistake in judgment or do supervisors and agency directors take some of the responsibility?

6. Representing the Child

The lawyer for the child is one of the key safeguards for the child’s well-being. The process should protect the child, but the adverse consequences of intervening must also be minimized. But what if a child does not wish to be removed from his parents? *Does the lawyer in your state represent what the child says he or she wants or what the lawyer considers in the child’s best interests? Philosophically and psychologically what is the optimum role for the child’s lawyer to play – as advocate for the best interests of the child or as advocate for the child’s expressed wishes?*

7. Religious Beliefs

Are the FLDS being punished for unpopular and unfamiliar religious beliefs? The Texas lead investigator was of the opinion that due to the “pervasive belief system” of the FLDS, boys are groomed to be perpetrators of sexual abuse and girls are raised to be victims of sexual abuse. Because of the “pervasive belief system” it is acceptable for girls to marry, engage in sex, and bear children as soon as they reach puberty, and it thus poses a danger to the children.

But America prides itself on our freedom of religion and tolerance of unfamiliar religious practices – so long as they do not harm a child. The Texas COA reflects the law on this topic when it says, “The existence of the FLDS belief system as described by the Department’s witnesses, by itself, does not put children of the FLDS parents in physical danger. In is the **imposition** of certain alleged tenets of that system on specific individuals that may put them in physical danger.” (Emphasis added.)

Are some religious groups’ ideas about childrearing more acceptable than those of other religious groups?