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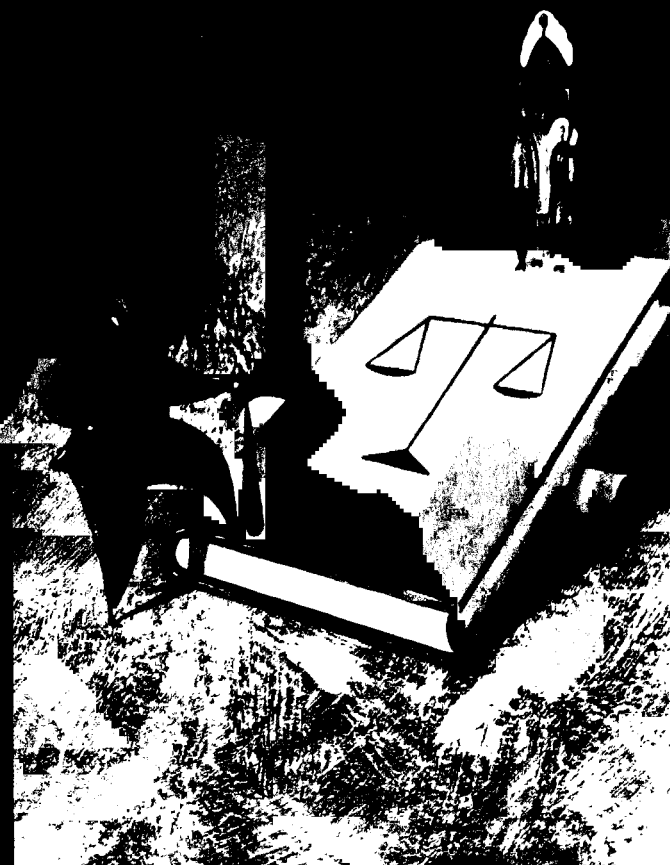
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Child Protection— What Ought to Be

Finding a balance between
aggressive protection and erosion
of civil liberties

BY DONALD N. DUQUETTE



America's child protection system should not only protect our children, it should protect our liberty. Several recent cases, and perhaps others in your jurisdiction, highlight a general tension in America's child protection system between child protection and family integrity.

Consider the dramatic removal of more than 450 children in April 2008 from The Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) Yearning for Zion ranch in Texas without a factual or legal showing of imminent harm to the children—resulting in the summary reversal by the Texas Court of Appeals and Texas Supreme Court. Consider the Mike's-Hard-Lemonade case in Michigan in which a seven year old was placed in foster care for two days because his father mistakenly gave him the product, not knowing it was alcoholic. And in the District of Columbia, the case of the eight-month-old Caplan twins, placed in foster care for nearly two weeks even though medical professionals and the court found no grounds to believe the children were abused.

What should be the proper balance between aggressive action to protect children from abuse and neglect—and undesirable overreaction resulting in erosion of civil liberties and imposition of unnecessary psychological harm to children and their families?

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. Media stories on such tragic cases are unfortunately common. 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. 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. It is the quality of the decision-making that should be improved, including independent review by the judiciary.

The child-protective-services job is very difficult. I know because I was a CPS caseworker. Literally life, death, or serious injury to a child can hang on a decision. But the seriousness of the work and good intentions do not excuse CPS staff and the supervising courts from a duty to be careful,

thoughtful, professional, and child-centered. A child should not be removed from a parent unless it is absolutely necessary to do so to protect that child.

The U.S. Constitution protects parental rights to custody of children and the parallel children's right to family integrity as among the highest liberty values of our society. Among the federal circuit courts, the constitutional test for breaching this right of family integrity in an 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); *Gates v. Texas Department of Protective and Regulatory Services*, F.3d (Cal. 5, 2008) (No. 06 20763). *Gomes v. Wood*, 451 F.3d 1122 (Cal. 10, 2006). The statutory ground in Texas is consistent with this standard, although not so in Michigan or the District of Columbia.

What is the statutory ground for emergency removal of children in your jurisdiction? Does it protect the civil liberties of children and parents by meeting the constitutional standard? Is the legal standard carefully implemented such that children in danger can be protected and not exposed to continued harm?

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 Adoption and Safe Families Act, governing federal funding for state foster care, is that "continuation in the home is contrary to the child's welfare." Some state courts have interpreted this language as requiring judges to *balance* the harm that a removal would cause against the imminent risk to a child of remaining in the parent's care. For example, the New York Court of Appeals, the highest New York appellate court, said:

[A] blanket presumption favoring removal was never intended. The court *must do more* than identify the existence of a risk of serious harm.... It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.

Nicholson v. Scoppetta, 3 N.Y. 3d 357, 378 (2004).

What are the criteria for court-ordered pretrial removal in your state? Does the statute or court rule require the court and other decision makers to balance the risk of harm presented by the parents against the risk of harm from removal? Do your state's practices require decision makers to consider a range of placement options that might protect the child and be more sensitive to the child's individual needs?

Many states permit the court to enter protective orders for the child, pending trial. Protective orders commonly include terms and conditions for the child remaining with a parent, such as a prohibition of physical discipline or routine drug screens for parents. State statutes commonly permit the court, based on a low standard of proof, such as probable cause, to order the alleged perpetrator or persons accused of endangering the child to leave the home.

Federal law also requires, as a condition of federal funding, that the state make "reasonable efforts" to prevent or elimi-

nate the need for removing the child, and the court is asked to make a finding that "reasonable efforts" have been attempted. This requirement can provide an opportunity to consider more options to protect the child than removal and to weigh the detriment to the child from placement against the risks faced in the home. These statutes and rules can often protect the child while lessening the child's trauma because of government intervention.

Do your state statutes or court rules require decision makers to consider ways to remove the danger and not the child? How does your state implement the federal "reasonable efforts" requirement?

CPS policies and their related actions should reflect the constitutional standard, statute, and best practices in the field. But the work of child protection is very delicate and stressful. State organizations do not always create a work environment in which these important government officials feel supported and valued. Training is often deficient. Turn over in many state CPS offices is very high, thus making maintaining a professional work force difficult to impossible. Many in CPS, responding to this difficult balancing act between removal and nonremoval, 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 staff well trained? Are caseloads manageable? Does CPS receive the support and recognition it deserves for such a difficult job? Or are CPS staff treated as fungible bureaucrats who must only follow procedure?

A more careful decision-making process with a truly independent judiciary could actually enhance the result for children and their parents, because the assessments would be more deliberate and thoughtful. The caseworkers and ultimately the court would be required to analyze the case from all perspectives, considering not only the risk to the child but also ways in which the child could immediately be made safe without removal from parents or family. These decisions should never be by rote or ritual. Unfortunately, far too often these cases are simply processed rather than thoughtfully reviewed and deliberated.

Our child protection system needs more and better training of caseworkers and the judges hearing these cases. Child protective service caseworkers should receive the status and compensation consistent with the professionalism required of this important job. Parents and children need assertive and competent lawyers to represent their interests.

We can and should do a better job of balancing the interests of protection and liberty. Improved check-and-balance decision making with strict constitutional standards and high

professionalism can achieve better results for children and families. **FA**



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