

# Voluntary Placements and the Importance of Due Process

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Anne Marie Lancour, JD, MAT  
ABA Center on Children and the Law

# Federal Case Issues-Circuits are split

- Is the action Voluntary or Coercive?
- Duration?
- Has the government accurately represented law and fact prior to deprivation (was there legal justification for threatened removal)?
- Is revocation procedure clearly delineated?
- Is there a post-deprivation due process hearing?
- Do government officials have qualified immunity when deprivation is determined to be improper or coercive?

# 7<sup>th</sup> Circuit (Illinois)

- Dupuy v. Samuels, 465 F3d 757 (7<sup>th</sup> Circuit)(2006).
  - Government can threaten to enforce it's legal right, but cannot infringe on parent's legal rights
  - Deprivation, infringement on custody will be considered coercive.
  - Entering into a safety plan must be optional.
  - Safety plan is not inherently coercive if truly voluntary.
  - If safety plan is voluntary, no hearing of any kind is necessary
    - hearings are required for deprivations ordered over objection, not for steps authorized by consent

# 7<sup>th</sup> Circuit (Illinois)

- Hernandez v. Foster, 657 F.3d 463 (7<sup>th</sup> Circuit)(2011).
  - Substantive due process
    - Initial removal of child justified because DSS had probable cause
    - Continued withholding & requirement that visits be supervised was violation of substantive due process
    - Safety plan was coerced because placement and supervision of visits were not justified
  - Procedural due process
    - Predeprivation Hearing required unless exigent circumstances (probable cause)
    - If government misrepresents facts or law, agreement is coerced (not voluntary)
  - Qualified Immunity
    - Qualified immunity for initial placement because probable cause existed
    - No qualified immunity for continued deprivation because he was held beyond the point when probable cause ended

# 6<sup>th</sup> Circuit (Ohio)

- Smith v. Williams-Ashe, 520 F.3d 596 (6<sup>th</sup> Circuit)(2008)
  - Adopts Dupuy rule – emphasis on whether the government had a legal right to require deprivation
  - Instead of complaining about the plan, parents should have explicitly revoked agreement

# 6<sup>th</sup> Circuit (Michigan)

- Davis v. Kentrick, 2015 U.S. Dist. Lexis 145315 (EDM)(2015).
  - Government's motion for summary judgment denied
  - Substantive due process (deliberate indifference)
    - Shock the conscience test
      - Voluntariness?
      - Was there time for the government to deliberate?
      - Was government actor pursuing a legitimate governmental purpose?
  - Key facts working against government position:
    - Social worker lied about purpose of meeting and status of mother's custody
    - Social workers coached child to justify intervention
    - Social workers used security guards to compel mother to leave without child

# 6<sup>th</sup> Circuit (Michigan)

- Davis v. Kentrick, 2015 U.S. Dist. Lexis 145315 (EDM)(2015).
  - Procedural due process
    - Mother denies agreeing to safety plan – not voluntary
  - Qualified Immunity
    - No immunity because a reasonable official should have known the deliberate and disturbing abuse of authority would violate the mother's due process rights.

# 9<sup>th</sup> Circuit (California)

- Sangraal v. San Francisco, 2013 U.S. Dist. LEXIS 87664 (2013).
  - Adopts Dupuy rationale – no requirement for deprivation hearing if voluntary and legal right for deprivation exists.
  - “One example of coercion is when a state agency lacks legal authority to remove the child but coerces parents into agreeing to a safety plan by threatening to remove the child anyway.”
  - Due process
    - If allegations true, there is strong evidence of reasonable cause of imminent harm and safety plan was narrowly tailored to prevent that harm
  - Qualified immunity
    - Any violation was not of a clearly established right at the time



# 9<sup>th</sup> Circuit (California)

- Shuey v. Ventura County, 2015 U.S. Dist. LEXIS 148993 (2015) (Order addressing motion to dismiss)
  - Fourth amendment applies to child welfare workers & interview with child at school is a seizure without a warrant
  - Substantive due process
    - interview does not shock the conscience, but physical exam without parents present may
    - Government's false statement that it will remove if safety plan is not signed (as opposed to mere possibility of removal) may violate due process
- Qualified Immunity
  - No immunity for falsely telling parent the government would remove if safety plan was not signed.

# Pennsylvania Approach

- Many federal lawsuits
- Allegations of coercion, deprivation of rights, fraud and lack of due process
- Decided on the need for a statewide approach
- ABA worked with state and county representatives and other TA providers to help come up with an approach that made sense for PA families and state.

## 3<sup>rd</sup> Circuit (Pennsylvania)

- Croft v. Westmoreland County, 103 F.3d 1123 (3<sup>rd</sup> Cir. 1997).
- Threatening to file a petition if father does not leave the house while investigating allegations of sexual abuse implicates procedural due process requirement
  - Absent sufficient justification, government intrusion is arbitrary
  - Relevant that allegation received from anonymous reporter and social worker did not have an opinion as to whether child was sexually abused.

## 3<sup>rd</sup> Circuit (Pennsylvania)

- Starkey v. York County, 2012 U.S. Dist. LEXIS 189055 (M.D. Penn.)(2012)
- Substantive due process -
  - “[m]ere negligence of a social worker is insufficient to constitute a violation of substantive due process rights.”
  - Parents have a right to remain free from objectively unreasonable child abuse investigations that interfere with custody & care of child
- Procedural due process - Court explicitly rejects notion that safety plan is voluntary when under threat of removal (“blatantly coercive”)
- Immunity – social workers entitled to qualified immunity for substantive due process claim because action was not an arbitrary abuse of power, but not for procedural due process claim

# 3<sup>rd</sup> Circuit (Pennsylvania)

- B.S. v. Somerset County, 704 F.3d 250 (2013).
- Procedural due process – county liable under Matthews v. Eldridge balancing test for not providing prompt post-deprivation hearing.
  - Private interest
  - Risk of erroneous deprivation using procedures offered by government
  - Government's interest
  - Fiscal and administrative burdens
- Immunity – individual social workers receive absolute immunity for substantive and procedural due process claims against them personally because they presented allegations to the court in ex parte hearing (analogous to prosecutor)

- The deprivation of a parent's custodial relationship with a child is among the most drastic actions *that a state can take* against an individual's liberty interest, with profound ramifications for the integrity of the family unit and for each member of it. From the parent's perspective, there may be little meaningful difference between instances in which *the state removes* a child and takes her into state custody and those in which *the state shifts custody* from one parent to another, as occurred here. In either case, *the government* has implicated a fundamental liberty interest of the parent who loses custody. *The state has caused a deprivation* and risks having done so wrongly. *See id.* (noting "the risk of an erroneous deprivation" must be considered). Therefore, assuming the "fiscal and administrative burdens," *id.*, of affording such parents a prompt post-removal hearing do not outweigh the need for one—and it is hard to imagine when they would—such a hearing ought to be held.

B.S. v. Somerset County, 704 F.3d 250, at 272.

Delays in holding post-deprivation hearings “should be measured in hours or days, not weeks” and it is “obvious that a hearing 40 days later is not sufficiently prompt.

## 3<sup>rd</sup> Circuit (Pennsylvania)

- D.M. v. County of Berks, 929 F.Supp. 2d 390 (2013)
- Substantive due process – claim may proceed because plaintiff’s facts show social workers knew or should have known risk was low
- Procedural due process – parents have a right to a prompt post-deprivation hearing after state requires removal of children.
- Immunity – absolute immunity not extended because actions were “investigative” and not “prosecutorial.”

## 3<sup>rd</sup> Circuit (Pennsylvania)

- R.B. v. Westmoreland County, 526 ed. Appx. 181 (2013)(unpublished)
- Substantive due process – plaintiffs failed to allege “conscience-shocking” behavior sufficient to support substantive due process claim
- Procedural due process – prompt post-deprivation hearing required even if “removal” is “voluntary.”



## 3<sup>rd</sup> Circuit (Pennsylvania)

- Weaver v. Marling, 2013 U.S. Dist. LEXIS 111518 (W.D. Penn.)(2013)
- Substantive due process – balancing test applied, but insufficient facts to dismiss complaint
- Procedural due process – separation of family members was without judicial approval or post-deprivation hearing
- Immunity –
  - Qualified immunity for substantive or procedural due process claim cannot be determined on facts
  - Cannot shift burden of proving facts for qualified immunity to plaintiffs

# 3<sup>rd</sup> Circuit (Pennsylvania)

- Isbell v. Bellino, 962 F.Supp. 2d 738 (2013).
- Procedural due process
  - “Notice of Rights” in family service plan did not apply and there was no notice of rights in any of the versions of the safety plan
  - Hearing held several months after father moved out of home, so no “different result,” but claim can proceed for nominal damages
  - Parents were not given any instruction about how to challenge or revoke safety plan

“This Court is not unsympathetic to the myriad challenges facing the nation's social workers daily, and we are in full agreement with the Defendants' contention that they are frequently required to make instant, difficult decisions, often under tense and stressful circumstances. We are likewise cognizant of the Hobson's choice forced on social workers in these situations, where the safety of a child or children must be balanced against the constitutional rights of parents. Our decision today does not, as Defendants apparently fear, tip the scales in favor of the parents over the safety of the child. Indeed, to be clear, we do not hold that any level of due process is required *prior* to the deprivation attendant to a safety plan; our holding, as it was in *Starkey*, is simply that once a safety plan is implemented, a parent is entitled to some level of procedural protection in order to challenge the alteration of their parental rights, and that such opportunities must be provided in a meaningful and timely manner after the deprivation. Because the undisputed facts before the Court establish that the Defendants entirely failed to offer *any* pre- or post-deprivation protections to the Plaintiffs in connection with the safety plan, it is appropriate to enter summary judgment in the Plaintiffs' favor on the procedural due process claims.”

Isbell v. Bellino, 962 F.Supp. 2d 738 (2013).

# 3<sup>rd</sup> Circuit - Immunity for Officials

- Absolute immunity applies when social worker is in a “prosecutorial” role (filing a petition or acting as guardian pursuant to a court order)
- Qualified immunity test:
  - Do the facts alleged show that a state actor violated a constitutional right?
  - Was the constitutional right clearly established so a reasonable person would know that the conduct was unlawful?

# Pennsylvania Approach –Safety Planning Must:

- 1) Be immediate so that it is can be in operation the same day it is created
- 2) Contain actions that are specific and measurable;
- 3) Be sufficient to manage safety
- 4) Used when there is present danger or impending danger of conditions that could reasonably result in the harsh and unacceptable pain and suffering for a vulnerable child.

# Pennsylvania Approach

- Two types of safety threats:
  - Present Danger
    - Immediate, significant, and clearly observable family condition (severe harm or threat of severe harm) occurring to a child in the present.
    - Easier to detect because it is transparent and is occurring now.
    - If present danger is observed, the child is not safe.
  - Impending Danger (covert)
    - Threatening conditions that are not immediately obvious or currently active but are out of control and likely to cause serious harm to a child in the near future.
    - Can be reasonably expected to result in serious harm if safety action(s) are not implemented and/or not sustained.
    - These threats may or may not be identified at the onset of CPS involvement, but are understood upon a more complete evaluation and understanding of the individual and family conditions and functioning.

# Pennsylvania Approach – Safety Threshold

- To reach safety threshold, condition or behavior must meet all of the following criteria:
  - Have a potential to cause **Serious** harm to a child
  - Be specific and **Observable**
  - Be **Out of Control**
  - Affect a **Vulnerable** child; and
  - Be **Imminent**

# Pennsylvania Approach – Safety Plan

Must be:

- Most appropriate and least restrictive means for controlling safety threats
  - *Developing a safety plan when no safety threat exists unnecessarily alters a parent's right to the care, custody, and control of his or her child*
- Voluntary in nature
- Revocable and reviewable



# Pennsylvania Approach – Potential Safety Actions

- Separation – *temporarily* taking any household member out of the home for a period of time
- Crisis Management – intervening to bring a halt to crisis, mobilize problem solving, and return family to a state of calm; will likely be used in conjunction with other safety actions
- Social Support – an action that reduces social isolation; may be applied alone or in combination with other actions.
- Resource Support – directed at a shortage of family resources, the absence of which directly threatens child safety

# Pennsylvania Approach - Duration

- Safety plan should not exceed 60 days in most cases
- After 60 days, a new assessment should be completed and safety plan will be revised if necessary
- Informal, out-of-home arrangements lasting beyond 60 days should only occur with exceptional circumstances

# Pennsylvania Approach – Due Process

- County must provide a post-deprivation hearing at agency within 72 hours when:
  - Any altering of parental capacity
  - Separation of parent from a child
    - Removal of parent
    - Removal of child
  - Interference with custody
  - Interference with decision making authority
  - Interference with parental visitation, such as limiting unsupervised contact with a child
- County largely determines its own review process under State parameters

# Pennsylvania Approach: Scope of Review

- Were parents given notice of rights to amend, alter, or revoke agreement or request a review?
- Was there informed consent?
  - Parents understand rights and ramifications?
  - Signature was voluntary?
- Is the proposed deprivation reasonable and proportionate to the alleged safety threat?
- Is deprivation limited and only in place for a set amount of time?
- Are modifications necessary to which all parties will agree?

# Pennsylvania Approach – Potential Outcomes

- 1) Accepted “as is” - determination that the Safety Plan is reasonable and all parties agreed knowingly & voluntarily
- 2) Modified by party or reviewer and all agree
- 3) Review continued to agreed upon date to get more information – must still be timely.
- 4) No safety plan because no agreement between parties. County has responsibility to determine whether petition is warranted

# Thank you

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For more information contact:

Anne Marie Lancour, JD, MAT

ABA Center on Children and the Law

[Annemarie.Lancour@americanbar.org](mailto:Annemarie.Lancour@americanbar.org)

202-662-1756