

MEMORANDUM

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

TO: All CPS Personnel

FROM: Carey Cockerell, Commissioner and
Joyce James, Assistant Commissioner, CPS
through Gerry Williams, General Counsel

SUBJECT: URGENT LEGAL ADVISORY FOR
INVESTIGATIONS

DATE: August 22, 2008



On July 28, 2008, a federal appeals court with authority over Texas handed down a decision in a case that will be referred to as "the *Gates* case."¹ The decision is binding on Texas and because it involves federal constitutional rights, supersedes anything to the contrary in Texas law, or DFPS policy or practice.

I. INTRODUCTION

The *Gates* case is significant for two key reasons. First, it sets out a new standard that will require DFPS to obtain a court order prior to removal in a much larger proportion of our cases and affects whether we can transport or enter a home. Second, it is significant because it clarifies that if the standard is not followed, staff could be sued as individuals and lose qualified immunity, *i.e.*, be responsible for monetary damages. Staff will still be represented by the Attorney General. However, it is our intention to revise our policies and practices so that you will stay protected and avoid needing representation in the first place, and you will not lose qualified immunity.

This advisory is the preliminary step in making the changes required by the decision, and is effective immediately. This advisory should guide your day-to-day practices. In the meantime, State Office, along with regional leadership, will work as quickly as possible to revise training and policies and work with the many stakeholders who are also affected by the decision. Because this advisory supersedes some of our policies and practices, you **must read it in its entirety**; it addresses key areas related to removal of children from their homes, transporting children from their school, and workers entering and remaining in a family's home.

We understand that the changes discussed in this advisory are substantial, but remember that all the tools available to us are the same; we will just be using them in a different

¹ The decision is available for everyone to read at
<http://www.ca5.uscourts.gov/opinions/pub/06/06-20763-CV0.wpd.pdf>.

manner. This agency, and you, the people who do the work necessary to protect Texas children, are no strangers to challenges and difficult decisions. Although the adjustments will be difficult, we believe that as an agency we are capable of adapting our practices to continue to protect children from abuse and neglect.

II. REMOVAL OF A CHILD

A. SUMMARY

When CPS investigates a family, there are many options available: establishing that the children are safe, removing the alleged perpetrator, making voluntary placements, removing the children, and so on. This remains unchanged. If CPS determines that removal of the children is appropriate, we continue to have three options: 1) emergency removal prior to obtaining a court order (exigent circumstances), 2) removal pursuant to a court order, or 3) consent to the removal (voluntary placements). What must change is our practice for these cases because the *Gates* case sets out a significantly higher threshold for emergency removals prior to obtaining a court order.

Current Practice: In the majority of cases, DFPS removes based on immediate danger to the physical health or safety of the child or prior sexual abuse of the child, and then goes to court the next business day to file for an ex parte order for the removal of the child.

New Practice: We obtain consent or file for a court order prior to removal of the child unless life or limb is in immediate jeopardy or sexual abuse is about to occur.

B. OPTIONS FOR REMOVAL OF CHILDREN (Exigent Circumstances, Court Orders or Consent)

1. Emergency Removal Prior to Obtaining a Court Order (Exigent Circumstances)

The *Gates* ruling confirms that in order to do a removal without a court order, DFPS must either have consent or "exigent circumstances," which is consistent with current policy and practice. However, the threshold that the opinion set for "exigent circumstances" is higher than the one currently utilized in CPS investigations.

Definition

Exigent circumstance: based on the totality of the circumstances, there is *reasonable cause* to believe that the child is in *imminent danger of physical or sexual abuse if he remains in his home*

Imminent Danger: life or limb is in immediate jeopardy or that sexual abuse is about to occur.

As the court described it, we can only perform such removals if we have "exigent circumstances" defined as follows: "based on the totality of the circumstances, there is *reasonable cause* to believe that the child is in *imminent danger of physical or sexual*

abuse if he remains in his home." (Emphasis added). According to this definition and the other portions of the case, we can do emergency removals without a court order only if the danger is truly imminent or immediate and only if it is tied to physical or sexual abuse. To believe that a child is in imminent danger, we must have reason to believe that life or limb is in immediate jeopardy or that sexual abuse is about to occur.

NOTE: For a discussion of neglect, see "The nature of the abuse" below.

The court in the *Gates* case listed several factors that may be considered in deciding whether the child is in imminent danger. These factors must be weighed for *each child* you are considering removing, *i.e.*, it is not enough that there are allegations related to one child in the home. If you do not have a court order and you are removing an additional child or children there must be information to support the other removals, or you must seek an order from the court to remove the additional child or children prior to actually removing them. The factors considered, and the weight you give them, may vary for each child depending on the circumstances of each child's case. The factors to consider include:

- **Whether there is time to obtain a court order**
This does not mean that if the courthouse is closed you automatically do an emergency removal without an order, or that if the courthouse is open you cannot do an emergency removal without an order. It means that, weighing everything you know at the moment you are considering the removal, would the time it takes to obtain a court order place the child in imminent danger of physical or sexual abuse? If the answer to the question is yes, then an emergency removal without an order would be appropriate. If the answer to the question is no, then an emergency removal without a court order would not be appropriate unless other factors and circumstances support it.

Questions to ask yourself before removing a child WITHOUT a court order:

- **Is the child in danger of being harmed while you are getting a court order?**
- **How immediate is the danger to the child?**
- **What does the severity, duration and frequency of the abuse appear to be?**
- **How strong is the evidence supporting the allegations of abuse?**
- **How likely is the parent to flee with the child?**
- **Is there another way to ensure the safety of the child short of a removal?**
- **How traumatic will the removal be to the child?**

You should consider how much time would elapse if you waited to obtain an order. So, for example, in a close case there may be more exigency on a Friday evening (where at least two days will elapse before you can seek an ex parte order) than there would be on a weekday at 3 a.m. (where you can obtain an order in a matter of hours). However, you must take the facts as you find them; it would never be appropriate to delay action to make the situation seem more exigent.

- **The nature of the abuse (its severity, duration, and frequency)**

The key question for this factor is the immediacy of the danger. A neglect case will rarely support an *emergency* removal without a court order. On the other hand, neglectful behavior may result in imminent danger and would support an emergency removal, e.g., an infant at home alone, a case of medical neglect that has become urgent, or a toddler found wandering in the street. In a physical or sexual abuse case, an emergency removal will be appropriate only where the information that you have supports the conclusion that the risk of further abuse is immediate. Information that may tend to support an emergency removal includes evidence of one or more of the following:

- the severity of the abuse;
- how recently the abuse occurred;
- whether the abuse has been committed against multiple children;
- whether there is a pattern of abuse or that this is an isolated incident; or
- whether there is a condition that requires immediate medical attention.

NOTES:

- The fact that there is CPS history on the family is not enough to constitute an emergency. You must have information that suggests that the child in question is in danger of harm *now*.
- Although you should have evidence to support the removal of each child, remember that evidence of abuse to multiple children demonstrates a pattern of abuse; the more widespread the abuse seems to be, the more support there is for the idea that all of the children are in danger. In the *Gates* case, because there was evidence about possible abuse to five of the thirteen children, that was corroborated by multiple children, the court held that the removal of ALL the children was not improper.
- Increased severity means increased danger. In the case of a child death caused by abuse, the danger to other children immediately following the abuse is extreme and would support the removal of other children. Similarly, serious physical injuries caused by abuse are more likely to support the removal of other children in the home unless, for example, weeks or months have elapsed prior to the "emergency" removal.
- **The strength of the evidence supporting the allegations of abuse**
The key question for this factor is whether the allegations have been corroborated. In all likelihood, some of the information you gather on a report will tend to support the allegations and some will tend to contradict it. As with other work in investigations, you must weigh the strength of the evidence you gather to determine whether the allegations seem reliable. If the allegations in the report are supported by your visual observation of the child(ren) and the premises, and/or by interviews with collaterals or other children in the home, this tends to support an emergency removal (assuming there is also imminent danger to the child). On the other hand, if your observations and interviews do not line up with the allegations in the report then this would weigh against an emergency removal, although a removal without a court order may still be appropriate if the information provided in the interviews is clearly implausible (e.g. child got compound fracture in leg after falling off sofa on to a carpeted floor) or you have other pieces of corroborating evidence that support the allegations.

- **The risk that the parent will flee with the child**
It is not enough to have a suspicion the parent might flee with the child. There should be some objective indication that the parent may do so, e.g., a threat to that effect, prior CPS history where the parent actually did flee, a parent who is only visiting Texas versus a parent who lives in Texas, etc.
- **The possibility of less extreme solutions to the problem**
This factor is consistent with our current practice of making reasonable efforts to prevent removal. For example, we should consider a voluntary placement or a safety plan that will enable the child to remain in the home while still protecting him or her. Ensure such efforts are made and documented in your case narratives.
- **Any harm to the child that might result from the removal**
This inquiry should be guided by social work best practices. Some characteristics that make a child vulnerable to abuse (age, ability to verbalize, special needs, etc.) may also make a removal more traumatic.

2. Removal pursuant to a court order

Because it is very likely that DFPS practice will change and we will be conducting more removals pursuant to a court order, keep in mind that the following guidelines apply:

- **A court order must be proper.** If you do not have exigent circumstances or consent and are going to rely on an order for an emergency removal, it must be **written, and not verbal**. Although judges may have varying practices, and some issue verbal orders when we have exigent circumstances, it is important to your protection that you not rely on any type of verbal order for a removal where we do not have exigent circumstances or consent.
- **Emergency hearings will follow the same procedures they do now.** If it is 2 a.m. and you want to remove but do not think you have exigent circumstances, then you can do a voluntary placement or remove the alleged perpetrator but you do not remove. This decision does not mean that hearings are going to start being held at all hours of the night. It means that if we do not have the type of exceptional circumstances needed for an emergency removal, then we wait until court opens the following workday.
- **A court order is not the same thing as exigent circumstances.** Although the threshold for an emergency removal prior to a court order has been raised significantly for CPS practice, that does not mean that the courts' standards have changed. The standard for an emergency removal order still permits a judge to order a removal not only for children who are in immediate danger but also children who have been victims of neglect or sexual abuse and continuation in the home is contrary to the child's welfare. Moreover, the judge is specifically authorized to consider prior sexual abuse or other serious abuse or neglect in making the decision.
- **Practices with respect to court orders will change.** We understand that it may not be possible to obtain emergency removal orders for all of the removals we currently perform. We understand that we may have to make increasing use of

non-emergency removal orders and will be working with all our stakeholders to effectuate any necessary changes.

3. Consent to Removal

Parents can always agree to having their children removed from their care by authorizing a voluntary placement of the children.

C. CASE EXAMPLES

NOTE: As you know from your experience in CPS, it is impossible to take into account all of the many factual variations a given investigation will present. These examples, and the examples given elsewhere in this advisory, are meant to serve as illustrations of possible outcomes but should not be read as absolutes or relied on too literally. In other words, if there are exigent circumstances in one of the examples because of a recently broken arm, you should not rely on that literally and remove any time you find a broken arm.

- We receive a report about physical abuse of a child from a neighbor who states he heard screaming coming from the potential victim's house. You go to the home within a few hours of the report, receive consent to interview everyone in the home, and determine there is only one child in the home, who appears to be fairly badly beaten (bruises, swollen eye, a welt on the arm). The father tells you the child tripped on a toy but this seems inconsistent with the extent of the injuries that are visible. Can you remove?
 - Yes. The child is in imminent danger of physical abuse. The report indicates that the abuse is very recent and your observations back this up. There is nothing to indicate that the abusive episode has ended, that it is an isolated instance, or that the child will be safe in the time it would take you to file for an emergency removal order prior to carrying out the removal. The best way to assure the child's safety in this instance is to remove him and file for a court order following the removal.
- We receive an intake about physical abuse to a child in a home with four other children. You are sent to the home and the parents consent to the interview of all five children. The child who is the subject of the report has visible bruises, which is consistent with the intake. The other four children confirm that their father routinely punishes and beats the child in the report but they state they have not been harmed. Who do you remove, if anyone?
 - Only the child for whom you have evidence of abuse and imminent danger of further abuse. For the other four children you will need to either seek an emergency or non-emergency order to remove prior to removing.
- A mother who has been RTB'ed for abuse for failure to protect two of her children who have died is nine months pregnant. In the past, after the mother gave birth, we would have immediately removed the baby without a court order. Can we still do that?

- No. You can still do a removal, but you should get a court order prior to the removal. Assuming mother gives birth in the hospital, there will be time to obtain a court order in all but the most unusual of circumstances. Unusual circumstances may include removing a child on a Friday evening if you know the baby will be released from the hospital over the weekend and the mother is a flight risk or there is other immediate danger to the child (e.g. the other two deaths involved newborn infants, the parent she failed to protect the babies from is still in the home, the mother is incapacitated from drugs or mental disturbance and is clearly unable to care for the baby, etc.).
- We receive a report of SXAB of a sixteen-year-old girl. The outcry of abuse in the intake is confirmed by the sixteen-year-old in an interview that takes place in the home. She says that Daddy has been inappropriately touching her for a couple of years and as far as she knows she is the only one he touches. There is also a fifteen-year-old girl in the home, as well as two younger siblings. Do you have enough to remove the other children?
 - You do not have any information that the younger siblings are in imminent danger of sexual abuse so they should fairly clearly not be removed without a court order. The fifteen-year-old girl is a MUCH closer call but on the facts presented there appears to be no suggestion that the father is perpetrating the abuse against anyone other than the sixteen-year-old. Although it is also true the father is eventually likely to perpetrate the abuse against the fifteen-year-old, you should ordinarily have enough time to seek a court order for removal before she is in imminent danger of such abuse.
- SWI receives a report of RAPR for a sixteen-year-old male whose parents will not come to pick him up from a private psychiatric hospital. Can we pick him up without a court order?
 - The best practice would be to obtain a court order prior to the removal, but there may be rare situations that constitute exigent circumstances.

III. TRANSPORTING A CHILD FROM SCHOOL

A. SUMMARY

Just as was the case with removals, the options available to CPS in the context of transporting a child from school are the same as they have always been but our practices must be modified. Transporting a child should already be reserved for the most severe cases we see. If you and your supervisor determine transport is appropriate, the same options are available now: 1) obtain consent 2) obtain a court order or 3) rely on what used to be referred to as "exigent circumstances" but has been explained by the *Gates* court as "*a reasonable belief that the child has been abused and probably will suffer further abuse upon his return home at the end of the school day.*"

Current Practice: We attempt to avoid multiple interviews whenever a CAC interview is planned. For example, if a child makes a clear outcry of abuse to a

teacher it is not necessary for CPS to determine specific details of the abuse before taking the child to a CAC without a court order. In addition, we transport over parental objection only if “*exigent circumstances*” are present or we obtain a court order.

New Practice: We still attempt to avoid multiple interviews when a CAC interview is planned, but it is now necessary for CPS to independently corroborate the allegations prior to transport without a court order in aid of investigation. In addition, we transport pursuant to parental consent, a court order, or a “*reasonable belief* that the child has been abused and probably will suffer further abuse upon his return home at the end of the school day.”

B. OPTIONS FOR TRANSPORT

1. Reasonable Belief The court set out this new standard based on the fact that the child was in a public school instead of at home, and explained that is a lower standard than “*exigent circumstances*.” The key points for this standard are as follows:

- The child need not be in imminent danger of abuse but it must appear probable that abuse will happen again *soon, i.e.,* that evening. However, keep in mind that because this is a lower standard than *exigent circumstances*, so anything that constitutes *exigent circumstances* is also sufficient to support the transport.
- The allegations in the report must be independently corroborated *before* a child is transported. A report of abuse in and of itself will rarely be sufficiently reliable to base your decision to transport on, because there may be another explanation for an injury, the report could have been inaccurate, etc. Prior to transport by any DFPS employee, the employee must have either obtained first-hand information or received information that makes it reasonable to believe the child has been abused and probably will be abused again upon his return home. Examples of corroborating information include:
 - A preliminary interview of the child’s teachers;
 - A preliminary interview of the child’s peers;
 - A visual inspection of any injuries that can be seen *without* removal of the child’s clothing (provided you obtain other corroborating information and rule out another explanation for the injury); or

You must answer “YES” to one of the questions below **BEFORE** you transport a child from school

1. **Do you have a court order?**
2. **Do you have consent?**
3. **Do you have a “reasonable belief” that has been corroborated that the child has been abused and will suffer further abuse when they get home from school?**

- If necessary, a preliminary interview of the child—*e.g.* if the allegation is physical abuse and the child has bruises, you ask her where the bruises came from *prior to* transport.

NOTE: Any one of these actions, standing alone, may not be sufficient to corroborate the report. In the *Gates* case, the caseworkers observed one child who had a baggie full of food wrappers pinned to his shirt and two small marks on his hand and face, and a second child who had a bruise on her face, all of which was consistent with the intake. The court held that this information was still insufficient to transport because there was only information supporting emotional abuse to the first child; there was nothing to suggest that the child would be physically abused upon his return home; and the caseworkers did not ask the second child where her bruise came from.

- A fear that a child will recant once he goes home is not enough to meet the requirements of “reasonable belief.” However, if the situation warrants it, you should seek a court order in aid of investigation to transport and interview the child that day.

2. Consent

In this context, as others, “consent” means an affirmative expression that the parent or other person with legal responsibility over the child agrees that we may transport the child. It is not sufficient merely to follow the procedures outlined for notifying a parent that the child is being transported. *See Handbook section 2247.* The parent must affirmatively express agreement with the decision to transport. By the same token, even if a child is transported pursuant to other authority, *e.g.* reasonable belief as described above, we must still notify the parents of the transport so that they know the child’s whereabouts.

3. Court Order

In cases where you don’t think you have a “reasonable belief” as defined above, but you feel it is important to transport the child that day, you may obtain a court order in aid of investigation to transport the child, where the standard is “good cause shown” instead of the higher “reasonable belief” standard.

C. CASE EXAMPLES

- A school employee makes a report that a girl stated, “Daddy touched me down there.” You are dispatched to the school on a PI and speak to the reporter who confirms that the child made the statement but she made it last week. You ask to speak to the child alone to clarify what “down there” means, and the child states that she did not make such a statement.
 - Unless you obtain additional evidence, you should not transport the child for an interview without parental consent or a court order in aid of

investigation because you do not have any evidence that the child has actually been abused or that she may suffer further abuse later that day.

- A school employee makes a report that a girl stated, "Daddy touched me in my private parts last night." You are dispatched to the school on a P1 and speak to the reporter who confirms that the child made the statement earlier that morning.
 - Unless there is additional evidence to the contrary, you may transport the child. The outcry was corroborated by the teacher. You cannot ascertain more information without conducting a full interview, which would not be appropriate in this instance because it should be conducted at the CAC.

IV. ENTERING AND REMAINING IN A HOME

A. SUMMARY

As with removals, in order to gain entry into a home for the purpose of a CPS investigation, we must have one of the following: 1) exigent circumstances, 2) consent, or 3) a court order, but the *Gates* ruling provided additional explanation concerning exigent circumstances and consent that will affect our practices.

NOTE: even if we do have exigent circumstances to enter a home, it may be more appropriate for safety reasons to call law enforcement to gain entry.

Current Practice: CPS enters a family's home only if we have exigent circumstances, consent, or a court order. CPS does not always ensure consent is specific to our investigators. A court order in aid of investigation is rarely utilized.

New Practice: As with removals, exigent circumstances are present only where there is immediate danger to a child in the home, *i.e.* life or limb is in immediate jeopardy. Consent must be clear, unequivocal, voluntary and given specifically to CPS, as opposed to law enforcement. We will likely increase the use of court orders in aid of investigation.

You must answer "YES" to one of the questions below BEFORE you enter a home for the purposes of investigation

1. Do you have a court order?
2. Do you have consent?
3. Based on the totality of the circumstances, is there *reasonable cause* to believe that the child is in *imminent danger of physical or sexual abuse if he remains in his home?*

B. OPTIONS

1. Exigent Circumstances

In this context, exigent circumstances are present only where CPS has evidence that there is immediate danger to a child or children in the home and the purpose of CPS' entry in the home is to prevent immediate danger.

- Examples of exigent circumstances include: entry into a home to render emergency assistance to an injured occupant or to protect an occupant from imminent injury; a child needing emergency medical care or a small child left unattended for an extended time; life or limb being in immediate jeopardy and the intrusion being reasonably necessary to alleviate the threat;
- Entering the home solely for the purpose of interviews does not constitute exigent circumstances; and
- "Immediate danger" means immediate in the most literal sense of the word. If the alleged perpetrator is not home, we should have information that the alleged perpetrator will be home soon and is likely to harm the child at that time.

2. Consent

The *Gates* case serves as an important reminder about the need for consent to enter a home for the purposes of conducting a CPS investigation. Key points are:

- **Consent must be affirmative.** It is not enough that a person does not say no. Consent for CPS to enter a home must be voluntarily given and unequivocal (clear). You should identify yourself as a CPS investigator and explicitly request and receive permission to enter the home. The best practice is to ensure that the person states you may enter (rather than simply getting a nod or other non-verbal gesture). In any case you must document the basis for consent in your narrative.
- **Consent should be from someone with authority to give it.** A parent has the authority to consent to or deny entry to the home. It is also reasonable to assume that if the parents have left one or more children in the care of an adult caretaker, that caretaker has the authority to consent to allow the caseworker to enter the home and interview the child in private, although a caretaker probably does not have the authority to permit a search of the entire house. If an adult is not home, the caseworker should rely on the consent of a child in the home only if the child appears old enough to effectively give consent. Teenagers will likely be old enough; children 12 or younger probably will not.
- **Consent can be withdrawn at any time.** Anyone with authority to give consent can also withdraw it at any time. The decision of a parent or other individual living in the home is the final word. So, if entry is gained after a housekeeper who does not live in the home gives consent, a parent or other individual living in the home could at any point instruct CPS to leave and we would be obligated to do so.
- **Consent must be given to CPS.** We routinely conduct joint investigations with law enforcement, but it is important to remember that our activities are separate.

If law enforcement gains entry to a home, we must still request permission for CPS to enter. Moreover, if law enforcement determines consent is not necessary to their investigation, this determination does not apply to us. We must independently determine whether there are exigent circumstance or whether we have been given consent to enter.

3. Court Order

This is an aspect of our practice that is likely to be increasingly utilized. Keep in mind that the standard for a court to issue an order in aid of investigation to interview the child is "good cause shown," so this standard involves a lower threshold than that necessary for "exigent circumstances."

C. CASE EXAMPLES

- You are called to a home on a PI report of physical abuse. You arrive at the home and the parents are not home. An adult, who appears to be the housekeeper, answers the door. You ask for permission to come in and speak to the children in the home. She says, "sure, come on in." You begin interviewing the children who all tell you that they are afraid of their father's discipline methods. At that time the father comes home and tells you to get out of his house. Can you stay?
 - No, because the father revoked the housekeeper's consent and you do not have exigent circumstances.
- We sometimes accompany law enforcement on drug busts where they suspect children are in the home. Is this enough to constitute exigent circumstances?
 - Not without additional information. Law enforcement's suspicion that children are in a home where parents will be arrested, in and of itself, is not sufficient to constitute exigent circumstances, even if law enforcement thinks it does. If you get to the home and determine that there are children in the home who will have no one to care for them because the parents have been arrested, then in most cases the children can be said to be in "immediate danger" and you should take them into possession.

V. CONCLUSION

We know you will have many questions about this advisory and encourage you to work with your regional chain-of-command as well as your regional attorney as our revised policy and practices take shape. We will be working as quickly as possible on those, along with plans for regional and state office staff to meet with judges, district and county attorneys, child advocacy centers, and other key stakeholders.

As you can imagine, the changes required by the *Gates* decision will take some time to put into place. In the meantime you should rely on this Advisory and know that if followed, you will be protected. The decision will require us to make some extremely difficult decisions, but we know you are up to the challenge because these are the kinds of decisions you already make every day. It will not be easy but we can and will adapt so that we may continue to carry out our mission of protecting the most vulnerable Texans.