Contents

SECTION 2 BEFORE FILING SUIT

November 2013

ALTERNATIVES TO REMOVAL

If a child the subject of a CPS investigation can remain safely in his or her own home or stay with a friend or relative temporarily, that is always a better solution than a removal. CPS is charged with making reasonable efforts consistent with child safety, to prevent or eliminate the need for removal[1] and, at the adversary hearing, to show reasonable efforts were made to enable the child to return home. The reasonable efforts requirement is subject to waiver by the court if there is an aggravated circumstances finding. In the absence of a waiver, failure to show that reasonable efforts consistent with the circumstances and the child's safety were made to prevent the removal or return the child to the home may be grounds for challenging a temporary order for removal[2]

Alternatives to removal run the gamut from informal arrangements with the child remaining in the home, to agreements for the child to live temporarily outside the home, and court interventions that impose safety conditions. While child safety and other factors determine the viability of these options, each alternative is a vital tool that can greatly enhance a child's well-being. With a good working knowledge of these alternatives, an attorney can best support CPS' effort to maximize the opportunity for every child to avoid foster care without jeopardizing child safety and comply with the reasonable efforts requirement.

AUTHORITY

TEXAS FAMILY CODE, CHAPTER 34;
TEXAS FAMILY CODE, TITLE 4: Protective Orders and Family Violence;
TEXAS FAMILY CODE, TITLE 5, Subtitle E, Chapters 261 - 264;
40 TEXAS ADMINISTRATIVE CODE §§700.701 - .706.

COURT ORDER IN AID OF INVESTIGATION

If a person interferes with an investigation of a family or CPS has reason to anticipate interference during an investigation, the agency can seek a court order to compel cooperation with specific components of the investigation.[3] Court intervention is specifically authorized, upon a showing of good cause, to:

- Gain access to a home, school or any place where a child may be;[4] or

[1] TEX. FAM. CODE §§262,102 262.107(1)(3); 262.205(b).
[2] *In re Pate*,No. 14-13-00452-CV, 2013 WL 3694383 (Tex. App—Houston [14th Cist.] July 15, 2013 orig. proceeding) (although previous termination of another child is considered an aggravating circumstance, previous temporary removal is not sufficient to waive the requirement to make reasonable effort to enable the child to return home).
[3] CPS HB 2413,.
[4] TEX. FAM. CODE §261.303(b).

- Obtain a medical, psychological or psychiatric exam (or to obtain the records of such an exam). [5]

If a parent refuses to consent to the caseworker's entry into the home or to allow an interview or examination of a child, a Court Order to Aid Investigation is one option to pursue. Interference with an investigation can result in a criminal penalty.[6]

TIP: Court Order in Aid of Investigation

The caseworker's affidavit in support of a request for a Court Order In Aid of Investigation should detail the allegations of abuse or neglect, the evidence found to date, and the specific impediments to accessing the evidence in question. The affidavit must never name the reporter, but should include an indication of whether the reporter is a professional or private individual, the basis of the reporter's allegations, and whether the investigator has confirmed the reporter's identity and obtained any other information from the reporter or others corroborating the allegations. The caseworker's statement should be thorough, objective, and as specific as possible. If the caseworker has obtained evidence or information that casts serious doubt on the credibility of the report, the caseworker should include this information in the affidavit, with an explanation of why, nonetheless, the caseworker believes there is good cause for issuance of the court order.

If there is reason to believe that a parent or other caretaker may remove a child from the state (or another geographic limit imposed by the court) or may secrete a child, the court can render a temporary restraining order if it finds DFPS has probable cause to conduct the investigation and there is reason to believe that the person may remove or secrete the child.[7]

SAFETY PLANS

A safety plan is a written agreement between CPS and the family which serves as a short term solution to address specific concerns about child safety in a home. A safety plan is a voluntary agreement and is *not* legally binding. Consequently, a safety plan is only appropriate for a limited time.[8]

Safety plans commonly include voluntary agreements to:

- Place a child outside the home;
- Suspend or restrict visitation; and/or
- Submit to drug testing.

[5] See Practice Guide, SECTION 13 TOOLS, Affidavits, Order in Aid of Investigation and for a discussion of the Constitutional issues related to CPS investigations, SECTION 1 BEFORE FILING SUIT, The Fourth Amendment & CPS Practice.
[6] TEX. FAM. CODE §§ 261.302(f); 261.3032.
[7] TEX. FAM. CODE §261.306.
[8] CPS HB2420..

A safety plan cannot contradict existing court orders, but can require a parent to voluntarily forgo or limit visitation rights for a specified time while the safety of the child is assessed.

EXAMPLE:
A divorce decree grants a father the right to visitation with his minor daughter. CPS cannot compel the mother to interfere with those rights (by, for example, only allowing supervised visits), because the mother could be held in contempt for violating the terms of the decree. However, if an allegation of sexual abuse against the father is pending, a condition of the safety plan could be for the father to agree to forego his rights to unsupervised visits until the investigation is complete.

Violation of Safety Plan

Although terms of a safety plan are not legally enforceable, failure to comply with a safety plan can be valuable evidence at various stages of a case. Consider:

- Violation of a safety plan is not a basis for removal, but it may contribute to show an immediate danger to the physical health or safety of a child to support a removal; and
- Failure of a parent to follow a safety plan may be relevant in a termination case.[9]

Parental Child Safety Placement (PCSP)

A Parental Child Safety Placement is a temporary out-of-home placement made by a parent (or other person a child lives with) with a caregiver who is either related to the child or has a long-standing and significant relationship with the child or family.[10]

DFPS' written evaluation of a potential PCSP caregiver must include:

- A completed criminal background check, as well as an abuse and neglect history, of the proposed caregivers; and
- An assessment of the caregiver's home environment and ability to care for the child. [11]

If DFPS decides placement with a proposed caregiver is not in the child's best interest, both the parent and the proposed caregiver must be notified of the reasons for this decision, but the specifics of any criminal or abuse and neglect history cannot be disclosed without the caregiver's agreement.[12]

[9] *In re K.C.B.*, 280 S.W.3d 888(Tex. App. —Amarillo 2009, pet.denied) (evidence that parent violated safety plan almost daily construed as endangering conduct); *In the Interest of J.M.*, No. 2-08-259-CV., 2009 WL 112679 (Tex. App.—Fort Worth, Jan. 15, 2009, no pet.)(mem.op)(mother's willful violation of safety plan lead to removal of child and supports finding that termination of parental rights is in the child's best interest).
[10] TEX. FAM. CODE §264.901 et seq.
[11] TEX. FAM. CODE §264.903.
[12] TEX. FAM. CODE §264.903 (c)

A PCSP placement must be supported by a written agreement that specifies:

- Respective duties of placing person and caregiver, including a plan for medical care and school enrollment;
- Any conditions that apply to visitation with child and frequency of visitation;
- DFPS' duties;
- A termination date;
- Other terms necessary for safety and welfare of the child;
- That signing a PCSP is not an admission of child abuse or neglect and cannot be used as such.[13]

If a PCSP is in effect, DFPS must take specific steps before closing a case depending on whether the child could safely return to the parent (or other person who made the placement).[14] If the child could return safely to the parent or other person, but that person agrees in writing to let the child remain with the PCSP caretaker, DFPS can close the case.

If the child cannot return safely to the parent or other person, DFPS must decide whether the child can remain safely in the caregiver's home or whether DFPS conservatorship is necessary. In most cases if a child will remain in a PCSP following case closure, DFPS must:

- Document its determination that the child can remain safely with the PCSP caregiver without DFPS supervision;
- Obtain written agreement of the parent or other person who made the PCSP if possible;
- Obtain the caregiver's written agreement to continue caring for the child; and
- Develop a written plan for the child's care after the case is closed.

The one exception to this requirement is if a court has denied DFPS' petition to be named conservator of the child.[15]

DFPS retains the same right to remove a child from the person placing a child in a PCSP or from a caregiver as always under CHAPTER 262, TEX. FAM. CODE. If removal becomes necessary, any safe and available caregiver with a PCSP in effect will have priority for placement.[16]

Authorization Agreements

One available tool a parent can use in conjunction with a Parental Child Safety Placement (PCSP) is an authorization agreement.[17] By signing an authorization agreement a parent can give a relative or other PCSP caretaker with whom a child is placed authority to take action ranging from medical consent, school enrollment, consent for participation in school and sport events, applying for public benefits, and related authority.[18]

---

[13] TEX. FAM. CODE §264.902.
[14] TEX. FAM. CODE §264.904.
[15] TEX. FAM. CODE §264.904(e).
[16] TEX. FAM. CODE §§264.905,.906.
[17] TEX. FAM. CODE §34.0021.
[18] TEX. FAM. CODE §34.021.

For non-CPS cases, an authorization agreement is limited to a grandparent, adult sibling or adult aunt or uncle of the child.[19] However, a parent may enter into an agreement with any person a child is placed with under a PCSP agreement approved by DFPS. Though there must be an active PCSP placement at the time the agreement is entered into with a person who is not a grandparent, adult sibling, or adult aunt or uncle of the child, the authorization agreement itself may continue after CPS closes its case, and is terminated in the same manner as any other authorization agreement under Chapter 34 of the Family Code.[20]

Note that an authorization agreement does not confer custody of the child, and does not prevent a parent from removing the child from a PCSP caregiver at any time.[21] If a parent removes the child from a PCSP caregiver while CPS still has an open case, CPS staff can take any measures necessary for child safety. However, when a child remains with a PCSP caregiver after CPS closes its case, with or without benefit of an authorization agreement, CPS will have no means to protect the child from a dangerous parent who removes the child from the PCSP caregiver unless CPS receives a new report of suspected abuse or neglect. For this reason, in addition to the statutory provisions that restrict a PCSP placement after the CPS case has closed, CPS has adopted stringent policy criteria for closing a CPS case when a child remains with a PCSP caregiver.[22]

DFPS created the form for authorization agreements as directed by the Legislature, and a copy of this form is available on both the DFPS and TEA public websites, but agency staff are not authorized to give legal advice to families seeking to enter into such an agreement. [23]

FAMILY-BASED SAFETY SERVICES

Family-Based Safety Services (FBSS) are protective services provided to a family whose children are not in the managing conservatorship of DFPS to prevent the need to remove a child from the home. There are three levels of services —regular, moderate, and intensive— which correspond to the degree of risk to the child.[24] These protective services are often offered in conjunction with a safety plan.

COURT ORDER FOR PARTICIPATION IN SERVICES

If a family has refused services or is not cooperating with services, or the weight of the court's authority is desired to bolster a family's chance for success, court ordered services can be an

[19] TEX. FAMILY CODE §34.001(1).
[20] TEX. FAM. CODE §§34.001(2); 34.0021.
[21] TEX. FAM. CODE §34.007(b).
[22] CPS HB 2437.3-2437.32.
[23] DFPS Form 2638 (Intake/Investigation Forms).
[24] 40 TAC §700.702.

effective solution.[25] The court may order a parent to participate in services that DFPS provides or purchases to alleviate the effects of abuse or neglect or to reduce the reasonable likelihood of abuse or neglect in the immediate or foreseeable future. The caseworker must be able to set out the facts that meet this standard.[26] If the court denies a request to order participation, the court must specify its reasons in writing. A parent's failure to comply with court-ordered services is relevant evidence at trial.[27]

PROTECTIVE ORDERS

If family violence is an issue in a household, a protective order may be an appropriate method to protect the victim. Family violence includes acts intended to result in physical harm, bodily injury, assault, sexual assault or threats that reasonably cause fear of imminent physical harm, bodily injury, assault, or sexual assault.[28] A protective order can address many of the most common issues that lead to removal of a child from the home.

What can be included in a protective order?

If a court finds family violence has occurred and is likely to occur in the future, there are many possible restrictions a court can impose against the perpetrator.[29] The most common sanctions in a DFPS case would prohibit a person from:

- Committing family violence;
- Threatening or harassing a person;
- Going to or near a person's home, business, school, or child-care facility; or
- Possessing a firearm.[30]

The court can also order a perpetrator to complete a batterer's intervention and prevention program.

Who can request a protective order?

DFPS, any prosecutor who represents the state in a county where the venue for a protective order is proper, or any adult can file for a protective order on behalf of a child.[31] The county or district attorney's office serves as the prosecuting attorney for a family violence protective order.[32] In an effort to improve access to legal help for domestic violence

[25] TEX. FAM. CODE §264.203.
[26] See Practice Guide, SECTION 13 TOOLS, Affidavits, Order to Participate in Services.
[27] *In re A.D.M*, No.2-04-007-CV, 2004 WL 1799983(Tex. App.— Ft. Worth, Aug.12, 2004, no pet.) (mem. op.) (failure to use court-ordered services, attend counseling, complete parenting class, complete drug assessment, or use bus ticket to travel to inpatient drug treatment, all support finding that termination is in best interest of children).
[28] TEX. FAM. CODE §71.004.;.
[29] TEX. FAM. CODE §85.001(b).
[30] TEX. FAM. CODE §85.022(b).
[31] TEX. FAM. CODE §82.002. A child may also seek a protective order under §82.002(b)(1), but only in the context of dating violence.

victims, the prosecuting attorney is specifically not prohibited from representing both a party in a protective order application and DFPS in an action involving the same party, unless doing so in an individual case would be prohibited by the Texas Disciplinary Rules of Professional Conduct.[33] Apart from civil remedies, there may be grounds for a criminal protective order, depending on the circumstances. Particularly if a person has been a victim of a sexual or trafficking offense, a criminal protective order may afford greater protection in some cases.[34]

DFPS is authorized to request a protective order, either as an alternative to an order requiring a perpetrator of abuse to leave the home, or in addition to such an order.[35] DFPS can apply on behalf of a child or can assist a parent or other adult the child lives with in obtaining a protective order.

Where should a protective order request be filed?

If a SAPCR is pending, an application for protective order can be filed in a court where the suit is pending or in a court where the applicant resides if that is outside the jurisdiction where the case is pending.[36] If there is no suit pending, the application may be filed in the county where either the applicant or the respondent resides or (as of June 14, 2013), where the family violence is alleged to have occurred.[37] District courts, courts of domestic relations, statutory county courts, and constitutional county courts all have jurisdiction to issue a protective order.[38]

What must be proven to obtain a protective order?

The court must find that family violence has occurred and is likely to occur in the future.[39] For this purpose, a statement made by a child 12 years old or younger describing alleged family violence is admissible in the same manner as a statement regarding alleged abuse under TEX. FAM. CODE §104.006.

---

[32] TEX. FAM. CODE §81.007.
[33] TEX. FAM. CODE §81.075, as amended by SB 130 (83rd , Reg. Sess., effective June 14, 2013).
[34] CODE CRIM. PROC. ART 7A.01.
[35] TEX. FAM. CODE §262.1015(a-1).
[36] TEX. FAM. CODE §85.062.
[37] TEX. FAM. CODE §82.003, as amended by S.B. 129, 83rd , Reg. Sess. effective June 14, 2013.
[38] TEX. FAM. CODE §71.002.
[39] TEX. FAM. CODE §85.001(b); *Johnson v. Johnson* No. 13–12–00080–CV ,2012 WL 3525655 (Tex. App—Corpus Christi-Edinburg Aug. 16, 2012, no pet.(mem.op.) (single instance of "short tempered" husband cocking shotgun pointed at wife's head sufficient to show family violence) *Dalbosco v. Seibert*, 2012 WL 1795108 (Tex. App.—Houston [14th Dist.], pet. denied) (mem.op.) (pattern of violent behavior, including yanking, shoving, punching with a full fist, hitting, choking, kicking, biting, hair pulling and threatening is sufficient basis to conclude future violence is likely to occur.) (*Teel v. Shifflett*, 309 S.W.3d 597 (Tex. App. — Houston [14th Dist.] 2010,(no pet.) (boyfriend's testimony regarding incidents of violence, including police use of taser to subdue girlfriend because she would not give up weapon, supports finding that future violence is likely to occur); *In re Lewis*, N0. 11-04-00075-CV, 2005.WL 1903571 (Tex. App.—Eastland, Aug.11, 2005, no pet.) (mem.op.)(five witnesses to angry telephone calls and testimony regarding threat against reporter of child abuse sufficient to show threat of imminent harm).; *Dominguez v. Hughes*, 225 S.W.3d 272 (Tex. App.—El Paso 2006, no pet.)(six-year-old with dime-sized mark behind his ear as a result of rough play sufficient evidence that family violence had occurred and was likely to occur again even though victim did not complain of any pain or fear, or feel threatened).

TIP:
Even if a protective order is not granted, a request to the court to make a finding that family violence has occurred may be useful to prompt an abuser to participate in counseling, substance abuse treatment or batterer intervention programs and to create a record regarding this history.

Can a protective order be granted in an ex parte proceeding?

Yes, if specific standards are met. An application for ex parte relief:

- Must contain detailed facts concerning the family violence and be signed under oath by each applicant;[40]
- Must demonstrate a clear and present danger of family violence;[41] and
- Is limited to 20 day or shorter period (subject to a 20 day extension).[42]

A child's statement signed under oath that otherwise meets requirements of Chapter 82 can be used for this purpose.[43]

How long does a protective order last?

After a hearing on the merits, a judge can issue a protective order for a period not to exceed two years. An order that does not specify the period of the order's effectiveness expires on the second anniversary of the date the order was issued. [44] A court can only render a protective order for more than two years if the court finds the perpetrator:

- Caused serious bodily injury to the applicant, or a member of the applicant's family or household, or
- Was the subject of two or more prior protective orders rendered for protection of the same person and after a finding that the perpetrator has committed family violence and is likely to reoffend in the future.[45]

How is a protective order enforced?

The applicant or the applicant's attorney must provide the court clerk with the name and address of each law enforcement agency, child-care facility, and school to which the clerk must mail a copy of the order, along with any other information required under TEXAS GOVERNMENT CODE §411.042(b)(6).[46] A motion for enforcement may be filed in the county where the order was

[40] TEX. FAM. CODE §82.009.
[41] TEX. FAM. CODE §83.001.
[42] TEX. FAM. CODE §83.002.
[43] TEX. FAM. CODE §82.009(b).
[44] TEX. FAM. CODE §85.025(a).
[45] TEX. FAM. CODE §85.025 (a-1).
[46] TEX. FAM. CODE §85.042(d).

rendered, in a county where either party resides, or where an alleged violation of the order occurs.[47]

TIP:
The applicant and the person with whom the child is living should keep a certified copy of the protective order to provide to law enforcement if necessary.

ORDER FOR THE REMOVAL OF AN ALLEGED PERPETRATOR (AKA "KICK-OUT ORDER")

An order for the removal of an alleged perpetrator is a temporary restraining order that requires an alleged perpetrator to leave the home and requires the remaining parent or other person with whom the child will reside to make a reasonable effort to monitor the residence and report any attempt by the alleged perpetrator to return to the home.[48] The theory is that when possible, fairness dictates that perpetrators, not the victims, be the ones forced to leave the home. This is often referred to as a "kick-out order."

Can a "Kick-Out Order" be Ex Parte?

Yes, if DFPS can show that:

- There is an immediate danger to the child's physical health or safety or that the child has been a victim of sexual abuse;
- There is no time, consistent with the physical health or safety of the child, for an adversary hearing;
- The child is not in danger of abuse from a parent or other adult who will remain in home;
- The parent or other adult in the home is likely to make a reasonable effort to monitor and report any attempt by the alleged perpetrator to return to the home; and
- Issuance of the order is in child's best interest.[49]

The order and notice of hearing on the order must be served on the alleged perpetrator, and on the parent or other adult with whom the child will continue to live.[50] A temporary restraining order issued under this provision expires no later than 14 days after it is rendered, unless the court grants an extension under TEX. FAM. CODE §262.201(a-3).[51]

---

[47] TEX. FAM. CODE §81,010.
[48] TEX. FAM. CODE §262.1015(b) and (e).
[49] TEX. FAM. CODE §262.1015(b); See Practice Guide, SECTION 13 TOOLS, Affidavits, Order to Remove Alleged Perpetrator.
[50] TEX. FAM. CODE §262.1015(c).
[51] TEX. FAM. CODE §262.1015(d), as amended by S.B. 1759 ((83rd Reg. Sess., effective Sept. 1, 2013).
[51] CODE CRIM. PROC. ART 7A.01.

Temporary "Kick-Out Order"

A court shall enter a temporary order for the removal of the alleged perpetrator from the home after motion and hearing if the court finds:

- The child would be in danger if the alleged perpetrator remained in the victim's home, or
- That the child has been the victim of sexual abuse and there is a substantial risk that the child will be a victim of sexual abuse in the future if the alleged perpetrator remains in the residence.[52]

"Kick-Out Order" Applies to Both Parties

A kick out order must require the parent (or other adult with whom the child will continue to reside in the child's home) to make a reasonable effort to monitor the residence and report to DFPS and law enforcement any attempt by the alleged perpetrator to return to the residence.[53]

Enforcement of a "Kick-out Order"

Violation of a "kick-out order" by either party may result in criminal charges. The return of the alleged perpetrator to the home is a Class A misdemeanor, as is the failure of the at home parent or adult to report the return of the alleged perpetrator.[54] A second violation of such of an order is a third degree felony.[55]

Duration of "Kick-Out Order"

After a hearing on the matter, a temporary order for removal of the alleged perpetrator continues until superseded by a court with jurisdiction to do so. [56]

THE 4TH AMENDMENT & CPS PRACTICE

Many everyday CPS practices implicate the 4th Amendment. When CPS requests entry into a home as part of an investigation, seeks to transport a child for an interview, to examine a child's injuries or to remove a child from the home, the 4th Amendment applies. For this reason, the requirements of the 4th Amendment are incorporated into the CPS Handbook, the Basic Skills Development (BSD) course for new staff, and ongoing trainings for staff. In addition, CPS has issued policy in response to specific questions. *See* PSA 14 006 (September 16, 2013).

The 5th Circuit Court of Appeals decision *Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404 (5th Cir. 2008) remains the primary guidance on the 4th Amendment in the

[52] TEX. FAM. CODE §262.1015(f).
[53] TEX. FAM. CODE §262.1015(e).
[54] TEX. FAM. CODE §262.1015(g) and (h).
[55] TEX. FAM. CODE §262.1015(h).
[56] TEX. FAM. CODE §262.204(a).

context of child protection in Texas. Attorneys representing DFPS can best understand the implications of the decision, by reading the decision, in part to fully appreciate the factual context the court based this decision on. Key points in *Gates* that impact CPS practice, discussed in detail below include:

- A removal standard that requires CPS to obtain a court order *prior to removal* in a larger proportion of cases;
- A new standard for assessing when CPS can transport a child for purposes of an interview; and
- A clear standard for when CPS can enter (or remain in) a home during an investigation.

REMOVAL OF A CHILD

If CPS determines that a child must be removed from his home despite reasonable efforts to prevent or eliminate the need for removal, then there are three options for obtaining an order for removal:

#1 Ex Parte Order *Before* Removal
#2 Emergency Ex Parte Order *After* Removal
#3 Non-Emergency Removal

In the first option, CPS obtains a court order before removal of the child. In the second option, CPS has determined that the child is in immediate danger (exigent circumstances) and the child must be removed from the home. A court order is then obtained after the exigent circumstances removal. A comparison of the statutory language and case law interpretation between an ex parte order before removal and an exigent circumstances removal prior to obtaining an ex parte order reveals that the language is markedly similar. In the first instance, CPS must show "immediate danger to the physical health or safety of the child OR that the child has been a victim of neglect or sexual abuse" (among other requirements); and in the second instance, CPS must show that "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*."

Fourth Amendment case law presumes a preference for the state to obtain advance approval from a neutral magistrate before taking action to "search" or "seize." To justify taking action without prior court approval, the state must meet a higher evidentiary threshold. This distinction is implicit in the *Gates* opinion, but the court does not elaborate how these standards compare. The time frames a court considers under these two options are significantly different. With a request for a court order *before* removal of a child, the court need only conclude there is not time consistent with health or safety of the child for a full adversary hearing, a hearing generally set at least fourteen days after a removal. In contrast, for a removal of a child without a prior court order, CPS must show there was no time consistent with the child's health or safety to obtain an ex parte order, which could be obtained within hours or one or two days. As detailed below, the lapse of time necessary to obtain a prior court order is a primary factor in the totality of the circumstances analysis for purposes of "exigent circumstances." Without question timing is critical to any assessment of child safety.

OPTION #1: Ex Parte Order *Before* Removal

In this circumstance the court must find:

- There is immediate danger to the physical health or safety of the child OR that the child has been a victim of neglect or sexual abuse;
- Continuation in the home is contrary to the child's welfare;
- There is not sufficient time consistent with the child's physical health or safety to hold an Adversary Hearing; and
- CPS made reasonable efforts to prevent or eliminate the need for removal.

A few observations about the process to keep in mind:

- **A court order must be written**. If CPS is going to rely on an order for an emergency removal, it must be **written,** and not verbal. A verbal order offers no legal protection if the order's existence or contents are questioned.[57]
- **Hearings conducted during normal business hours.** If there are no exigent circumstances to remove a child at 2 a.m., the family may agree to a parental-child safety placement or to have the alleged perpetrator leave the home. If these options are not feasible, the option is to wait until court opens the following workday to request an order authorizing the removal. However, any increased danger to the child and the extent of the delay required to obtain a court order will impact whether there are exigent circumstances as discussed in more detail below.

[57] In some jurisdictions verbal orders are sometimes obtained when there are exigent circumstances. This is not necessary, but sometimes it is the practice and it is not harmful. However, one problem with getting "verbal approval" is the possibility that the judge will not agree that there are exigent circumstances. If this occurs, the attorney should carefully reassess the case, and confer with CPS to ensure every fact that supports the agency's decision is documented. You may also consider conferring with supervisory attorneys either within your own office, the DFPS managing attorney or the General Counsel's office. If it is determined that there is sufficient basis to proceed via exigent circumstances or requesting a court order before removal of the child, then CPS should formally proceed with the appropriate paperwork. A judge may not approve of this course of action, but CPS must act upon the facts as they view them. The judge can then order the child into the managing conservatorship of DFPS or not, depending upon his or her own view of the facts.

OPTION #2: Emergency Ex Parte Order *After* Removal (Exigent Circumstances)

CPS can only remove a child without a prior court order if based on the totality of the circumstances there is a reasonable cause to believe that the child is in imminent danger of physical or sexual abuse.

The *Gates* ruling makes clear that CPS can only do emergency removals without a court order if the danger is truly imminent and only if it is tied to physical or sexual abuse. To believe that a child is in imminent danger, CPS must have reason to believe that life or limb is in 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 i.e.*, it is not enough that there are allegations related to one child in the home. If CPS seeks to remove an additional child or children there must be information to support the other removals, unless there is a court order authorizing removal in advance. The factors considered, and the weight a caseworker gives to them, may vary for each child depending on the circumstances of each child's case. The factors to consider include:

- Before removing a child WITHOUT a court order ask: **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?**

- **Whether there is time to obtain a court order**

  This does not mean that if the courthouse is closed CPS can automatically do an emergency removal without an order, or that if the courthouse is open CPS cannot do an emergency removal without an order. It means that the caseworker (in consultation with the supervisor) must weigh all the facts known when CPS is considering the removal, and determine whether the time it takes to obtain a court order would 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 is appropriate. If the answer to the question is no, then an emergency removal without a court order is not appropriate unless other factors and circumstances support it.

  A caseworker should consider how much time would elapse if she waits to obtain an order. For example, in a close case there may be more exigency on a Friday evening (where at least two days will elapse before she can seek an ex parte order) than there would be on a weekday at 3 a.m. (where she can obtain an order in a matter of hours). However, CPS must take the facts as they find them; it is never 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 prior court order. On the other hand, neglectful behavior may create imminent danger that 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 CPS has supports the conclusion that the risk of further abuse is imminent. 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 another child or multiple children;
    - whether there is a pattern of abuse or this is an isolated incident; or
    - whether there is a condition that requires immediate medical attention.

  NOTE:
    - 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 supports 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.

    - Although there should be evidence to support the removal of each child, evidence that the household includes "a person who has abused or neglected *another child* in a manner that caused serious injury or death or sexually abused *another child*" [58] is relevant to both types of ex parte removal when the court is making a determination regarding the immediate or continuing danger to a child's physical health or safety. Similarly, evidence of abuse to multiple children can be used to show a pattern of abuse; the more widespread the abuse seems to be, the more likely it is that all of the children are in danger. In the *Gates* case, although the court found it was a "close call," because there was evidence about possible abuse to five of the thirteen children, corroborated by multiple children, the court approved removal of all of the children.

    - The fact that there is CPS history on the family is not solely enough to constitute an emergency. There must be information that suggests that the child in question is in danger of harm *now*.

- **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 that the CPS investigator gathers on a report will tend to support the allegations and some will tend to contradict it. As with other work in investigations, the caseworker must weigh the strength of the evidence to determine whether the allegations are reliable. If the allegations in the report are supported by

[58] TEX. FAM. CODE §§262.102(b); 262.107(b).

staff's visual observation of the child(ren) and the premises, and/or by interviews with collaterals, including other CPS caseworkers who have relevant information about the family, 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 staff's observations and interviews are not consistent 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 received a compound leg fracture after falling off sofa on to a carpeted floor) or if CPS has 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 longstanding practice which requires CPS to make reasonable efforts to prevent removal. For example, we should consider a parental-child safety placement (formerly known as a voluntary placement) or a safety plan that will enable the child to be safe without being removed by CPS. These efforts must be made and documented in the case narrative.

- **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, inability to verbalize, special needs, etc.) may also make a removal more traumatic. Just because a removal may be traumatic, doesn't mean that you can't remove. The affidavit should indicate that the caseworker has considered this factor in making the decision to remove.

OPTION #3: Non-Emergency Removal

To obtain a non-emergency order before removal of a child, CPS must show:

- It is contrary to the child's welfare to remain in the home;
- Reasonable efforts were made to prevent or eliminate the need for removal;[59]
- Appointment of the parent or parents as temporary managing conservator of the child is not in the best interest of the child because appointment of the parent as conservator would significantly impair the child's physical, health, or emotional development;[60] and
- Placement with a noncustodial parent or another relative is not in the best interest of the child.[61]

[59] TEX. FAM. CODE §262.205(b).
[60] TEX. FAM. CODE §153.131, a history of family violence removes the presumption that a parent should be appointed managing conservatory.
[61] TEX. FAM. CODE §262.205(e).

CASE EXAMPLES

Note: The following case examples are intended to discuss whether the facts warrant the removal of the child via exigent circumstances (removal without a prior order) or whether a removal with a prior order is necessary. However, both types of removal require a showing that reasonable efforts were made to prevent or eliminate the need for removal of the child. All of these examples presume that reasonable efforts have been made and no other placement option is available.

- CPS receives a report about physical abuse of a child from a neighbor who states he heard screaming coming from the potential victim's house. CPS goes to the home within a few hours of the report, receives consent to interview everyone in the home, and determines 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 CPS remove the child without a prior court order?
    - Yes, exigent circumstances exist. 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 CPS to file and obtain an emergency ex parte order prior to removing the child. 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.
- CPS receives an intake about physical abuse to a child in a home with four other children. 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 can CPS remove, if anyone?
    - Only the child for whom CPS has evidence of abuse and imminent danger of further abuse. For the other four children danger is not immediately at issue, because CPS has time to either seek an ex parte order before removal or non-emergency order prior to removing the other four children.
- A mother for whom there are prior reason to believe (RTB) findings for abuse for failure to protect two of her children who died as a result, is nine months pregnant. Can CPS immediately remove the new baby without a court order?
    - No. CPS can do a removal, but 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 CPS knows 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 infants, the parent she failed to protect the babies from is still in the home, or the mother is incapacitated from drugs or mental disturbance or mental retardation and is clearly unable to care for the baby, etc.).

- CPS receives a report of sexual abuse (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; all three of whom deny any sexual abuse. Does CPS have enough to remove the other children?
    - Without additional information indicating that the younger siblings are in imminent danger of sexual abuse, they should not be removed without a prior court order. The fifteen-year-old girl is a MUCH closer call and in this type of case staff should always consult with supervisory staff or the regional attorney. 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, especially once the 16 year old is removed, CPS should ordinarily have enough time to seek a court order for removal before she is in imminent danger of such abuse. Of course, if an interview with the fifteen year old or the younger children reveals additional information, this conclusion might be different.
- SWI receives a report of Refusal to Accept Parental Responsibility (RAPR) for a sixteen-year-old male whose parents will not come to pick him up from a private psychiatric hospital. Can CPS 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.

TRANSPORTING A CHILD FROM SCHOOL

Transporting a child during an investigation should be reserved for the most severe cases. CPS attempts to avoid multiple interviews and avoid trauma to the children by having interviews conducted at a CAC. If a CPS caseworker confers and the supervisor agrees transport is appropriate, the available options are:

- Obtain consent;
- Obtain a court order; or
- Show that CPS has 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.

We transport over parental objection only if the *"reasonable belief"* standard below is met or we obtain a court order.

OPTIONS

1. Consent

Ideally, parental consent is obtained to transport a child to a CAC. 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.[62] 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 below, CPS must still notify the parents of the transport so the parents know the child's whereabouts.

2. Court Order

In cases where CPS can show "good cause" to transport but does not have consent of the parent and cannot meet the "reasonable belief" standard defined below, the best option is to request a court order in aid of investigation to transport the child for an interview.

3. Reasonable Belief

The *Gates* court set out a new lower standard than "exigent circumstances" based on the fact that the child was in a public school instead of at home. The key points for this standard are as follows:

- The child need not be in imminent danger of abuse, but the investigator must have a reasonable belief that the child has been abused and probably will suffer abuse again soon, i.e., that evening. However, keep in mind that because this is a lower standard than exigent circumstances, 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 a 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

CPS must answer "YES" to one of the questions below BEFORE transporting a child from school

1. **Do you have consent?**
2. **Do you have a court order?**
3. **Do you have a "reasonable belief" that has been corroborated?**

62 CPS HB 2260-2261

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 indicates the initial report is accurate;
- A preliminary interview of the child's peers indicates the initial report is accurate;
- A visual inspection of any injuries that can be seen without removal of the child's clothing and other information indicates that the injuries were received by an alleged perpetrator (see Note below for further discussion);
- 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 and in doing so rule out an innocent explanation or confirm the initial report of the injury.

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, without more, is not enough to meet the requirements of "reasonable belief." However, if the situation warrants it, CPS should seek a court order in aid of investigation to transport and interview the child that day.

CASE EXAMPLES

- A teacher makes a report that a girl stated, "Daddy touched me in my private parts last night." CPS is dispatched to the school on a P1 and speaks to the teacher who confirms that the child made the statement earlier that morning.
  - Unless there is additional evidence to the contrary, CPS may transport the child. The outcry was corroborated by the teacher. CPS 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.
- A school employee makes a report that a girl stated, "Daddy touched me down there." You are dispatched to the school on a P1 and speak to the reporter who confirms that the child made the statement, but she made it last week. CPS asks 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 CPS obtains additional evidence, they should not transport the child for an interview without parental consent or a court order in aid of investigation because there is no evidence that the child has actually been abused or that she may suffer further abuse later that day.

ENTERING AND REMAINING IN A HOME

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

OPTIONS

1. 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). CPS staff should identify themselves as a CPS investigator and explicitly request and receive permission to enter the home. The best practice is to ensure that the person states that CPS may enter (rather than simply getting a nod or other non-verbal gesture). In any case CPS staff must document the basis for consent in the 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 living in the home is paramount to a decision made by someone not living in the home. 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 CPS would be obligated to do so.
- **Consent must be given to CPS**. CPS routinely conducts joint investigations with law enforcement, but it is important to remember that CPS's activities are separate. If law enforcement gains entry to a home, CPS 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 CPS. CPS must independently determine whether there are exigent circumstances or whether there is consent for CPS to enter.

2. Court Order In Aid Of Investigation

If a person interferes with an investigation of a family or is uncooperative during an investigation, CPS can seek a court order to compel cooperation with specific components of the

investigation. [63] A court order in aid of investigation will only serve CPS to the extent the language in the court order specifies exactly what CPS is authorized to do. As a result, it is very important to make sure the court order lists whatever is needed for the investigation (e.g. transportation of the child to the CAC, interview of the child, entering the home, viewing the child's bedroom, etc.) or is broad enough to complete the investigation. Court intervention is specifically authorized, upon a showing of good cause, to:

- Gain access to a home, school or any place where a child may be;[64] or
- Obtain a medical, psychological or psychiatric exam (or to obtain the records of such an exam).[65]

If a parent refuses to consent to the caseworker's entry into the home or to allow an interview or examination of a child, and there are not exigent circumstances (described below) the caseworker should discuss whether there is sufficient evidence to support a Court Order to Aid Investigation.

For a complete description of the procedural prerequisites, including the application and a sample affidavit, see Practice Guide, SECTION 2 BEFORE FILING SUIT, Court Order in Aid of Investigation.

3. Exigent Circumstances

For purposes of entry into the home, exigent circumstances are present only where CPS has evidence that there is imminent danger to a child or children in the home and the purpose of CPS' entry in the home is to prevent imminent harm.

- Examples of exigent circumstances include: entry into a home to render emergency assistance to an injured child or to protect an child from imminent injury; a child needing emergency medical care; a small child left unattended for an extended time; or any child whose life or limb is in immediate jeopardy and the intrusion is reasonably necessary to alleviate the threat;
- Entering the home solely for the purpose of interviews does not constitute exigent circumstances; and
- "Imminent danger" means there is very little time before the danger is anticipated. If the alleged perpetrator is not home, CPS must have information that the alleged perpetrator will be home soon and is likely to harm the child at that time to justify concluding the child is in imminent danger. If it is unclear when the alleged perpetrator will be returning to the home, you must look to the totality of the circumstances to determine if imminent danger exists.

[63] TEX. FAM. CODE §261.303(b).
[64] TEX. FAM. CODE §261.303(b).
[65] TEX. FAM. CODE §261.303(c).

CASE EXAMPLES

- CPS is called to a home on a P1 report of physical abuse. CPS arrives at the home and the parents are not home. An adult, who appears to be the housekeeper, answers the door. CPS asks for permission to come in and speak to the children in the home. She says, "sure, come on in." CPS begins interviewing the children who all say they are afraid of their father's discipline methods. At that time the father comes home and tells CPS to get out of his house. Can the caseworker stay?
    - No, because the father revoked the housekeeper's consent and there are no exigent circumstances.

- CPS staff 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 believes it does. If CPS enters the home and determines 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 "imminent danger" and can be taken into possession, assuming reasonable efforts are made to find an alternative to removal.