



Constitutional Protections in Child Welfare Cases

Nina Datlof
Staff Attorney, Family Advocacy Unit
Community Legal Services of Philadelphia



OVERVIEW

- ❖ Understanding investigations
- ❖ Navigating investigations
- ❖ Law & Best Practice:
 - ❖ Types of protections
 - ❖ State and U.S. constitutional rights
 - ❖ Mississippi 1983 case law
 - ❖ Legal strategy
 - ❖ Negotiating in active investigations



CPS INVESTIGATIONS

What does
CPS want?

- Home searches—check each room, utilities, hazards, fridge
- Releases of information—medical, dental, educational, mental health (parent and child)
- Drug testing
- Interviews—parents or children
- Observe child/photograph child

What are
the risks
to a client?

- Cooperation could increase likelihood of supervision or foster care
- Cooperation could increase likelihood of criminal charges
- Failure to cooperate could increase likelihood that DHS requests removal of the child because they “can’t assess safety”

ASK QUESTIONS

To DHS: (gauge the level of concern)

- Is it child abuse or neglect?
- Who was the reporter?
- Are they anonymous, confidential, or known?
- What has DHS done to corroborate the report?

To the client: (identify their position and exposure)

- What is your tolerance level for DHS involvement? Help them balance the discomfort with cooperating with the risks of refusal
- What will DHS find if we give them access to ___?
- Who do you think made the report?

Types of Protections



CONSTITUTIONAL PROTECTIONS

- Fourth Amendment/ Special Needs Exception
- State constitutional protections (*Y.W.-B.*)
- Fifth Amendment
- First Amendment—Can you record interviews or interactions with CPS?
 - Beware of two-party consent laws
- Right to counsel
- Due process

STATUTORY PROTECTIONS

- Only actions specifically allowed by statute
 - *Interest of D.R.*, 216 A.3d 286 (Pa. Super. 2019), affirmed on other grounds, 232 A.3d 547 (Pa. 2020) (drug screens not authorized by CPSL).
- Family Miranda (Texas) Family Code § 261.307
- Rule of Evidence 408—Statements obtained in service of generating a safety plan may be inadmissible.

FOURTH AMENDMENT & STATE CONSTITUTION

- Not specific to criminal law
- Principles of search and seizure/probable cause (as summarized by *Y.W.-B.*):
 - Nexus
 - **Veracity of anonymous/confidential sources**—Anonymous sources must be corroborated by reliable evidence. *Florida v. J.L.*, 529 U.S. 266, 270 (2000).
 - Staleness
 - Due process/four corners
 - Specificity/particularity

SPECIAL NEEDS EXCEPTION

- Cases in which the warrant and probable cause requirements do not apply, such as students, probationers, parolees, and government employees
- Requires:
 - Search is “justified at its inception” and reasonable in its scope given the circumstances OR
 - Balanced government and private interests. *Doe v. Woodard*, 912 F.3d 1278, 1291 (10th Cir. 2019)

(SOME) SPECIAL NEEDS EXCEPTION FACTORS

- Enough time to obtain a court order
- Nature of the abuse (its severity, duration, and frequency)
- Strength of the evidence supporting the allegations of abuse
- Risk that the parent will flee with the child
- Possibility of less extreme solutions to the problem
- Any harm to the child that might result from the removal.

Gates v. Texas Dep't of Protective & Regul. Servs., 537 F.3d 404, 429 (5th Cir. 2008)

Gates v. Texas Dep't of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008)

- Child seized at YMCA based on a non-anonymous report by a YMCA employee who observed injuries on a child
- Police went to the YMCA, saw the children there, and seized them
- Note: Reduced expectation of privacy in public places, like public schools. *Gates* at 432 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)).

Gates v. Texas Dep't of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008)

- Applied a balancing approach to assess the reasonableness of the seizure
- “To determine the reasonableness of a seizure under the Fourth Amendment, we **balance** the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests that justify the intrusion.” *Gates* at 432 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

Gates v. Texas Dep't of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008)

- ***Gates* observed that anonymous reports are insufficient to support seizures in child welfare investigations.**
- “[A]n anonymous tip regarding child abuse will rarely be sufficient to justify the seizure of a child.” *Gates* at 433.
- To support 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,” the worker must have “first-hand observations” or an anonymous report with “significant indicia of reliability.” *Id.*

McMurry v. Weaver, 142 F.4th 292 (5th Cir. 2025)

- 12- and 14-year-old attend to virtual school
- Mother notifies school that she is out of town neighbor will check on kids during the day
- Two school police officers go to home and tell the kids not to call their mom, look around home, including in the pantry.
- Officers took the 14-year-old from the home (seizure) and placed in private office
- Mother criminally charged with abandonment and EWOC, later acquitted

McMurry v. Weaver, 142 F.4th 292
(5th Cir. 2025)

Child welfare investigations are not sufficiently divorced from general law enforcement, or the violation of a criminal statute, to support the application of [the community caretaking or special needs exceptions to the Fourth Amendment]. That is particularly evident here, where criminal charges were ultimately brought against Ms. McMurry.

McMurry at 300 (citations omitted)

McMurry v. Weaver, 142 F.4th 292 (5th Cir. 2025)

- “Moreover, the rationale behind *Gates*' **explicit rejection of the special needs exception** applies with equal force to community caretaking: The home entry ‘was not divorced from the state's general interest in law enforcement.’” *McMurry* at 301
- Procedural due process claim: “**A child cannot be removed ‘without a court order or exigent circumstances.’**” *McMurry* at 302 (quoting *Romero v. Brown*, 937 F.3d 514, 521 (5th Cir. 2019))

APPLICABLE STANDARD

- Where do *Gates* and *McMurry* leave us?
- Do typical Fourth Amendment protections apply in child welfare investigations, or does the special needs exception apply?
- How would this be applied differently in Mississippi state courts?

FIFTH AMENDMENT

- **Right to remain silent** where the evidence could provide a link between the person and a crime (even if the crime has not been charged)
- **Must be explicitly invoked!**
- Judge can take an "**adverse inference**" (assume guilt) if used in non-criminal cases
- Think about what criminal charges could be brought (usually child endangerment)
- Does the Fifth Amendment attach is child welfare investigations?
 - If there is criminal overlap? Definitely
 - Summary offenses? Maybe



Litigating Constitutional Violations in Youth Court



REQUEST FOR STAY/INJUNCTION

- Request for the court to stay (stop the search) until an appeal is decided
- Generally, must make request before trial court first, then can appeal
- Required for stay:
 - Likelihood of success on appeal
 - Likelihood of irreparable harm pending appeal
 - Balance of hardships
 - Public interest

MOTION FOR PROTECTIVE ORDER

- A request that the court **intervene to limit or prevent unlawful discovery requests**
- Treat DHS's investigation as "discovery," subject to discovery rules
- Look in local rules, rules of youth court procedure, rules of civil procedure
- Standard may vary, but generally requires a showing of reasonableness from moving party
- Great **opportunity to tell the client's story** before DHS has an opportunity to present evidence

MOTION TO SUPPRESS

- A request that the **judge not consider evidence that was obtained unconstitutionally**, usually made in criminal cases
- Only comes into play at trial
- Federal law is unhelpful, look to state constitutions for protection
- Application of the exclusionary rule in a new context may require an additional foundation, for instance showing a **policy justification**, so **consider whether expert testimony** or other evidence is necessary to make a record for appeal

RULE OF EVIDENCE 408

- A rule of evidence that prevents parties from using **statements made during a negotiation against a party in court**, with exceptions for proving a witness's bias, disproving an accusation that the party improperly delayed the proceeding, or proving obstruction of a criminal investigation or prosecution
- Has been applied in child welfare cases. *Blakes v. Arkansas Dep't of Hum. Servs.*, 374 S.W.3d 898 (Ark. App. 2010); *In re A.C.*, No. 99-0955, 1999 WL 1255793, at *4 (Iowa Ct. App. Dec. 27, 1999); *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1105 n.7 (9th Cir. 2010)

Negotiations in Child Welfare Investigations



NEGOTIATION IS DIFFERENT FROM LITIGATION

- We often think of negotiating as talking to convince, but listening is a two-way street
- Connect and build rapport
- Conversation about hypotheticals, not facts
- No arbiter of fact
- See if you can agree on
 - Whether the investigation is necessary
 - What is the scope of the investigation
 - What results would lead to court involvement

SOME TIPS



Getting to Yes:

Separate the people from the problem - imagine the situation from their viewpoint

Focus on interests, not positions - what is really the thing they want

Learn to manage emotions - give space for them to express powerful emotions

Express appreciations - understand their perspective and show appreciation for it

Put a positive spin on the message

Get out of the cycle of "action/ reaction" - people who are pushed tend to push back



Listen to what is said and what is not said.

What is behind the words? Bias, burnout

What are the underlying feelings, needs, and wants?

What is the deepest need? Safety of child, power complex, burnout

Questions? Comments?

Nina Datlof

Staff Attorney, Family Advocacy Unit

Ndatlof@clphila.org

484-267-5712

