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**PROTECTING OUR CHILDREN – AND OUR LIBERTY:  
Striking the Balance in Child Protection Removals**

by

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**INTRODUCTION**

The dramatic removal of 460 FLDS children in Texas and the intense media attention to the story highlights a greater and more general tension in America's child welfare world. Taking children away from their Moms and Dads in the face of reports of suspected child abuse or neglect is one of the most delicate steps in the child protection process. Critics charge that more and more children are being unnecessarily removed from their parents on an emergency basis, before a full court review, overloading the foster care system and harming large numbers of children the child welfare system is supposed to protect. Probably no other stage in the child protection process is as poignant and difficult with so much riding on the skill and good judgment of the professionals. *What is the proper balance between aggressive action to protect children from abuse and neglect -- and undesirable over-reaction resulting in erosion of civil liberties and imposition of unnecessary psychological harm on children and their families? What is the law? What is required for the physical and psychological well-being of the children?*

For decades America's child protection system has been criticized as being both *under-inclusive* and *over-inclusive*. That is, CPS is *under-inclusive* because families and children who should be receiving child protective services are not -- resulting in children remaining at risk, suffering additional harm and even death. At the same time CPS is *over-inclusive* because many families that are currently in the system should not be -- imposing an enormous cost on children and their families -- and on the system itself. Are our current laws adequate for this delicate and important balancing act? *What does the U.S. Constitution require? Are CPS policies appropriate? Is the workforce capable of making the fine judgments required? If not, what has to be done to ensure that the police, caseworkers, lawyers and judges are competent to make these subtle discriminations?*

This paper is intended to set up an ABA/APA teleconference on July 9, 2008 on this topic. Our goal is to draw what lessons we can from some recent and high profile cases. But we also must be cautious not to over-react to the alleged CPS over-reaction in these few cases. CPS is charged with an important mission -- to protect children from abuse and neglect. (I know how hard it is to be a child protective services worker; I used to be one myself.) Life, death or serious injury can hang on CPS decisions. But the seriousness of their work and their good intentions do not excuse them from the duty to be

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

## **TEXAS HOUSE OF ZION CHILDREN**

On April 3, 2008 Texas child protection authorities, assisted by a SWAT team, entered the Yearning for Zion Ranch, an isolated compound of the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS) in Eldorado, Texas and began removing about 460 children. The officials declared the children to be in immediate danger so that continuation in their homes would be “contrary to the child’s welfare.” The authorities alleged “a pervasive pattern of sexual abuse that put every child at the ranch at risk.” They determined that a pervasive belief system at the ranch condoned under-age marriage and pregnancy. Authorities also alleged that the whole ranch functioned as one “household” and that sexual abuse anywhere within that household threatened children in the entire community.

Texas child protection authorities placed the children at the San Angelo Coliseum and other temporary shelters in the San Angelo area. Approximately 127 women voluntarily left the ranch to be with and care for the children. By April 25, after nearly three weeks in temporary shelter, Texas authorities moved the children to temporary foster care. Except for 17 mothers with babies under the age of 12 months, the women were separated from their children. Those 17 women did not return home but went into a care facility where they could be with their babies.

Some expressed concern that the children who were moved to foster care would be plunged into a culture radically different from the community in which they lived, a trauma possibly compounded by their placement into an environment they had been taught to shun as a hostile, contaminating influence on their godly way of life. Many of the children had seen little or no television. They had been essentially home-schooled all their lives. Most were raised on garden-grown vegetables and twice-daily prayers with family. They were accustomed to wearing long dresses and buttoned-up shirts from another century.

On May 22, 2008 the Texas Court of Appeals (COA) ruled that the state had illegally seized the children. The Court said:

“Removing children from their homes and parents on an emergency basis before fully litigating the issue of whether the parents should continue to have custody of the children is an extreme measure. It is, unfortunately, sometimes necessary for the protection of the children involved.”

But the COA found that the evidence of danger to these FLDS children “was legally and factually insufficient” to justify emergency removal. The court found there was a lack of evidence that the children were in immediate danger of sexual or physical abuse.

“The existence of the FLDS belief system as described by the Department’s witnesses, by itself, does not put children of FLDS parents in physical danger. It is the imposition of certain alleged tenets of that system on specific individuals that may put them in physical danger.” (Opinion, p. 7) “Evidence that children raised in this particular environment may someday have their physical health and safety threatened is not evidence that the danger is imminent enough to warrant invoking the extreme measure of immediate removal prior to full litigation of the issue as required by section 262.201.”(Op. p. 8)

The court also found that the record did not reflect any reasonable effort on the part of the Department to ascertain if some measure short of removal and/or separation would have eliminated the risk. (Opinion, p. 9). The COA directed the lower court to vacate its orders regarding placement but did not order immediate return of the children to the parents.

The Texas Supreme Court reviewed the COA decision and upheld it on May 29, 2008:

Having carefully examined the testimony at the adversary hearing and the other evidence before us, we are not inclined to disturb the court of appeals’ decision. On the record before us, removal of the children was not warranted. (Texas S. Ct. Per Curiam Opinion, 08-0391, p. 5)

As of this writing the Texas FLDS children are gradually returning to the Yearning for Zion Ranch.

## **THE WRONG LEMONADE?**

On April 5, 2008, two days after the FLDS children were taken into custody, a Michigan child, seven year old Leo Ratte, spent two nights in foster care after his father, University of Michigan archeology professor Christopher Ratte ordered lemonade for his son at a Detroit Tiger’s baseball game and was given a bottle of Mike’s Hard Lemonade. Professor Ratte did not know the beverage contained alcohol. In the ninth inning security personnel confronted Ratte and told him the beverage was alcoholic. “You’ve got to be kidding”, he said. Police officers questioned father and son closely, took the boy to a hospital for a full check-up, and then placed him in foster care even though he was observed by the examining physician to be fine and he had no trace of alcohol in his blood. CPS refused to release the child to his father -- or to his mother, who had been at a concert with their twelve-year-old daughter for the day. Two aunts drove overnight to Michigan from Massachusetts after being told the boy could be released to them, but Michigan authorities ultimately refused to release the child to his aunts, one of whom had been a licensed foster parent in Wisconsin and had adopted a child. No amount of persuasion could get the boy released over a weekend. The following Monday, after two days in foster care, the court returned the child to his mother’s custody, but only after the

father agreed to move out of the home and not see his two children without her supervision. As the London-based magazine, *The Economist*, wrote on May 8, 2008, in a story about the state of freedom in America, "The American legal system \*\* seems to have lost any sense of proportion. \*\*\* [T]he family was condemned to legal hell: the police at first put the seven-year-old into a foster home and a judge ruled that he could go home only if his father moved out. It took several days of legal wrangling to reunite the family." The sub-title of the *Economist* story is "Liberty in America is not quite as revered as its leaders pretend." On April 10, after more interviews and a home check by authorities, CPS declined to substantiate the charge and the court dismissed the petition alleging child abuse and neglect. Leo was home free and Professor Ratte could check out of his hotel and move back with his family. (Full disclosure: I represented the parents in the child protection court proceedings.)

### **D.C. TWINS – MINOR ACCIDENT; MAJOR TRAUMA**

On Labor Day 2007, Julianna Caplan of the District of Columbia was changing the diaper on one of her 8-month-old twins when she heard a sound and turned to check her other daughter who was playing on the floor. The other 8-month-old tried to push herself up from the floor, fell, and knocked her head. As the *Washington Post* reported on February 24, 2008:

There were no bumps or bruises, but over the next few hours, the little girl acted fussy, then altogether out of sorts. After she began throwing up and drifting off to sleep, her parents grew concerned, called the doctor and ended up at Children's Hospital. The baby recovered fully within 24 hours, but almost six months later, Caplan and her husband, Greg, remain trapped in the District's frightening child-abuse system." \*\*\*

Because it was a holiday, the hospital had to wait several days to conduct tests to see if the baby had been abused. Those tests would find no reason to believe abuse had occurred. The police investigator would write that "all five examining physicians made no medical diagnoses or cause to support physical abuse." And D.C. Magistrate Judge Mary Grace Rook would find that "there are not reasonable grounds to believe that [the baby] was abused."

But Child and Family Services neither waited nor investigated. With lights flashing and four police officers on hand, social workers arrived at the Caplan house at midnight on the night after the baby entered the hospital. They took the infant's uninjured sister out of her father's embrace and put her in foster care in Prince George's County.

It was the first night she had ever spent away from her parents and her sister. It would not be the last.

She was forced to spend nearly two weeks at the foster care facility in Hyattsville. The injured sister, after her recovery, was kept in the hospital awaiting test results. Afterward, she was in foster care for five days. Both sisters were then reunited at home under their grandmothers' care, but on condition that the Caplans move out of their own house.

The Caplans raised \$75,000 for legal fees for their fight to get their children back. A court agreed with them and found no legal basis to keep their children in custody. But even after the court found for the Caplans, the city offered to end its investigation only if the parents submitted to counseling, anger management classes and unannounced visits from social workers. The Caplans declined the deal. Six months later, the Caplans remain on the DC list of child abusers. The *Washington Post* article continued:

The Caplans reject the idea that the city is only doing its job well by being on hair-trigger alert. "Do you believe innocent families have to get caught up in this?" Greg asks. "This is a false choice. What has to happen is not overreaction, but competence."

The Caplans plan to sue the District, seeking reforms in the child welfare system and reimbursement of what they spent fighting the allegations. The twins are happy and playful children now, but the daughter who spent two weeks in foster care "freaks out if I leave the room," Julianna says. "Before, she would let anyone hold her. Now, she screams."

## **COMMUNE AS A "HOUSEHOLD"; LACK OF INDIVIDUALIZED TREATMENT**

There are precedents in which state child protection authorities have treated communes with allegedly abused or neglected children as a single family or household- and courts have generally criticized the lack of an individualized, child-by-child, parent-by-parent, intervention. In 1953 authorities raided a polygamist community called Short Creek (now Colorado City, AZ) and Hildale, Utah, taking 160 children into custody. The custody ruling was overturned on appeal in 1955. In 1984, Vermont officials took custody of 112 children whose families belonged to the Northeast Kingdom Community Church in Island Pond, Vermont. The Vermont trial court refused to accept a generalized petition covering all children in the community. It rejected the state's petition for jurisdiction as "defective on its face" because it "made no attempt to allege facts constituting any of the children to be children in need of care or supervision. \*\*\* [The petition] is essentially a collection of generalized assumptions as to these children." The court was concerned that the state's group approach might violate the parents' constitutional rights of freedom of association and religion.

In July 1983, in rural Allegan County, Michigan, at the compound of the House of Judah religious camp, a woman beat to death her twelve-year-old son. The authorities took the boy's five siblings into custody. At the first hearing regarding the five children in

custody the court found there was also sufficient cause to be concerned about the safety of other children in the community and ordered a prompt investigation and evaluation of all the children in the compound. The court did not order removal of the remaining children before the investigation. A committee of physicians and social workers visited the camp and examined the children residing there. When the committee found evidence of physical abuse of eleven of the sixty-six children, the court took temporary custody of all sixty-six children. (More disclosure – our Child Advocacy Law Clinic represented two of the children.) The children were first placed in foster and relative homes. As in the Texas FLDS case, the Michigan court treated the head of the commune, Prophet Lewis, as “guardian” of all the children and considered the entire community as one communal family. Interlocutory appeals were filed.

While the appeals were pending, the authorities determined that they could not prove abuse or neglect on all sixty-six children, but only as to eleven of them, so they proposed a settlement to the parents. The settlement involved the return of most of the children to their parents, without adjudication, if the parents agreed to a Dispositional Plan. Under the Dispositional Plan, the parents would agree to end all excessive physical punishment, make certain repairs and improvements to the camp, and attend a six week parenting class conducted by the state department. In addition, the Plan permitted certain court officials and social workers to visit, observe, and inspect the camp at any time. The parents agreed to the settlement and within two months all but eleven children were returned to their parents. These eleven were not returned for some time because many of their parents were in prison or had just been released and were as yet unable to care for the children.

This case was also criticized for the non-individualized theory of the case. The emergency removal of the first five children, in the wake of their mother’s homicidal slaying of their brother, was clearly appropriate and constitutionally justified. The court’s –order of a fuller investigation and assessment rather than immediate removal demonstrated a more nuanced and child-centered response. The subsequent blanket removal of all 66 children, however, was an over-reaction to the threat presented by the 11 further abuse cases; an over-response that was corrected in part, as in the Texas FLDS case, because of assertive legal representation of the parents and an independent judiciary.

## **QUESTIONS PRESENTED**

These cases provide some valuable lessons as we try to strike the proper balance between aggressive action to protect children and undesirable over-reaction resulting in unnecessary traumatization of children and erosion of civil liberties. Let’s consider a few of the questions that these cases raise.

### **1. Constitutional Standard for Emergency Removal**

The U.S. Constitution protects parental rights to custody of children, and the parallel children’s right to family integrity, as among the highest liberty values of our society. The constitutional test for breaching this right of family integrity in an

emergency seems to be that the child be in “imminent danger”. *Mabe v. San Bernardino Co*, 237 F.3d 1101, 1105 (9<sup>th</sup> Cir. 2001); *Tenenbaum v. Williams*, 193 F.3d 581, 588-89 (2d Cir. 1999). *Is this an acceptable legal standard? Does it serve the physical and psychological well-being of the children?*

## **2. Statutory Standards for Ex-parte Emergency Removal**

Texas statutes governing emergency removal on their face seem to fully meet the constitutional standard. Under Texas statutes, before a child may be taken into possession without prior notice and hearing, a person with personal knowledge must file an affidavit that (1) “there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child’s welfare;” (2) there is no time for a full adversary hearing; and (3) “reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child.” (V.T.C.A. Family Code § 262.101) Texas statute also provides for the alternative removal of the alleged perpetrator so long as, “the child is not in danger of abuse from a parent or other adult with whom the child will continue to reside in the residence of the child.” (V.T.C.A. Family Code § 262.1015) With a statute as clear as this, what explains the over-reaction in the FLDS case? Is it a matter of inadequate professional training of police and caseworkers? The court, presumably an independent judiciary, later affirmed the emergency removals. Why would that have happened?

Other state statutes do not meet the constitutional standard. In my home state of Michigan, for example, the police may take a child in custody, “...whose surroundings are such as to endanger his health, morals, or welfare...” There is no definition of “health, morals or welfare” and no requirement of “imminent danger.” The court, acting ex parte pending a hearing, may continue the child in custody if “home conditions make immediate removal necessary.” No state has a more relaxed standard than Michigan’s. *What is your state’s test for emergency removal? Does it protect the civil liberties of children and parents by meeting the constitutional standard? Is the legal standard such that children in danger can be protected and not exposed to continued harm?*

## **3. Court-ordered Pretrial Removals**

The next step in removing children from their parents is at the first hearing, commonly called a “preliminary hearing”, “first hearing”, or “shelter hearing”. The state authorities must provide some evidence in support of their petition and the question of placement of the child pending trial is revisited. Although this hearing is typically held within a day or so of a child being removed from parents, there is generally more information available about the conditions leading to the CPS concern, whether the danger to the child at home may be controlled, and about alternative placements for child, such as with a familiar relative.

Many state statutes employ a common legal standard for court ordered removal of children suspected to be abused or neglected. This standard, taken from the federal

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

... a blanket presumption favoring removal was never intended. The court *must do more* than identify the existence of a risk of serious harm...It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child’s best interests. (Nicholson v. Scoppetta, 3 N.Y. 3d 357, 378 (2004))

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

#### **4. Remove the Danger, not the Child; Reasonable Efforts.**

Many states permit the court to enter protective orders for the child, pending trial. Protective orders commonly include terms and conditions for the child remaining with a parent, such as a prohibition of physical discipline or routine drug screens for parents. State statutes commonly permit the court, based on a low standard of proof such as probable cause, to order the alleged perpetrator or persons who are accused of endangering the child to leave the home. Federal law also requires, as a condition of federal funding, that the state take “reasonable efforts” to prevent or eliminate the need for removing the child and the court is asked to make a finding that “reasonable efforts” have been attempted. This requirement can provide an opportunity to consider more options to protect the child than removal and to weigh the detriment to the child from placement against the risks faced in the home. These statutes and rules can often protect the child while lessening the child’s traumatization because of the government intervention.

*Does your state statutes or court rules require decision-makers to consider ways to remove the danger and not the child? How does your state operationalize the federal “reasonable efforts” requirement?*

#### **5. CPS Policies Governing Removal; Professional Expertise**

CPS policies and their related actions should reflect the constitutional standard, statute and best practices in the field. But the work of child protection is very delicate and stressful. State organizations do not always create a work environment in which these important government officials feel supported and valued. Training is often deficient. Turn-over in many state CPS offices is very high so that it is difficult to impossible to maintain a professional work force. Many in CPS, responding to this difficult balancing

act between removal and not-removal, use the refrain, “Damned if you do, damned if you don’t. “Either way we get criticized.”

*What is the state of professionalism in your CPS? Are they well trained? Are caseloads manageable? Do they receive the support and recognition they deserve for such a difficult job? Or are they treated as fungible bureaucrats who must only follow procedure, as in the Michigan lemonade case? CPS is an inherently high risk venture. Mistakes will be made. Some cases will be misdiagnosed. Risk to the child will be over-rated, as in the Michigan lemonade case, or under-rated, as in the myriad of front page stories about child death or abuse after reports to CPS. Who carries the blame in your state or community? Does the individual caseworker serve as scapegoat and get fired following a mistake in judgment or do supervisors and agency directors take some of the responsibility?*

## **6. Representing the Child**

The lawyer for the child is one of the key safeguards for the child’s well-being. The process should protect the child, but the adverse consequences of intervening must also be minimized. But what if a child does not wish to be removed from his parents? *Does the lawyer in your state represent what the child says he or she wants or what the lawyer considers in the child’s best interests? Philosophically and psychologically what is the optimum role for the child’s lawyer to play – as advocate for the best interests of the child or as advocate for the child’s expressed wishes?*

## **7. Religious Beliefs**

Are the FLDS being punished for unpopular and unfamiliar religious beliefs? The Texas lead investigator was of the opinion that due to the “pervasive belief system” of the FLDS, boys are groomed to be perpetrators of sexual abuse and girls are raised to be victims of sexual abuse. Because of the “pervasive belief system” it is acceptable for girls to marry, engage in sex, and bear children as soon as they reach puberty, and it thus poses a danger to the children.

But America prides itself on our freedom of religion and tolerance of unfamiliar religious practices – so long as they do not harm a child. The Texas COA reflects the law on this topic when it says, “The existence of the FLDS belief system as described by the Department’s witnesses, by itself, does not put children of the FLDS parents in physical danger. In is the **imposition** of certain alleged tenets of that system on specific individuals that may put them in physical danger.” (Emphasis added.)

*Are some religious groups’ ideas about childrearing more acceptable than those of other religious groups?*

## CONCLUSION

So what should be the proper balance between protecting our children and protecting our liberties? Over-response not only erodes personal liberty in our country that values it so highly, but is also causes additional harm to the children we are trying to protect. How do we achieve this balance -- through law, training, professional standards, an independent judiciary? The responsibility of a child protective service is very, very difficult. But we must balance the interests of protection and liberty. Justice Louis Brandeis made this comment in 1928 in the *Olmstead* case, an observation as relevant today as it was then:

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."