

COUNTY RISK SHARING AUTHORITY

“AVOIDING CHILD PROTECTION LITIGATION”

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I. FEDERAL ISSUES

A. FOURTH AMENDMENT - Prohibition against unreasonable searches and seizures.

1. Entry into a home or other area having a reasonable expectation of privacy – Must have a warrant or one of the exceptions to the warrant requirement such as consent or exigent circumstances must exist.

- a. **Warrant.** Obtained through a neutral magistrate upon a showing of probable cause that evidence of a crime will be discovered upon search.
- b. **Consent** – Needs to be voluntary consent from a party with authority to enter premises
- c. **Exigent Circumstances** –
 - 1) hot pursuit of a fleeing felon;
 - 2) imminent destruction of evidence;
 - 3) the need to prevent a suspect's escape; and
 - 4) a risk of danger to the police or others.

Example Cases:

Jordan v. Murphy (6th Cir. 2005), 145 Fed.Appx. 513

- Where caseworker relied on representations made by officer with first hand information of deplorable conditions in a home, caseworker was entitled to qualified immunity when caseworker entered home, even though police had previously entered without probable cause.
- Where police officers have entered a home, a caseworker may (depending on the circumstances) defer to the judgment of the police officers

Kovacik v. Cuyahoga County DCFS (N.D. Ohio), 2007 WL 2027326

- Cuyahoga County DCFS determines that subject children are in imminent risk and need to be removed from mother.
- DCFS drafts a "Temporary Emergency Custody Order" which is signed by various DCFS officials and caseworkers. The TEC Order is not issued by a judge or magistrate.

- DCFS caseworkers bring the TEC Order to the North Olmsted Police Department, claiming they have an “order” to remove subject children and require the assistance of the police.
- North Olmsted police do not scrutinize the “order,” and go with DCFS caseworkers to the subject children’s home.
- After no response to knocking on door, police break down front door, retrieve children from home and turn them over to DCFS.
- In partially denying summary judgment, the trial court found that police had entered into home without valid warrant, court order or exigent circumstances.
- Trial court also found that DCFS caseworker who entered home was not entitled to qualified immunity because (a) the police did not have a warrant to enter home, (b) prior to the police entering, she did not know of exigent circumstances that would have allowed warrantless entry into home and (c) after the police entered, she did not have information to show that exigent circumstances existed to enter the home without a warrant.

Practice Tip: Get your lines of authority straight. Make sure that the responsibility for obtaining a search warrant or other order is clearly established. Be sure that the warrant or order properly authorizes entry into the premises. If resort must be had to one of the warrant exceptions, make sure that the information is reliable and actually fulfills one of the warrant exceptions. “Risk of danger to others” is the exigent circumstance most likely to be encountered by children services agencies.

B. FOURTEENTH AMENDMENT – Due Process

1. Substantive Due Process – Fundamental Rights. Claims based on certain fundamental rights individuals have that cannot be infringed by the government without justification. **Substantive Due Process cases typically have at issue the following:**

- a. Is there a substantive due process right?** In other words, is the “right” infringed the kind for which the government must have a substantial justification before infringing upon it? Typically, courts have found fundamental rights related to privacy, family integrity, sex and marriage deserve substantive

due process protection (i.e. the government must have justification to legally infringe on the right).

- b. If there is a substantive due process right, did the government have the requisite justification?** Depending on the fundamental right involved, government may need more or less justification to infringe upon it.

Example Case:

Kottmyer v. Maas (6th Cir. 2006), 436 F3d 684.

- Where there is no removal of children (either temporary or permanent), a children services agency's mere investigation of alleged child abuse or neglect does not violate a family's fundamental due process rights.

Practice Tip: The right to familial integrity is one the fundamental liberty rights that cannot be disturbed without due process of law. However, mere investigation of a family does not, without more, constitute a deprivation of this fundamental right.

2. Substantive Due Process - Protecting People from Private Violence.

- a. Generally, no duty to protect.** Generally, the government is *not* obligated to protect individuals from private violence. For example, while police have the goal to protect the public, normally a police officer's failure to prevent a crime does *not* create a cause of action for the victim against the police officer.
- b. Exception – the “State-Created-Danger” Rule.** When the government has a “special relationship” with an individual (usually when the state assumes some form of custody of an individual), a duty to protect that individual from private violence may arise.
 - **Foster Children** – Where a children services agency puts a child into a foster home and the child is harmed by the foster parents or the foster care environment, the foster child's due process rights are violated where the agency showed “deliberate indifference” to a “substantial risk of harm” about which the agency knew or should have known during the placement process.

Example Case:

Arledge v. Franklin County (6th Cir. 2007), 509 F.3d 258.

- Due to behavioral problems of child and arrest of custodial father (who assaulted child), agency temporarily placed child with non-foster couple.
- Couple knew child and child had often stayed with the couple in the past. Couple also housed child's sister. Child seemed comfortable with couple.
- However, couple lived in a trailer park where child had previously lived and had "not stabilized." Also, unknown to agency, husband of the non-foster couple was on probation for aggravated menacing.
- Placement occurred, but agency was still investigating couple and had not yet done a criminal background check.
- Prior to completion of investigation, husband pointed a revolver at child's head and killed him.
- Trial court found (and appellate court affirmed) that caseworkers were not aware of facts "so obvious" as to constitute a violation of substantive due process under the state-created-danger rule nor did they actually conclude from the facts available to them that the placement placed the child in danger.
- The court further held that there was no evidence of ongoing problems of this type and, therefore, the children services agency could not be held liable for failing to train its employees.

Practice Tip: If at all possible, finish criminal background checks before placing children but, if not possible, resolve doubts against the placement. If a particular practice with respect to placements causes continuing problems, strongly consider a revision of the policy and remedial training.

3. Procedural Due Process – Claims based on *how* a government can infringe on a person's rights to liberty and property, where the law grants the government the power to do so. **Procedural Due Process claims typically have at issue the following:**

- a. Is the right being infringed a protected right to life, liberty or property?

- b. If the right being infringed is protected, what procedural process is due? Typical procedural due process requirement is notice of government action and a hearing prior to action.

Example Case:

Smith v. Williams-Ash (6th Cir. 2008), 520 F.3d 596

- Where parents voluntarily enter into a safety plan that calls for the removal of their children, parents are not entitled to a hearing.
- Safety plans are not inherently coercive, even where agencies force parents to sign a safety plan or face the threat of formal removal proceedings.

Practice Tip: The termination of a parent-child relationship invades a fundamental liberty interest requiring that due process be afforded. If the parent waives his or her due process rights by means of a safety plan or other means, be sure that the waiver is clearly established in writing and that the lack of undue coercion for that waiver can be established.

- C. **Habeas Corpus** – Right to petition for release from state custody. Does not apply to custody of child by children services agency.

Example Case:

Jacobson v. Summit County Children Services Board (6th Cir. 2006), 202 Fed.Appx. 88. Federal courts do not have jurisdiction state court judgments regarding involuntary termination of parental rights. Also, “a state’s physical custody of [a child] has not restrained his liberty to a significantly greater degree than a parent’s or foster parent’s custody. The state has neither incarcerated [the child] nor imposed penal restrictions on him. Such custody does not present the type of confinement of which habeas corpus jurisdiction traditionally exists.” (quoting from Amerson v. State of Iowa (8th Cir. 1885), 59 F.3d 92.

II. STATE LAW ISSUES

A. Common Law Claims

1. Common law tort claims (i.e. non-statutory claims) often brought against children services agencies and their employees include negligence, false imprisonment, intentional infliction of emotional harm, malicious prosecution, defamation (and others).
2. Political Subdivision Immunity - Most all common law claims brought against children services agencies (as political subdivisions) and their employees (as employees of political subdivisions) are barred by immunity under Revised Code Chapter 2744. There are important exceptions, however, as follows:
 - a. Applicable exceptions to immunity granted to children services agencies:
 - i. An agency employee's negligent operation of a motor vehicle,
 - ii. An agency employee's performance of a proprietary function,
 - iii. Injuries caused by physical defects on agency property,
 - iv. Where civil liability is expressly imposed on the agency by an Ohio Revised Code Statute.

Example Case:

Johnson v. Calhoun (9th Dist.), 2008-Ohio-549

- Foster child assaults and kills another foster child at a therapeutic foster home. Estate sues Cuyahoga County DCFS and Summit County CSB.
- Appellate court affirms dismissal of counties based on immunity under R.C. Chapter 2744. Specifically, the court finds that the counties were not engaging in a "proprietary function," as a "governmental function" includes the operation of "children's homes or agencies" which, the court concludes, includes foster homes and specialized foster homes, which would include a "therapeutic foster home."

Practice Tip: The children services agency the political subdivision which operates it are generally immune from liability for state law claims. However, the immunity for employees is much less clear cut and the political subdivision is generally responsible to defend and indemnify those employees.

3. Employee immunity. Like children services agencies, employees are generally immune under state law for claims against them in their individual capacities. However, there are exceptions to this immunity.

a. Applicable exceptions to immunity granted to the employees of children services agencies:

- i. Agency employee's acts or omissions were manifestly outside the scope of the employee's employment,
- ii. Agency employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
- iii. Where civil liability is expressly imposed on the agency employee by an Ohio Revised Code Statute.

Example Cases:

O'Toole v. Denihan (Sup. Ct.), 2008-Ohio-2574

- Very complicated facts. Essentially, a child dies of abuse subsequent to Cuyahoga County DCFS investigating an allegation of child abuse and the child is not removed from caretakers.
- Ohio Supreme Court makes several holdings related to children services and immunity under R.C. Chapter 2744.
- Court defines "recklessness" as a perverse disregard of a known risk. Recklessness "necessarily requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in injury."
- Ohio's Child Endangering statute, R.C. §2919.22, does not expressly impose liability on political subdivisions or employees of political subdivisions. Therefore, R.C. §2919.22 cannot serve to support the exceptions to immunity regarding "when civil liability is expressly imposed" upon the political subdivision or employees of political subdivisions "by a section of the Revised Code." R.C. §2744.02(B)(5); 2744.03(A)(6)(c).

Johnson v. Baldrick (12th Dist.), 2008-Ohio-1794

- Mentally handicapped mother goes into a rage and sets fire to trailer with baby son inside. Baby dies.
- Mother had long history of mental problems and abused previous children of her own and others. Mother had served two years for raping a 12 year-old boy.
- Prior to fire, Butler County DCFS investigated an anonymous report that the mother abused the baby son. No evidence of abuse is found.
- Case is round-tabled at DCFS. Mother's history is noted as a concern, including that two of her prior children had been removed from custody. However, mother apparently had no recent mental issues and there was no way to follow-up on anonymous source of complaint. DCFS determines it does not have grounds for removal of baby son.
- Appellate court affirms trial court's summary judgment in favor of DCFS and caseworkers. DCFS is immune under R.C. Chapter 2744. Also, caseworkers' "round-tabling" of case evaluation, in addition to lack of other evidence showing an imminent threat to baby, showed that caseworkers were not "reckless" in their conduct and no other exceptions to immunity applied.

Practice Tip: The law clearly requires much more than negligence to hold an individual children services employee liable. However, the distinction between simple negligence on one hand and bad faith, wanton, malicious and reckless misconduct on the other is traditionally viewed as an issue of fact for the jury preventing courts in many instances from summarily dismissing case against individual employees. It is critical that children services employees be able to document the steps they have taken to investigate allegations of abuse and, if necessary, obtain legal counsel prior to taking or deferring action.

B. Statutory Claims

1. Liability for Agency and Caseworkers:

- a. **R.C. §2151.421(A)(1)(a)** - Duty to Report Knowledge or Suspicions of Abuse or Neglect. Civil liability cannot be imposed but criminal liability can.
- b. **R.C. §2151.421(F)(1)** – Agency Duty to investigate – Civil liability cannot be imposed.
- c. **R.C. §2919.22** – Child Endangering Statute – No civil liability, criminal liability as per statute.
- d. **Various statutes and regulations regarding procedure** – No civil liability.

Example Case:

O’Toole v. Denihan (Sup. Ct.), 2008-Ohio-2574

- Under R.C. 2151.421, children services agencies and caseworkers do not have a duty to “cross-report” to law enforcement concerns of abuse or neglect. In contrast, under R.C. §2151.421, police officers do have a duty to report to concerns of abuse or neglect to a children services agency.

Practice Tip: While it is clear under O’Toole that a children services employee is not require to cross-report complaints of abuse or neglect to law enforcement authorities, it is incumbent upon those employees to begin agency intake and investigation procedures in a proper and timely fashion as failure to do so may be cited as evidence of recklessness.

4. Public Duty Rule

Example Case:

Rankin v. Cuyahoga Cty. Dept. of Children and Family Services (Sup. Ct.), 2008-Ohio-2567.

- Child sexually assaulted by father at Cuyahoga DCFS service center while child was in DCFS’s temporary custody. (Note: father was not known to be previously sexually abusive).
- Public duty rule “special duty exception” is not an exception to immunity under R.C. Chapter 2744 and is otherwise irrelevant to the immunity analysis.

- Public duty rule is only relevant in analysis of the duty element of negligence claim. Claims against DCFS dismissed.
- Claims against individual DCFS employees remanded as Court did not have enough evidence on record to determine involvement of individually named DCFS employees.

Practice Tip: The public duty rule is finally... FINALLY... cleared up despite notable attempts by the 8th District to allow causes of action based on the "special duty" exception. That said, the public duty rule cannot be relied upon as a defense in the children services context because the Ohio Supreme Court has held that a "special relationship" exists between a children services agency, its employees and its clients. Brodie v. Summit County Children Services Bd., (1990) 51 Ohio St. 3d. 112.