

**The Importance of Immediacy:  
A Discussion of the Narrow Set of Circumstances that Could Support  
the Warrantless Removal of a Child**

*By: Bruce A. Kilday and Serena M. Sanders of Angelo, Kilday & Kilduff, LLP*

Welfare & Institutions Code section 305 permits a peace officer to take a minor into temporary custody without a warrant where it is reasonable to believe that the child has suffered, or there is a substantial risk that the child will suffer, serious physical harm by a parent or guardian. The statute also permits removal where there is evidence of serious physical harm or illness as a result of a parent or guardian's failure or inability to supervise or care for the child. The statute allows the child to be removed without judicial intervention where the child is in immediate danger of physical or sexual abuse. However, absent immediate danger, the warrantless removal of a child quickly crosses into the constitutional right of parents and children to live together without governmental interference and can lead to substantial punitive damages awards. Accordingly, it is key for police departments to educate officers on the risk of harm required for warrantless removal and what steps officers should take when receiving a request for removal of a child from Child Protective Services (CPS).

Judicial decisions have very narrowly defined the circumstances that would constitute legitimate grounds for removing the child without a warrant. In *Wallis ex rel. Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 1999) the Court held officers could proceed without a warrant if they reasonably believed that they were confronted with an emergency that threatened life or limb. However, the Court made it clear that the officer's actions must be strictly circumscribed by the particular exigency. In *Wallis*, the officers had reason to believe that there was a threat to the health of a child on a particular day. The Court concluded that the danger existed only on that particular day and did not continue to the following day. Thus, removal of the child on a day **after** the date on which the threat was presented was not proper. Similarly, in *Calbretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), the Court determined there was no exigency to support the warrantless removal of a child four days after the social worker learned a child had been heard screaming "no no no." The Court noted the lack of alleged physical abuse in the initial report and the delay between the time the social worker received the report and her investigation.

Stale information and the failure of officers to conduct independent investigations have contributed to plaintiff's verdicts and punitive damages awards in jury trials. In *Keller v. City of Stockton*, 2006 U.S. Dist. LEXIS 61090 (E.D. Cal. 2006), a jury in the Eastern District of California found that the warrantless removal of a child by the Stockton Police Department was improper where the officers acted on out-of-date information when removing a four-year-old child from her daycare provider without a warrant and without making an independent determination of exigency to support the removal.<sup>1</sup> In case out of the Northern District of California, a jury awarded \$1.25 million in compensatory damages and \$2 million in punitive damages against two officers who removed an eight-year-old girl and her two brothers without a warrant. The removal took place five days after an investigation found a connection between the female child's masturbatory behavior at school and the child's statement about baths she took

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<sup>1</sup> The trial judge upheld a jury verdict of \$600,000 in damages. The jury had also awarded \$2 million in punitive damages, which was reduced slightly by the Judge in a post-trial motion. Ultimately, the case settled for about \$850,000.

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with her father. Post-removal evidence that the girl had chlamydia was excluded from trial because such evidence was not known to the officers at the time of removal. The jury found the officers' warrantless removal of the children from the custody of their parents was neither supported by exigent circumstances nor was the least intrusive means of protecting the child from the risk of harm. Although damages awards were later found to be excessive, the trial court found there was sufficient evidence to support an award of punitive damages. *See Watson v. County of Santa Clara*, 2012 U.S. Dist. LEXIS 3544 (N.D. Cal. 2012). *See also Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007).

That the removal was requested by CPS does not absolve an officer of the responsibility to determine whether a child is in imminent danger of serious physical harm or sexual abuse. In a recent case out of the Eastern District, the Court denied summary judgment for defendants, the County and an individually named CPS employee. The Court held the collaboration between the police officers and on-call social worker created a reasonable inference the decision to conduct a warrantless removal of a child was a group decision, and thus a question of fact for the jury to determine how, when, and by whom the decision was made. *McLaughlin v. County of El Dorado*, 2012 U.S. Dist. LEXIS 157186 (E.D. Cal. 2012) (holding an "integral participant" in the decision to remove a child without a warrant absent exigent circumstances could be liable under the Fourteenth Amendment).

Conversely, an officer **is** entitled to rely on the opinions of qualified medical professionals when making the determination of whether a child is in "imminent danger." In *Mueller v. Auken*, 700 F.3d 1180 (9th Cir. 2012), the Ninth Circuit held defendant officer was entitled to qualified immunity where his decision to remove an infant child from her mother's care to be tested for meningitis was based on two physicians' assessments that the child could die or suffer brain damage if she had meningitis and was not immediately treated. The officer's reliance on the physicians' assessment was deemed reasonable although meningitis was later ruled out by the tests. *Id.* at 1188 (quoting *Graham v. Connor*, 409 U.S. 386, 396-97 (1989) "reasonableness 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight'").

### **Key Takeaway Points:**

- Do not simply rely on CPS recommendations or information: An officer must conduct his own investigation and analysis of the circumstances to determine whether exigent circumstances exist.
- Ask whether there is a substantial risk the child will sustain serious physical injury or sexual abuse in the time it would take to secure a warrant; an officer may rely on a qualified medical professional's assessment in making an "imminent danger" determination.
- Evaluate whether there are less intrusive means to protect the safety of a child, such as posting an officer at a residence until a warrant to remove is secure.

*Bruce A. Kilday is a Partner at Angelo, Kilday & Kilduff. Serena M. Sanders is an Associate Attorney. If you have any questions about this article, please feel free to contact Ms. Sanders at (916) 564-6100 or [ssanders@akk-law.com](mailto:ssanders@akk-law.com).*

**April 2013**