

Why We Remove Kids

Introduction

A long time ago when our Executive Director managed a county Child Protective Services (CPS) agency a community group decided that a survey about the quality of the agency's services was needed. The survey had an interesting finding: ½ of the respondents believed that the CPS agency removed too many children; ½ of the respondents believed that the CPS agency did not remove children enough. Hmmm. Wonder what the truth was?

CPS agencies get a lot of grief over the question of whether to remove a child from his or her home or not. CPS agencies are criticized for disproportionality with respect to child removal. Critics observe that agencies remove higher percentages of minority children – in particular African American children – in comparison to minority populations within communities. When fatalities occur, community advocates say CPS should remove more children, and as a result often placement rates go up. Upon occasion, observers of CPS decision making state that child removal decisions are biased or often associated with worker values, workload, lack of resources, uncooperative clients, and so on.

It's correct to acknowledge that criticism of the effectiveness of decision making and practice in this extremely serious area of CPS work is at times warranted. In fact it is imperative that those of us in the CPS profession continue to always be vigilant about actions we are taking which interfere with family life and parental authority. So, this month we are taking a look at this question of child removal as a dimension of safety intervention decision making and practice.

We will use another article to stimulate the consideration. Paul Chill wrote an excellent article, *Burden of Proof Begone: The Pernicious Effect of Removal in Child Protective Services*, for the Family Court Review (Volume 41, October

2003.) We will summarize some key points Mr. Chill made in his article prior to providing observations about removal as a safety intervention. We encourage you to read Chill's powerful article and share it with your attorneys and judges (just in case they've not read it).

The Pernicious Effect of Removal in Child Protective Services

The author begins in his article and throughout to emphasize the significant negative effect removal has on children, families, and parents. Chill correctly explains how removal launches a process which can literally spin out of control in terms of reuniting a family. It is pointed out that questionable and sometimes increasing child removals occur despite law which requires this option being seldom used. Chill points out as we have in previous articles concern with CPS intervention which fails to respect the U.S. Constitution which assures parents, children – families a right to be free from unwarranted government intrusion. With respect to that right, courts have held that only an imminent danger to a child's life or health can justify interfering in family life resulting in the removal of a child without notice and a court hearing first. Chill agrees that increases in the “use of emergency removal might be justified if it were necessary to protect children from imminent danger.” He observes, however, statistics published by the U.S. Department of Health and Human Services 2001 indicated that one in three who was removed was found not to have been maltreated. Chill's point is that the standard for removal – imminent danger – is not applied in 2/3 of the decisions.

The author concludes that statutory definitions of maltreatment contribute to the mistakes occurring in deciding to remove children. He states, “Because definitions of maltreatment are extremely broad and substantiation standards low, it can be reasonably assumed that a significant number of other children who are found maltreated, and for whom perhaps some intervention--short of removal--is warranted, are nonetheless removed on an emergency basis.”

Chill believes that a major influence of this tendency to remove is "defensive Social Work." This refers to practice and decision making in CPS that is fear driven. The idea is that CPS workers (and perhaps supervisors and managers also) lean toward removing children out of fear of what might happen if they didn't. This includes the CYA mentality related to civil and criminal liability, threat of personnel actions, and/or bad PR. Chill mentions the mentality of staff and agency leaders operating and justifying their actions and decision as "erring on the side of safety."

Most of Chill's article is devoted to what he calls the "snow ball effect" that occurs in the legal process once a child is removed. He correctly points out that the focus of court proceedings (and we might add continuing CPS intervention) changes from the criteria on which a removal is justified to different criteria for whether and when a child should be returned. He says, "The burden of proof shifts, in effect, if not in law, from the state to the parents."

In his article, the author reinforces our own experience that once children are removed they remain in CPS custody a long time. This should not happen. Chill discusses the way it is supposed to work. He describes the two-step legal process with which you are likely familiar: (1) the adjudicatory phase which determines whether a child has been maltreated and (2) the disposition phase which determines what remedy is indicated. Chill believes the emergency removal "serves as an end-run around the adjudicatory and dispositional phases, effectively predetermining their outcome and depriving them of their intended purposes." In part, he suggests this happens as much from personal predispositions as anything else. Here we conclude the meaning to be that once the process starts actors in the process (e.g., CPS staff, lawyers, judges) they go along with the assumption that a child is in imminent danger rather than taking an alternative view including requiring rigorous justification. Chill points out that reunifying a child following emergency removal is more likely to occur if done so at the initial court hearing (i.e., detention hearing occurring within 24 to 72 hours following removal depending on a state's law). Yet the author is concerned about

the quality of the initial hearings. He's right in observing that these hearings are brief, often occurring without legal representation for parents, or occurring with attorneys who've not had time to prepare a response to CPS' claim and evidence related to imminent danger.

Another factor that Chill identifies which affects a child remaining in placement is the changing burden of proof. He points out that the context for proof associated with removal is imminent danger; however, the context during the adjudication phase changes to proving child abuse or neglect. He believes that, "It may...be easier to prove that a child has been abused or neglected, even by a preponderance of the evidence, than to prove that the child faces imminent danger by the same or a lesser standard."

Chill offers some other factors that influence a child remaining in placement once removed:

- ✘ Emphasis within court hearings on the "dramatic and tangible" risk of harm to the child
- ✘ Resource disparity between disempowered parents and the CPS system
- ✘ "Defensive judging" which is essentially the same thing as "defensive Social Work" in terms of wanting to avoid fallout from a wrong decision
- ✘ Effects that removal and separation have on parents' response and sometimes deterioration (e.g., anger, depression, hostility, avoidance, etc.)
- ✘ A change in criteria for why the child is placed (from imminent danger to well-being)
- ✘ The strain on the parent – child relationship (i.e., changing nature and quality)

As placement continues, Chill observes the following:

Parents are repeatedly told--by their court-appointed lawyers, CPS caseworkers, court personnel, and others--that regaining custody of their child will be difficult. They are told that their best chance of regaining custody quickly is by showing "cooperation" and settling. This creates enormous pressure to settle, and most parents in fact do. Settling in this context generally means admitting or pleading nolo contendere to abusing or neglecting the child and accepting the services deemed necessary by the CPS agency to permit the child to return home. Thus, some cases that might actually result in a child being returned home quickly, if the parents were to litigate the matter aggressively, wind up being settled with the child remaining in foster care for an extended period.

We share Chill's concern about the lengthy placement problem, the things he describes about long stays in placement, and the Adoption and Safe Families Act (ASFA) which presses for permanency alternative to the child's family if reunification doesn't occur within a limited time.

The author brings the article to a close concluding that "several relatively minor statutory changes would significantly reduce the risk that children will be unnecessarily removed" while "maintaining sufficient authority and flexibility for CPS to seize a child on an emergency basis when such action is truly needed to protect the child." He suggests statutory clarification of the concept of "imminent danger" as "imminent risk of serious physical injury or death. He points out that few state statutes contain such specific, limited definition and some states contain no reference to imminent or immediate danger even though that presumably is the standard for removal. We agree with Chill that emergency removal should not occur without an ex parte order unless to do otherwise would jeopardize a child's safety.

As further solutions, Chill offers:

- ✘ Adherence to and enforcement of reasonable efforts related to acquiring representation for parents

- ✘ Promptly convened initial hearings

- ✘ Sufficient time and quality at initial hearings

- ✘ Clear and convincing evidence required that the child is in imminent danger of serious bodily harm or death if returned home

- ✘ Judicial weighing of the emotional and separation risks a child experiences resulting from removal against evidence of imminent danger

Commentary

There is much to think about in Chill's article. But this commentary will focus mainly upon the standard for the child removal and reunification issues.

Standard for Removal

The standard for removal is imminent danger. Whether deciding correctly or not, workers and supervisors will all say that they remove children because they are not safe. The problem becomes one of precision about what constitutes an unsafe child. It is that precision that is required in relation to establishing a fact base which supports and explains imminent danger. Imminent danger is defined as a specific family situation or behavior, emotion, motive, perception, or capacity within the family and home that is out of control and reasonably can be concluded to have severe effects on a vulnerable child. If the danger is active, it is called present danger; if the threat is inactive, it is called impending danger (as in

a state of danger). Imminent danger is justified by information that meets this threshold:

- There is evidence that a family situation or behavior, emotion, motive, perception or capacity is out of control.
- The family situation or behavior, emotion, motive, perception, or capacity is observable and specific; facts can be identified, explained, and testified to.
- The family situation or behavior, emotion, motive, perception, or capacity is occurring in relation and proximity to a vulnerable child.
- The family situation or behavior, emotion, motive, perception, or capacity is such that it is reasonable to believe it could have severe effects on a child.
- The continuance of the unchecked family situation or behavior, emotion, motive, perception, or capacity is imminent, will continue, and could have a severe effect at any time.

Chill correctly identifies that the standard for imminent danger should be at a level consistent with serious physical injury or death. Using the severity as an essential feature of imminent danger, the following can be added to Chill's qualification: dismemberment, disability, grievous pain and suffering, terror, impairment, grave and debilitating health conditions, and impairment.

Conceptual Disconnect

Chill refers to imminent danger as the standard for child removal decisions. He also mentions child abuse and neglect and substantiation in relation to child removal decisions when discussing imprecise statutory definitions. Here we see a

longstanding conceptual disconnect. Laws establish court jurisdiction based on child abuse and neglect; however, child removals ought to be based only on imminent danger. Courts do address issues associated with child abuse and neglect as a part of remediation. Yet the decision about placement, continuing custody, and reunification are safety decisions and not treatment decisions.

We should pause here and consider context. Child abuse and neglect statutes in large part arose in the mid 1970's. Those laws were based on understanding of child abuse and neglect at that time nearly 40 years ago. The design for juvenile and family courts including the 2 step decision making process Chill mentioned predates 1970. The inception of safety intervention and the concepts associated with it (such as imminent danger) began in the late 1980's. Greater development and precision of safety intervention constructs has occurred within the past decade. What this means is to a large extent the foundation for invoking court jurisdiction (as done related to child removal) is archaic; we are in effect confounded by the imposition of the 1970's child abuse and neglect standard while the state of the art in safety intervention practice and decision making is attempting to employ a 2009 imminent danger standard.

Changing Decision-Making Criteria

Remember the "snow ball effect" Chill mentioned. He referred to once a child is placed things spin out of control so that kids remain in care for longer periods and parents have more difficulty within the process. He cited changing decision-making criteria. Presumably imminent danger is applied with child removals while best interest of the child is applied as the case continues. We'd add in rehabilitation or remediation of parents is thrown in there. So the decision to reunify a child with his parents is not based on the same criteria as when the child was removed. In simple terms, a child is removed because they are not safe; they are reunified because their parents have been rehabilitated. This reality is another example of antiquated thinking and practice. As we have learned more about the dynamics and manifestation of imminent danger, we've come to

appreciate that intervention must accomplish two objectives: (1) control and manage the imminent danger and (2) enhance diminished caregiver protective capacities. While decision making between these two are related they are not interdependent. In other words, it is possible to make decisions about safety – like reunification – separate from rehabilitation. Children can be returned based on the ability to manage imminent danger in their homes even when parents have not achieved life altering changes.

Two safety intervention practice concepts apply: (1) conditions for return and (2) provisional safety management. When children are removed, CPS identifies in detail the nature, occurrence, activity, frequency, proximity, and influences of the imminent danger. In the case of child removal, CPS should have ruled out the option of an in-home safety plan. So, when placement occurs, the worker identifies for the parent exactly what conditions have to exist within the home for the child to return. These conditions may include some changes on the part of the parent – say for instance sobriety – but may identify other adjustments to the home situation which support the child returning. Let's think about a case where a toddler is unsupervised routinely because of a mother's mental health challenges. At the time an in-home safety plan is ruled out. A condition for return might be that a responsible adult will be in the home always when the toddler is there. This condition doesn't require that the person is the mother. The condition for return allows for the possibility that the mother's mental health issues may go on for some time rendering her unable to meet the supervision requirements. However, if a responsible adult could be found who could meet the demands of the condition for return then an in-home safety plan could replace the out-of-home safety plan. The toddler could go home.

This brings us to the second concept. Provisional safety management means flexible, adjustable, dynamic, subject to revision, diligent, active attention to evaluating and managing imminent danger. Provisional safety management is governed by the value *least intrusive intervention required to manage imminent danger*. The intention is to keep any safety plan on the front burner so that

attention is always given to whether more or less intervention is possible and reasonable. Once a child removal has occurred, provisional safety management occurs in the form of concerted efforts to constantly evaluate how a safety plan is performing and whether other options are possible.

So, relating back to the question of changing decision-making criteria, we can see there are specific ideas and action which can avoid that slippery slope. Imminent danger (safety) has to be the sole criterion for governing removal and reunification. Conditions for return should be identified when children are removed so everyone knows what the playing field is. Conditions for return must be based on managing imminent danger rather than client change. Provisional safety management is the means by which imminent danger is managed so that diligence occurs in achieving the least intrusive and effective way to manage imminent danger.

In Closing

There are three more related issues that will wind up this month's article.

Reasonable Efforts

Chill mentions the need for higher quality initial hearings when children are removed. He promotes greater rigor on the part of CPS staff who present their basis for imminent danger and from judges in challenging justification. We agree. A significant part of that kind of dialogue occurring during the initial hearing is justifying that reasonable efforts have occurred to prevent the removal.

Emergency child removal is a result of two assessments. The worker assesses and concludes the child is in imminent danger which could result in severe effects. That's the first assessment. The second assessment is concerned with whether there are any actions that can be taken or resources within the family network which would allow for control and management of the imminent danger

while the child remains home or within the family network. This second assessment is concerned with performing the effort necessary to explore any option that can confidently be put in place and will keep the child safe. That's reasonable efforts. When a worker appears in the initial hearing following an emergency child removal, he should fully explain everything he did to rule in or rule out how to manage imminent danger so that the child could remain home or within the family network.

Foster Care

An abiding mentality and perception about what foster care is contributes to some of the problems that Chill has observed about child removal such as the "snow ball effect." The mentality, like other things we've covered in this article, are an expression of the way things have been traditionally. It's pretty simple and yet profound. Foster care as a service has existed in foster care programs which have been considered to be at the same status as, say, the CPS program or adoption program. We've been talking about disconnects earlier. Here's another one. By many agencies and child welfare staff, foster care is not viewed as a safety response with respect to CPS cases. So where is the disconnect? If children are placed because they cannot be kept safely in their homes, how can it be that foster care is not a safety response...an option to managing imminent danger? This makes no sense and yet it is common to find programs that consider a safety plan involving only in-home options; placement as an out-of-home option is not considered a safety plan!

In relation to the shifting criteria used in child removal decision making, it is reasonable to consider that a person who does not view foster care as an imminent danger management response would not see the need to apply imminent danger as the basis for reunification.

Disproportionality

The problem of disproportionate percentages of minority kids being placed is an enduring one in CPS. Attention in determining cause is rightly occurring with respect to racial discrimination, cultural insensitivity, lack of empowerment, resources, and poverty, and so on. The issues covered in this article that we've summarized from Chill's article and our commentary could be added to the study of disproportionality. Specifically, consideration should be given to the application of "imminent danger" as the basis for child removal and reunification in child removals involving minority children. Without checking, we have no reason to believe that the mistake rate identified in 2001 (i.e., two thirds of removals are not justified) remains evident at similar levels today. And it could be that disproportionality can be associated with and perhaps affected by the failure to apply imminent danger child removal decisions accompanied by reasonable efforts to keep children within their family network.

Erring on the Side of Safety

Chill mentioned that CPS often positions their actions related to child removal as erring on the side of safety. We are in an era in which we no longer need to make decisions about child removal based on intuition or uncertain probabilities. We can avoid making decisions about child removal that are too heavily influenced or motivated by emotion or self-interest rather than the facts of the case. To decide about child removal by erring on the side of safety is an example of the "defensive Social Work" Chill described. It represents a self-centeredness on the part of CPS which diminishes the importance of parent's and children's rights. It reduces professionalism in safety decision making by not relying on concepts and methods that support effective identification of imminent danger. Literally this means that if CPS makes a mistake removing a child it will be justified by an attitude of "when in doubt remove." This seems to suggest that safety decision making is guess work which cannot be since we should be guided by facts and evidence. So, if imminent danger is suspected but the facts and

evidence are not forthcoming, then there is no basis for child removal. We do not remove a child just to be on the safe side in case imminent danger might exist.