ABA Center on Children and the Law
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Overview and Analysis of Recent Pennsylvania Due Process Cases

Introduction

A number of recent federal cases address substantive and procedural due process rights of parents separated from their children in Pennsylvania. Most involve 'safety plans' by which children were separated from parents by moving the parents out[1] or placing the children with other family or friends.[2] All involved scenarios where the child welfare agency did not initially offer the parents an opportunity for a hearing on the matter.[3]

The cases also involved separations over an extended period of time – at least a month.[4] In *Isbell v. Bellino,* the court clarified that it was not holding that there was any right to procedural protections *before* a safety plan is entered into to keep a child safe, but that protections must be available in a "meaningful and timely manner after the deprivation."[5] The Court of Appeals in *B.S. v. Somerset County* noted that a hearing regarding a parent's deprivation of his or her child "should ordinarily be measured in hours or days, not weeks."[6]

Some guidance can be gleaned from these cases:

(1) Parents have a right to some type of timely appeal when they are told to separate themselves from their children on threat of a dependency petition being filed.

(2) County child welfare agencies have a duty to establish policy and train staff to ensure that procedural rights are provided to parents.

(3) Caseworkers can be liable for violating parents' constitutional rights if they conduct investigations without "reasonable and articulable evidence… that a child has been abused or is in imminent danger of abuse."[7]

Additional case details and further analyses are provided below.

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[1] *See Starkey v. York County*, 2012 U.S. Dist. LEXIS 189055 (M. D. Penn.); *Isbell v. Bellino*, 2013 WL 4516475 (M. D. Penn.).
[2] *See D.M. v. County of Berks*, 2013 WL 1031824 (E. D. Penn.); *R.B. v. Westmoreland County*, 2013 WL 2303733 (3rd Cir.); *Weaver v. Marling*, 2013 WL 4040472 (W.D. Penn.); *B.S. v. Somerset County*, 704 F.3d 250 (3rd Cir.).
[3] *See Isbell*, 2013 WL 4516475 at 8; *Starkey*, 2012 U.S. Dist. LEXIS 189055 at 29; *Weaver*, 2013 WL 4040472 at 7; *D.M. v. County of Berks*, 2013 WL 1031824 at 1 (safety plans conducted without court involvement); *B.S.*, 704 F.3d at 250 (custody transferred via *ex parte* order without a hearing).
[4] *See Starkey*, 2012 U.S. Dist. LEXIS 189055 at 23; *Isbell*, 2013 WL 4516475 at 1-2; *Weaver*, 2013 WL 4040472 at 1; *R.B.*, 2013 WL 2303733 at 1; *D.M. v. County of Berks*, 2013 WL 1031824 at 4; *B.S.*, 704 F.3d at 272.
[5] *Isbell*, 2013 WL 4516475 at 18.
[6] *B.S.*, 704 F.3d at 272, n. 31.
[7] *D.M*, 2013 WL 1031824 at 4.

Brief Facts of the Recent Cases

***Starkey v. York County* – December 2012**
2012 U.S. Dist. LEXIS 189055 (M.D. Penn.)

The parents brought their child to the hospital after their son fell over and bumped his head. The hospital called ChildLine when it found a subdural hematoma and retinal hemorrhages. They suspected the boy had been shaken. The agency asked the Starkeys to agree to a safety plan while they investigated. They told the parents that if they did not agree, they would remove the children via court order. The grandmother moved into the home to watch the two children and the parents were allowed supervised visitation.

Continuing the investigation, the agency learned from two doctors, including one that originally had suspicions, that the child might have certain abnormal conditions that could increase the chances of hemorrhages even without serious trauma. The primary doctor reported that he remained suspicious but did not feel he had enough evidence to testify that the conditions were a result of abuse.

Approximately two months after the parents were first prohibited from unsupervised contact with the child, the agency filed a dependency petition. After an additional medical opinion could not confirm abuse, the agency withdrew its petition and determined it would not contest the parents' appeal of the indicated child abuse finding.

***B.S. v. Somerset County* – January 2013**
704 F.3d 250 (3rd Cir.)

Mother took her daughter to a gastroenterologist concerned about her lack of weight gain. She was admitted to the hospital and gained weight normally, but again struggled to gain weight when returned home. The doctor could not find a medical explanation and suspected failure to thrive via Munchausen Syndrome by Proxy. The child welfare agency obtained an *ex parte* order which transferred custody of the child to the father.

Over a month later, the same court heard mother's habeas corpus petition challenging the lack of a hearing for her child's removal. The court held that a full dependency proceeding was not needed if the child was merely moved to the other parent. In the meantime, the agency completed the investigation and recommended to the court that the child remain with the father with supervised visits with the mother. The court adopted the recommendations.

Mother found that there were errors in agency reports regarding the child's weight gain. Though the reports recounted what a doctor had told the caseworker, the small child had been clothed some of the times she was weighed. As such, some of the conclusions about how much weight the child had gained in mother's care were mistaken.

***D.M. v. County of Berks* – March 2013**
2013 WL 1031824 (E.D. Penn.)

In *D.M.*, an adult daughter accused her father of sexually abusing her 20 years earlier. The agency knew her parents because they had been foster parents during that time, and caseworkers had regularly checked the children and had found no signs of abuse or neglect. They also knew that the adult daughter was in a heated custody fight with her parents and previously had made several allegations that were found to be false.

The agency caseworker came to the home accompanied by law enforcement without a warrant and told the parents that the younger children would need to leave the home voluntarily or they would remove them.

After the parents sent the children to stay with friends and family, the father completed a psychological evaluation and polygraph which did not suggest he was prone to or did abuse any children. The minor son denied any abuse and a doctor found no evidence of abuse on examination. Over a month later, the agency filed a petition to compel the parents to cooperate with the investigation. At a hearing on that petition, the court heard from the adult daughter and the agency worker. The court granted the petition, ordering periodic caseworker visits, but ordered that the children be returned home.

***R.B. v. Westmoreland County* – May 2013**
2013 WL 2303733 (3rd Cir.)

This case began when father *R.B.* confronted his 15 year old daughter with his suspicion she was having a sexual relationship with a 20 year old. She ran away to the home of the young man. His mother, knowing that the father's suspicions were true, encouraged the daughter to make a false claim of sexual abuse, thinking this would allow her stay in the home and prevent suspicion of her son for statutory rape.

Upon receiving the report of sexual abuse, the agency asked the parents to agree that their daughter remain with her boyfriend's family or face formal removal. The father expressed his concerns, but the agency believed the son was not staying at the home at the time.

The investigation continued for a month and eventually the daughter admitted the allegations were false.

***Weaver v. Marling* – August 2013**
2013 WL 4040472 (W.D. Penn.)

In *Weaver*, the child reported that she fell on an exercise bike and injured her genital area. When her mother took her to the hospital, she told them she was injured by sexual abuse of her step-sister. The agency quickly asked the father and step-mother, who had joint custody, to abide by a safety plan that prevented unsupervised contact. The child remained with the mother under this plan. During the investigation, the parents argued that the child ultimately changed her story twice, often said false things, and there was no medical evidence that supported sexual abuse.

The parents claimed that the caseworkers threatened to remove the other children if they did not follow the plan. The District Court could not determine why, but the safety plan was dissolved after three months.

***Isbell v. Bellino* – August 2013**
2013 WL 4516475 (M.D. Penn.)

Mother took her child to the hospital concerned about excessive drowsiness and dehydration. The child was found to have rib fractures and head trauma. The doctor called ChildLine. The caseworker had the parents sign a series of safety plans over the next few weeks. The later plans required the father move out of the home and have only supervised visitation. The caseworker indicated that if the parents did not agree to the safety plan, a dependency petition would be filed. The parents were sent letters detailing their appeal rights regarding the child abuse report and a family service plan after the case was opened for general protective services.

A dependency petition was filed several months after the incident. The parties stipulated to the dependency adjudication with an in-home disposition. Approximately a year later, the case was closed after the court found that the mother was capable of providing a safe home for the children.

Holdings of the District Court and Circuit Court of Appeals

(1) Parents have a right to some type of timely appeal when they are told to separate themselves from their children on threat of a dependency petition being filed.

The parents in these cases made procedural due process claims under 42 U.S.C. § 1983 against individual caseworkers. Most of the defendant caseworkers argued they were entitled to qualified immunity. Under procedural due process, the courts must first analyze whether a constitutional right is clearly established to put the officials on notice that their actions might be unconstitutional and, if so, determine whether the right was violated.

The parties agree that the 'removal' of a child from a parent impacts a well-established constitutional right to care and control of one's child, however, the defendants argued that the children were not 'removed' because the safety plans were voluntary. The courts disagreed.[8]

The courts found that the right to procedural protection when a parent is separated from his or her child was clearly established by a Third Circuit opinion over 10 years ago.[9] While the *Croft* case focused on the substantive issue – the claim that the agency lacked a reasonable basis for the investigation – the court *did* hold that procedural protections were required with safety plans that separated a parent and child.

[8] *See, e.g., Isbell,* 2013 WL 4516475 at 1; *Starkey,* 2012 U.S. Dist. LEXIS 189055 at 30; *Weaver,* 2013 WL 4040472 at 2; *R.B. v. Westmoreland County,* 2013 WL 2303733 at 1.
[9] *See Croft v. Westmoreland County,* 103 F.3d 1123 (3rd Cir. 1997).

Even in what was arguably the least intrusive scenario, where the child was placed with the non-custodial parent as opposed to away from both parents, the court found that there was no meaningful difference as far as a parent was concerned anytime her or she is prevented from seeing his or her child.[10] In sum, the courts found that the children were 'constructively' removed when the parents were denied contact on threats of a petition.

The courts next considered arguments as to what procedural protections were offered. In two cases, the courts rejected the arguments that notices of appeal rights provided in connection with the child abuse report and a family service plan satisfied due process. The courts found these did not give sufficient notice as they were too disconnected from the safety plans. They were not attached to the safety plans and were not the instruments that had required the parent-child separation.[11]

A subsequent petition for dependency filed long after the separation was found to be inadequate.[12] Similarly, where a hearing was held on the agency's request to compel cooperation with an investigation, the court implied that though the hearing was an adequate opportunity to challenge the safety plan, it occurring 40 days after the child was moved was unacceptable. [13]

A mother's initiation of a habeas corpus proceeding demanding a hearing after an *ex parte* order was issued did not satisfy due process. There, the Court of Appeals stated just because a parent is "knowledgeable enough to initiate legal action" on her own does not meet the state's duty to provide an opportunity to be heard.[14]

Comparisons and Contrasts with Other Circuits

These cases establish a higher standard than that in other Circuits: requiring some type of appeals process even where the agency has sufficient grounds to file a dependency petition. The Sixth and Seventh Circuits have also considered cases where safety plans were implemented without notice and an opportunity for a hearing.

In *Dupuy v. Samuels*, 465 F.3d. 757, 761 (7th Cir. 2006) (Illinois), the Seventh Circuit held that there was no requirement of procedural due process because the safety plan was voluntary. A more recent Seventh Circuit case, *Hernandez v. Foster*, 657 F.3d 463, 484 (7th Cir. 2011), attempted to explain the Circuit split. The court there noted that the early Third Circuit case *Croft* was distinguishable by containing coercion through duress because a threat to remove was made when the agency did not have enough evidence to remove. In *Dupuy*, by contrast, the agency was merely asserting the legal right it had to remove if the parent did not agree to a settlement.

The opinions predate the recent Pennsylvania-based Third Circuit District Court and Court of Appeal opinions, however. Noting that several of the Third Circuit cases found that the caseworkers were entitled to immunity on the substantive, but not the procedural due process

[10] *See Weaver*, 2013 WL 4040472 at 7.
[11] *See Isbell*, 2013 WL 4516475 at 11-12; *Starkey*, 2012 U.S. Dist. LEXIS 189055 at 35.
[12] *See Isbell*, 2013 WL 4516475 at 12-13.
[13] *See D.M*, 2013 WL 1031824 at 8.
[14] *B.S.*, 704 F.3d at 272.

claims[15] and as recognized by the court in *Isbell,*[16] there is a split among the Circuits on this issue.

(2) County child welfare agencies have a duty to establish policy and train staff to ensure that procedural rights are provided to parents.

These cases found that a municipality can be liable for constitutional claims where it actually caused a constitutional violation by formally or informally adopting a policy that deprives a person of his or her rights without procedural protections.

In these cases, the counties acknowledged that they had policies or routine practices of requiring safety plans that resulted in parents or children being moved without providing rights to appeal.[17] Again, the counties had been operating under the belief that no procedural protections were required for these 'voluntary' plans, so, of course, there had been no training to provide any notice of appeal rights. Accordingly, the courts indicated the counties could be held liable.[18]

(3) Caseworkers can be liable for violating parents' constitutional rights if they conduct investigations without "reasonable and articulable evidence… that a child has been abused or is in imminent danger of abuse."[19]

Under substantive due process, parents have a "right to be free from unreasonable and unsupported child abuse investigations"[20] conducted without evidence that would lead a reasonable person to suspect abuse.[21] For professional case workers, the courts noted that more than a negligence standard had been established. The actions must be conscience shocking for a successful claim.[22]

Most of the cases included claims under this principle. The outcomes varied on the facts.

In *Starkey v. York County,* where the agency investigated possible physical abuse and was given changing medical theories over time, the court found that the caseworkers were entitled to qualified immunity. The court found they had conscientiously examined conflicting and equivocal medical analyses and could not be said to be deliberatively indifferent or grossly negligent.[23]

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[15] *Isbell,* 2013 WL 4516475 at 5, 13; *Starkey,* 2012 U.S. Dist. LEXIS 189055 at 23-24, 34.
[16] *Isbell,* 2013 WL 4516475 at 7 ("The defendants in Starkey urged this court to instead adopt *Dupuy v. Samuels*…which held that safety plans by their nature are voluntary and require no procedural safeguards. We noted, however, that the *Croft* panel expressly rejected that characterization…").
[17] Similarly, in *B.S.*, there was a routine practice of obtaining *ex parte* orders to transfer a child to a non-custodial parent without a hearing. *B.S.,* 704 F.3d at 272.
[18] *See, e.g., Isbell,* 2013 WL 4516475 at 17; *Starkey,* 2012 U.S. Dist. LEXIS 189055 at 41.
[19] *D.M,* 2013 WL 1031824 at 4.
[20] *Starkey,* 2012 U.S. Dist. LEXIS 189055 at 18.
[21] *See D.M,* 2013 WL 1031824 at 4.
[22] *See Starkey,* 2012 U.S. Dist. LEXIS 189055 at 21; *B.S.,* 704 F.3d at 267.
[23] *See Starkey,* 2012 U.S. Dist. LEXIS 189055 at 23-24.

In *R.B. v. Westmoreland County*, there was nothing conscience shocking about the agency's investigation. [24] Though the information eventually came out that the daughter and older boyfriend's mother had made up false allegations, the agency could not be faulted for acting cautiously in the face of what was initially a 'he said she said.'

In *D.M. v. County of Berks*, where the adult daughter accused her father of abuse 20 years earlier and there were a number of reasons to doubt her motives in making the allegation, the court found the parents had made a plausible claim that the caseworkers were acting unreasonably, sufficient at least to allow the case to proceed to a trial.[25]

As noted above, *B.S. v. Somerset County* involved discrepancies in the weight of a child suspected of failure to thrive. In contrast with the other cases, this case involved an *ex parte* order rather than a safety plan. Here, the Court of Appeals held the investigation was undertaken in a prosecutorial capacity, was intended to form a recommendation for a court order, and the workers were entitled to *absolute* immunity.[26]

Conclusion

These cases show that the Third Circuit has adopted a standard that safety plans which separate a child from a parent require some level of procedural protection. The Third Circuit Court of Appeals, though it implied a hearing was needed, did not specify what type of protection was required.[27]

The Pennsylvania cases do not depart significantly from substantive due process cases in which parents sought redress under § 1983 in other Circuits. Courts have articulated a high standard in the cases to protect caseworkers who are acting reasonably, recognizing the difficult, often time constrained situations in which they must make decisions. These liability standards have been described as 'conscience shocking,' 'deliberately indifferent' or 'grossly negligent.'

Potential County Actions

[24] *See R.B. v. Westmoreland County*, 2013 WL 2303733 at 3.
[25] *See D.M*, 2013 WL 1031824 at 5.
[26] *See B.S.*, 704 F.3d at 256-7, 270.
[27] *B.S.* 704 F.3d at 272; *D.M*, 2013 WL 1031824 at 5.