
LAW AND THE FAMILY

An Abused Child's Emergency Removal From Home

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THE CRIME against Elisa Izquierdo, the 6-year-old girl allegedly murdered by her mother, brought forth a surge of interest in child abuse cases. The tale is deeply troubling. In the past, this area has been given little more than the scantiest sort of treatment.

Talking with social service workers, one finds that many of them genuinely care about the tragedies imposed upon the young. But workers feel somewhat imprisoned themselves, forced by a severely underfunded, understaffed system to keep costs down, work loads up and have cases concluded. With nearly 358 reports alleging child abuse and neglect received on the Department of Social Service's hotline daily, it is little wonder caseworkers feel overwhelmed. Efforts are sweeping the state, however, as agencies shift from purely mechanical organizations to proactive, entities implementing authority delegated to them.

Article 10 of the Family Court Act (FCA) is designed to protect children from abuse and neglect. When necessary it permits the removal of an abused child from a parent who commits abuse or neglect. It is intended to protect children from injury or mistreatment and safeguard their well-being. Its further mission is to provide a system for guaranteeing due process of law when the state intervenes on behalf of the child against the wishes of a parent so that the child's needs are properly met.¹ While parents have a right to raise their children as they see fit, they must do so within reason and with an eye toward the good of the child. Parents have an affirmative obligation to protect their children. If they fail to meet that obligation, the state can and will intervene to protect them.²

Jurisdiction for Abuse, Neglect

Article 10 proceedings include "abuse" and "neglect" proceedings, with abuse encompassing the most serious acts or omissions to act that affect a child's health

and safety.³ Article VI §13(b)(1) of the New York State Constitution grants the Family Court jurisdiction over proceedings involving the protection and treatment of minors who need the Family Court's exercise of authority because of neglect or dependency. The Family Court Act specifies that the Family Court has exclusive original jurisdiction over abuse or neglect proceedings.⁴

The State Constitution however, grants the Supreme Court "general original jurisdiction in law and equity"⁵ and it may opt to exercise its jurisdiction where allegations of abuse or neglect arise in the context of a matrimonial proceeding.⁶ As a practical matter, the Supreme Court generally declines to exercise this jurisdiction and defers to the Family Court.⁷

If a child is abused or neglected, a peace officer, a police officer or an agent of a duly authorized agency may remove a child from the place where he or she is residing with the written consent of the child's parent or other person legally responsible for the child's care. If a child is removed with consent and not returned within three days from the date of removal, the procedures in the Family Court Act for commencing a child protective proceeding must be set in motion.⁸

Abuse and neglect proceedings may only be originated by a child protective agency or "a person on the court's direction."⁹ They are commenced by the filing of a petition alleging sufficient facts to establish that a child under 18 is abused or neglected.¹⁰ Thereafter, a summons is issued and served with the petition.¹¹ After the petition is filed, in cases involving abuse, or where the child is removed with an order, the court must hold a preliminary hearing to determine if the child requires interim protection during the pendency of the proceeding and may make an appropriate order, including removal from the home.¹²

Where a child's life or health are in imminent danger, FCA §1022 provides for obtaining an ex parte temporary removal order before the filing of an abuse or neglect petition, where the parent or person responsible for the child's care refuses to consent to temporary removal or is absent and there is not enough time to file a petition and hold a preliminary hearing.

Imminent Danger to Child

Sometimes a situation may arise that is so imminently dangerous to a child's health or life that only the immediate removal of the child from her residence can adequately protect her. There may be no time to resort to the Family Court to file a petition or to seek an ex parte order pursuant to FCA §1022 for the child's removal.

In such a case FCA §1024 permits the emergency removal of the child by specified persons without a court order or the parent's consent.¹³ Peace officers, police officers, law enforcement officials, agents of a duly incorporated society for the prevention of cruelty to children, and designated employees of a city or

county Department of Social Service (DSS) are required by statute to take all necessary and appropriate measures to protect a child's life or health.[14](#)

When appropriate they are required to take or keep a child in protective custody without an order and without the consent of the parent or person legally responsible for the child's care, if they have reasonable cause to believe that the child is in such circumstance or condition that would present an imminent danger to the child's life or health if the child remained in that person's residence or care and there is not enough time to apply for a temporary order of removal under FCA §1022.[15](#) This equates to a mandatory obligation that DSS take action when a child's welfare is seriously endangered.

If a person authorized by FCA §1024 removes or keeps custody of a child, he or she must[16](#) bring the child immediately to a place approved for such purpose by the local DSS, unless the person is a physician treating the child and the child is or will be soon admitted to a hospital. He must also make every reasonable effort to inform the parent or person legally responsible for the child's care of the place where the child has been brought. When the child is removed, the authorized person must give written notice to the parent or person legally responsible for the child's care of the right to apply to the Family Court for the return of the child as provided in FCA §1028.

That responsible person must also inform the court and make a report pursuant to Title 6 of the Social Services Law, as soon as possible.[17](#) The written notice must be personally served upon the parent or other person at the child's residence. If the person is not present at the child's residence when the child is removed, a copy of it must be affixed to the door of the residence and a second copy mailed to that person at his or her last known place of residence within 24 hours after the child's removal.[18](#)

If the child is removed from a place other than his residence, a copy of the notice must immediately be personally served on the parent or person legally responsible for the child's care, or a copy affixed to the door of the child's residence and a copy mailed to such person at his or her last known place of residence within 24 hours after the child's removal.[19](#)

A 1995 New York State Senate Report advises that the Child Abuse Hotline, operated by the Department of Social Services, received 128,111 reports of abuse or neglect in 1994. These reports involved 210,997 children and included 131 reports of suspected abuse-related deaths. Half of the hotline reports come from persons mandated by law to report observed incidences of abuse or neglect.[20](#)

Who Is Authorized?

Physicians are among those authorized to help these young victims. Where a physician who is treating a child has reasonable cause to believe that it would be

an imminent danger to the child's life or health to leave the child in the residence or in the custody of the parent or person responsible for his care, and there is not enough time to apply for a temporary order of removal under FCA §1022, he is required by law to notify the DSS or appropriate police authorities to take custody of the child.[21](#) Any physician keeping a child in custody pending action by the DSS or police authorities has the right to keep the child in custody until the child's custody is transferred to the police authorities or the social services official.[22](#)

Another overseer of a child's welfare is provided by SSL §417(2) under such circumstances where a person in charge of a hospital or a similar institution may retain custody of an abused or maltreated child until the next regular weekday session of the Family Court in which a child protection proceeding can be commenced, regardless of whether or not the child requires additional medical treatment during that period and regardless of any request by the parent or guardian for the child's return.

Immediate notification must be given to the appropriate local child protective service, which must immediately begin an investigation. If the child is in residential care, the child protective agency must notify the appropriate state agency, which must immediately commence an investigation. If no further medical treatment is necessary, the child protective agency must take all necessary steps to protect the child's life and health, including taking custody of the child if appropriate.

The child protective service must commence a child protective proceeding in the Family Court at the next regular weekday session of the court or recommend to the court that the child be returned to the parents or guardian.[23](#) Where a physician who is keeping a child in his or her custody pending action by the DSS or police authorities is doing so in the physician's capacity as a member of the staff of a hospital, the physician must notify the person in charge of the institution, or a designated agent, who then becomes responsible for the further care of the child.[24](#)

If a social services official receives custody of a child pursuant to FCA §1024 the official must promptly inform the parent or other person responsible for such child's care and the Family Court of such action.[25](#) Upon being informed that there has been an emergency removal of a child from the child's home without a court order, a child protective agency or the person designated by the court must[26](#): make every reasonable effort to communicate immediately with the child's parent or person legally responsible for the child's care and give the name and address of the place where the child is being held.[27](#)

In cases that do not involve abuse, the protective agency or designated person must return the child, if it concludes that it would not be an imminent risk to the child's health to do so.[28](#) In cases involving abuse, it must either recommend to the court that the child be returned or that no petition be filed. The child protective

agency may, but need not, condition the return of a child under §1026 of the Family Court Act upon the giving of a written promise, without security, by the parent or other person legally responsible for the child's care that he or she will appear at the Family Court at a time and place specified in the recognizance. It may also require such person to bring the child with him or her.[29](#)

If for any reason the child protective agency does not return the child, or if the child protective agency concludes that a petition should be filed under Article 10 of the Family Court Act, it must have the petition filed no later than the next court day after the child's removal. However, if good cause is shown, the Family Court may grant an extension to file the petition for up to three days from the date of the child's removal.[30](#)

Notes

(1) FCA §1011.

(2) *Re Keith R.* (1984) 123 Misc2d 617, 474 NYS2d 254.

(3) FCA 1012 (e) and (f) define "Abused child" and "Neglected child." Both sections apply only to a child younger than 18 years of age.

(4) FCA §115(a)(i); FCA §1013(a).

(5) NY Const Art VI §7(a). *Paul B. S. v. Pamela J. S.* (1987) 70 NY2d 739, 514 NE2d 382.

(6) See *Schneider v. Schneider* (1987, 1st Dept) 127 AD2d 491, affd, ctd ques ans 70 NY2d 739, 514 NE2d 382; *Paul B. S. v. Pamela J. S.*, supra.

(7) *People ex rel. McKay v. Barbaro* (1970) 63 Misc2d 138.

(8) FCA §1021. Even if a child is removed with the parent's consent, a hearing should be held before the child is returned. *Teeter v. Pruiksma* (1975, 4th Dept) 47 AD2d 101.

(9) FCA §1032.

(10) FCA §1031.

(11) FCA §1035(a). In certain situations a warrant may be issued and served, instead of the summons and petition. See FCA §1037(a).

(12) FCA §1027.

(13) FCA §1024.

(14) FCA §1024; SSL §417(a).

(15) FCA §1024(a); Soc Serv L §417(a).

(16) FCA §1024(b).

(17) See Soc Serv L §411 et seq. regarding the obligation to report child abuse statutorily imposed on health professionals, school officials, and other persons and public officials.

(18) FCA §1024(b)(iii).

(19) FCA §1024(b)(iii). An affidavit of service must be filed with the clerk of the court within 24 hours, exclusive of weekends and holidays, after service is made. However, failure to file the affidavit of service as required by the statute will not constitute grounds for return of the child. The form of the notice is prescribed by the chief administrator of the courts..

(20) [http://www. Senate. State. NY. US-1995, CHF, Narrative, Child Abuse, N 90704.](http://www.Senate.State.NY.US-1995,CHF,Narrative,ChildAbuse,N90704)

(21) FCA §1024(a).

(22) FCA §1024(e).

(23) Soc Serv L §417(2).

(24) FCA §1024(d).

(25) FCA §1024(e).

(26) FCA §1026.

(27) 22 NYCRR §205.81.

(28) FCA §1026(a)(ii); 22 NYCRR §205.81(b).

(29) FCA §1026(b); 22 NYCRR §205.81(c).

(30) FCA §1026(c); 22 NYCRR §205.81(d).

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