ASCEND JUSTICE

Hernandez v. Foster

Safety plans, as often implemented in Illinois, are intrusive so-called "agreements" that DCFS demands of families who are under investigation. Most safety plans require children to live with other relatives or require one or both parents to leave their homes during an investigation. Safety plans commonly are entered before much investigation has occurred and they often continue to be imposed upon families even when evidence has been gathered that demonstrates that the parents are innocent of wrongdoing.

The United States Court of Appeals for the Seventh Circuit, which is the federal appeals court for Illinois, Indiana, and Wisconsin, has now agreed with our legal position concerning the wrongful holding of a child away from his parent, both after a seizure into state protective custody and under a coerced safety plan. The Hernandez decision, which issued on August 26, 2011, gives some new teeth to the due process rights of families whose children are taken into state protective custody and affords some potentially strong remedies for coercive safety plans.

The Hernandez decision is particularly welcome in light of the torturous history of prior legal efforts to challenge coercive safety plans as violative of families' constitutional rights. In 2006, the Seventh Circuit Court of Appeals effectively overturned a class action ruling by Judge Rebecca Pallmeyer in Dupuy II v. Samuels that had found widespread coercion in DCFS' policies and practices compelling parents to accept safety plans under the threat that if they did not do so, their children would be taking into foster care. In a very troubling opinion authored by Judge Posner, and joined by Judges Easterbrook and Evans, the Seventh Circuit declared it permissible for DCFS investigators to threaten parents with the removal of their children because the parents were free to "thumb their nose at the offer" of a safety plan. In the evidentiary proceedings in the District Court, there was not a single example of a parent ever having "thumbed their nose" at the "offer" of a safety plan; the fear of having the children placed with strangers is overpowering. This is just one example of how the Dupuy II opinion failed to grapple with many of the facts found in the extensive preliminary injunction opinion by Judge Pallmeyer in favor of the families, including the findings as to pervasive coercion of families in the process of securing safety plans that separated children and parents.

Dupuy II also analogized DCFS demands for a safety plan to a choice of beverages at a cocktail party, holding that parents are not deprived of a protected liberty interest when they are "offered" a safety plan because they are given a choice. Viewing the "offer" as a choice and not a threat, as the trial court had found and the plaintiffs had claimed, the appeals court held that safety plans were not a deprivation of liberty because they did not make parents or children "worse off." In the most disturbing part of the Dupuy II opinion, the court stated: "We can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?" Of course, what Judge Posner's analogy fails to recognize is that at a cocktail party, guests are free to say "no thank you," whereas with a safety plan a "no thank you" means the children will be taken into foster care. Most reasonable parents are not willing to run a risk that

their child will actually be taken from them, and so they "agree" to safety plans even when DCFS lacks objective evidence against them.

We have believed that the Dupuy II opinion holding that safety plans do not deprive family members of their liberty interests in familial association liberty is incorrect. A basic tenet of law is that voluntariness of any agreement should be assessed based on individualized factors. Threats of the sort commonly used by DCFS investigators who tell parents to sign safety plans on pain of otherwise having their children taken into foster care render many so-called "agreements to safety plans involuntary.

Now, however, the Hernandez ruling clarifies the Dupuy II ruling by establishing that some safety plans can indeed be coercive, especially if DCFS has taken the child first and demands a signature on a safety plan thereafter. The Hernandez decision is already being touted nationally as an important statement of law governing the state's removal of children from their home and the processes that it must follow to insure timely review of decisions that separate children and parents. The Hernandez case was filed in the federal court for the Northern District of Illinois on April 23, 2009, on behalf of parents Crystelle and Joshua Hernandez and their toddler Jaymz.

The Hernandezes' complaint against DCFS arose when DCFS took 15-month-old toddler Jaymz Hernandez into DCFS protective custody after Jaymz suffered a broken arm. Jaymz had been napping on September 8, 2008, and his mother, Crystelle Hernandez, found him standing on the floor after his nap, crying in an unusual way and frowning when he used his right hand. Naturally, Crystelle believed that Jaymz had climbed out of his crib and fallen onto his right arm. She brought him to the doctor at Sherman Hospital. Jaymz also had a few very small bruises above his eye from a prior injury which Crystelle and Josh Hernandez, Jaymz's parents, did not know the cause of.

At the doctor's office, a note was made in Jaymz's chart saying, "Child cannot walk or climb." Because of this note and because the parents reportedly gave conflicting accounts of who was home at the time of the fall from the crib, the doctor's office called the DCFS Child Abuse Hotline, starting an investigation. The doctor did not take protective custody of the toddler; she released him to his parents (even though doctors have the power to take protective custody in abuse or neglect cases) at the same time as her office called DCFS to report a possible suspicion of child abuse.

DCFS investigator Lakesha Foster came to the Hernandez home at 4:00 the afternoon of September 8 to investigate. Jaymz seemed fine at home. Foster saw him walking and even climbing. She noted a light scratch above his eye. But when she called her supervisor, Pamela Foster–Stith, and reported that "everything looks fine; there's nothing that seems suspicious or anything like that," Foster-Stith directed that Investigator Foster treat the case like any other "protective custody case." Foster claimed that she discussed a safety plan at that time with the family, but the notes she made do not document that discussion, and Crystelle and Josh denied it ever occurred. In obtaining approval from her own supervisor for this decision to take protective custody, Foster-Stith misrepresented the facts, telling him that the parents had "no explanation for

how Jaymz actually fractured his arm. Foster-Stith then directed Foster to seize the child into DCFS's protective custody even though child seemed fine at the time of the seizure

At 5:45 or 6:00 p.m., Foster took Jaymz into DCFS protective custody. Foster then told Crystelle that Jaymz would be in protective custody for 48 hours and she and Joshua were not allowed to see him. DCFS took him to his great-grandmother's home.

The next day, Jaymz got a cast on his arm, and the Hernandezes were allowed to go with him for that doctor's appointment, but were not allowed to see him afterwards. The orthopedist told Foster that Jaymz's injuries "didn't look like abuse or neglect. It is consistent with the history of a child falling from a crib." And later that day, another doctor who specialized in emergency medicine found no clinical or radiological signs of abuse.

On September 9, as is typical when protective custody of a child has been taken, the DCFS investigator went to meet with the local state's attorney to seek the filing of a petition in the juvenile court. State law provides that any child taken into state protective custody must come before a judicial hearing office (i.e., a judge) within 48 hours or else the child must be released to his parents. The common practice is that DCFS investigators seek the filing of petitions as soon as they have their paperwork together, with some time—up to a day—before the 48-hour period expires.

The state's attorney considering the potential juvenile court casereviewed the evidence and concluded that "there is not enough to file a petition." The attorney told Foster that she could not "prove immediate and urgent need to remove the child."

Not later than this point, given that the state's attorney had rejected the request to file a case, the DCFS investigative team that had taken Jaymz into custody knew that its grounds for keeping Jaymz in state protective custody had evaporated. In fact, Foster admitted this to Crystelle. But instead of releasing Jaymz back to his parents' custody, Foster denied Crystelle's request that Jaymz come home. When Crystelle asked if she could now see Jaymz, Foster said "no" because the 48-hour period during which DCFS was required to bring any protective custody case before a judge had not yet ended.

After the 48 hours ended, however, Foster still refused to release Jaymz to his parents even though she, Foster-Stith, and Ruppe all knew that protective custody had lapsed. When Crystelle asked to see Jaymz, Foster told her she couldn't do so unless Crystelle signed a safety plan. Under the safety plan, which Crystelle and Joshua both signed in order to see their son, Jaymz had to remain in the care of his great- grandmother and all of his contact with his parents had to be supervised. The safety plan continued for 8 days, whereupon the Hernandezes secured a lawyer who "raised hell with DCFS and got the safety plan lifted. On November 7, 2008, DCFS determined that the allegations of abuse or neglect involving Jaymz were "unfounded."

The Hernandezes filed suit in federal court seeking damages for violation of their rights to due process and Jaymz's rights to be free from unreasonable seizure under the Fourth Amendment.

The family's claims survived DCFS's motions to dismiss the case. Then DCFS decided to seek a summary judgment ruling in its favor based on the facts that had been developed in preparation for trial.

Surprisingly, DCFS won its motion for summary judgment even though the facts that had been developed were virtually identical to the facts that the Hernandezes had relied upon in answering the motions to dismiss.

Realizing that the Hernandez case presented a particularly strong example of a coercive safety plan, because the "offer" of a safety plan is not voluntary if the person making the offer is holding a child hostage at the time, the team took the case up on appeal. DCFS tried to argue that the Dupuy II ruling made their conduct in Hernandez reasonable. The court of appeals didn't buy it. The court of appeals' Hernandez decision did not represent a complete victory for the Hernandez family however. The court of appeals applied a very deferential standard in assessing the initial taking of Jaymz, concluding that while it couldn't say that this action was reasonable, it was not so clearly unreasonable that any investigator would have known Jaymz should not be taken into custody. Therefore, the Hernandezes are unable to recover damages for the initial seizure of Jaymz. However, the court of appeals was not persuaded by any of DCFS's arguments about the remaining actions by its investigators. For starters, it did not accept the argument that DCFS can always hold children for 48 hours. The court held that it was clear that probable cause had dissipated before the 48-hour period ended, and as soon as it dissipated, DCFS could no longer hold a child in its custody.

The most important part of the ruling is one that the Hernandezes didn't win, but which will greatly benefit future families who come into contact with DCFS. While the court of appeals concluded that the investigators who took Jamyz into custody might have reasonably believed they had probable cause, and the law in the Seventh Circuit had been unclear as to whether probable cause alone was sufficient to take children into state custody, the court of appeals clarified the law going forward. It declared: "It does not suffice for the official to have probable cause merely to believe that the child was abused or neglected, or is in a general danger of future abuse or neglect. The danger must be imminent, or put another way, the circumstances must be exigent." Because the law had not been clearly established at the time Jaymz was taken into custody, the Hernandezes themselves are unable to win a judgment on this claim. But their efforts have established an important legal principle.

Thanks to the Hernandez decision, the Hernandezes will also soon get their day in court, seeking compensation for the injuries to their family that DCFS investigators caused. The case has been transferred to Honorable Milton Shadur and preparations for trial are underway.

DCFS now is on notice of the duty not to remove children from their homes without a court order unless they have exigent circumstances. And it also knows that it must release children home, not wait for 48 hours, if state's attorneys decide there is no petition to be filed or probable cause is obviously lacking. DCFS investigators also know that they cannot demand safety plans after protective custody has been taken without potentially incurring liability for a civil rights violation.

The word has not yet filtered down to the line investigators, however, for several investigators have threatened the taking of protective custody at a future date (belying the exigency requirement) and others have told clients they will need to sign safety plans if the State's Attorneys rejects a request to file a court petition. Armed now with the Hernandez decision, we are ready to keep holding DCFS investigators accountable if they do violate the constitutional rights of families. And the Hernandez trial, it is hoped, will also send the same message to DCFS investigators: follow the Constitution and get court orders before, not after, taking children from their parents in all but the most exigent cases.