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Critics say agency is being 'overly cautious' after rulings

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Written by **Anita Wadhvani**
The Tennessean

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THE TENNESSEAN

October 31, 2013

DCS will no longer remove kids from homes without a hearing

Critics say agency is being 'overly cautious' after rulings

By Anita Wadhvani
| *The Tennessean*

Late on a warm August evening in 2008, Robert Andrews was standing in his yard when three caseworkers with the Department of Children's Services and two Hickman County deputies drove up, got out of their cars and asked to go inside.

Andrews said no, but the caseworkers and one of the deputies went in anyway, searched the home and took each of his four children aside for interviews. Then the officials left. Neither Andrews nor his wife, Patti, was ever accused of a crime in connection with the visit.

The events of that night led to a lawsuit, one of two similar legal challenges filed by families against caseworkers. Both challenges were taken up by a federal appeals court. And in a pair of recent rulings, the U.S. Court of Appeals for the Sixth Circuit used the cases to spell out for the first time that caseworkers, like police, are governed by the U.S. Constitution's Fourth Amendment, which protects citizens against searches and seizures done without a warrant.

DCS response to the July 31 ruling, however, is drawing criticism from child advocates and juvenile judges.

The agency told caseworkers this month that they can no longer remove children from homes without an in-person court hearing, a process that can take days — or longer in some rural areas — and potentially leave a child being abused or neglected in dangerous homes until a judge can review the case.

Before the federal ruling, caseworkers and their supervisors could decide on their own to remove a child from a home, but had to petition a court within 72 hours for a hearing to review their actions — a policy that the Sixth Circuit decision made clear is unconstitutional.

Juvenile court officials and attorneys say there is a middle ground between DCS' previous policy giving the agency sole authority to remove a child on the spot and its new policy to wait until a judge can decide.

Juvenile judges are willing to issue temporary, emergency orders known as "ex parte orders" — even over the phone or by email — to caseworkers who attest to a child being in danger, said Davidson County Juvenile Court Judge Sophia Crawford. Juvenile judges across the state provided DCS officials personal cellphone numbers and designated on-call staff members during overnight hours to issue the orders shortly after the federal court rulings, Crawford said.

It's an offer that DCS officials declined, she said.

"Myself and magistrates are available on a 24-hour basis to address any problems or questions that arise as the department works to protect children," Crawford said. "We've gone over and

above by reminding them (DCS) we are available on a 24-hour basis for any issue that requires a court order of protection of children. As a juvenile court judge, I feel comfortable that we can do what we need to, but I don't have any control over the policies and procedures of the department."

Doug Dimond, the department's chief legal counsel, said he believes caseworkers can no longer remove a child from a home without a formal court hearing unless the situation meets a narrow definition of "exigent circumstances" — defined as an immediate, identifiable risk of harm that is "serious, immediate, physical or specific." The definition could exclude a child's disclosure of sexual or physical abuse, even if there are injuries visible on a child.

DCS could change its policy, Dimond noted. It is still deciding on its final policy, which won't take place until the end of the year, he said.

DCS is being 'overly cautious'

Rob Huddleston, an attorney who is often appointed as guardian ad litem to represent the interests of children, said the new rules are already affecting the safety of children.

Last week, Huddleston said, DCS didn't intervene to prevent a days-old baby born addicted to drugs in Sevier County from being sent home with the mother. Previously, caseworkers would have taken immediate custody of the child, he said. In this case, Huddleston had already been appointed to represent the child because of a legal dispute between the parents, and he was able to get an emergency order from a local judge without DCS intervention. The emergency order will last for only a few days, until the family, DCS and Huddleston can bring the case for a full hearing.

"I think they are being overly cautious," Huddleston said. "I do not agree with how they are reading the Sixth Circuit opinion. I think they are trying to protect caseworkers from liability instead of protecting children. My sense is this policy is going to be short-lived until something tragic happens."

Other states use emergency orders

No other state subject to the Sixth Circuit ruling has gone as far as DCS to limit caseworkers' abilities to remove children. The federal court has jurisdiction over Tennessee, Michigan, Ohio and Kentucky.

In Michigan, judges have set up a system in which someone is available 24 hours per day to issue emergency orders over the phone while awaiting a formal hearing to consider testimony from parents and child protective workers, according to Michigan Department of Human Services spokesman David Akerly.

In Kentucky, caseworkers are likewise instructed to seek such temporary orders while awaiting a hearing, according to the Kentucky Cabinet for Children and Family Services policy guide.

And in Ohio, the site of the second lawsuit used by federal judges to establish that parents have constitutional rights in the removal of their children, caseworkers can seek an emergency, temporary written order from a judge over the phone or via email. Caseworkers would then be required to appear at an in-person hearing in court on the next business day, in which parents also can present their side to the judge, according to Joe Frolik, spokesman for the Cuyahoga County prosecutor.

A 'neutral arbiter'

The Ohio case occurred six years before DCS caseworkers showed up at the Andrews family's

door in Hickman County. A police officer in a small, northern Ohio town kicked down Nancy Kovacic's door, and caseworkers placed her two school-age children in foster care, where they would remain for 10 months. Kovacic did not face any criminal charges in the case.

"Caseworkers can't just make a judgment call and say, 'Well, I don't like this, and with the power of the state, I'm taking these children,'" said Jay Crook, Kovacic's attorney. He said the now-grown children in the case suffered abuse in foster care and had to undergo years of therapy for the trauma of being removed from their mother. "Without that neutral arbiter, that magistrate, that judge — even over the phone — you have lost all your due process safeguards."
