



## THE GATES CASE: WHAT IT MEANS FOR CHILD PROTECTIVE SERVICES

In July 2008, the United States Court of Appeal for the Fifth Circuit published a decision in the case of *Gates v. the Texas Department of Family and Protective Services* (DFPS).<sup>1</sup> The Fifth Circuit set guidelines under the Fourth Amendment of the United States Constitution for state caseworkers to follow in making investigation and removal decisions in child protection cases. This policy page discusses what *Gates* means for caseworkers in the field, explores its impact on Child Protective Services (CPS), and makes recommendations about what the state and CPS need to do next.

### Investigations and Immunity after *Gates*

Like peace officers in criminal cases, CPS caseworkers in civil cases must often make difficult, on-the-spot decisions during a child abuse investigation. When they do, they face being sued by a parent claiming the decision was wrong and violated the parent's rights under state or federal law. To ensure that caseworkers are not afraid to make the hard judgment calls necessary to keep children safe, however, the law generally protects caseworkers sued in connection with their jobs.

Specifically, if a caseworker's actions meet certain criteria, the parent cannot get money from the caseworker even if a court later finds that the caseworker made the wrong decision about an investigation or removal. As stated in the case of *Austin v. Hale*<sup>2</sup>:

The problem is apparent in the area of child abuse where the investigator is required to make a decision that, in all likelihood, is going to be viewed by someone as improvident, no matter what the decision is. When making this delicate decision, a child abuse investigator should not have to worry about his own potential liability as long as he acts within his authority and in good faith.

State law refers to this protection as official immunity, while federal law calls it qualified immunity.

### Official Immunity under State Law

*Gates* did not address or change Texas law regarding caseworker protections. If a parent makes a claim against CPS caseworkers under state law because of an investigation or removal decision, caseworkers are protected if they acted in good faith.<sup>3</sup> The test for good faith is whether a reasonably prudent caseworker, under the same or similar circumstances, could have believed they needed to act in the same way.<sup>4</sup> It is an objective test and is not based on the caseworker's actual intent. But to meet the standard, the caseworker does not have to prove that all reasonably prudent caseworkers would have acted the same but, rather, that at least one reasonably prudent caseworker would have done so.<sup>5</sup>

### Qualified Immunity under Federal Law

For any claims under federal law, a caseworker is entitled to qualified immunity unless all of the following are true<sup>6</sup>:

- (1) Taken in the light most favorable to the parent, the alleged facts show that the caseworker's conduct violated statutory or constitutional law;
- (2) The law was clearly established at the time of the caseworker's actions; and
- (3) The caseworker's conduct was objectively unreasonable in light of the established law.

The objectively unreasonable test is similar to the good faith test under Texas law. It is not based on what the caseworker actually believed but on whether a reasonably competent caseworker could have believed that there was a need for the action.<sup>7</sup>

Applying these standards, the Fifth Circuit in *Gates* found that the caseworkers were entitled to qualified immunity even though the court disagreed with some of their decisions. The Fifth Circuit made the ruling because the law under the Fourth and Fourteenth Amendments of the United States Constitution<sup>8</sup> on how to investigate and remove a child in a child abuse case was not clearly established.

### **Exigent Circumstances under *Gates***

Even before *Gates*, it was generally accepted that the Fourth Amendment applied in CPS cases. Exactly how it applied, however, was not clear. To clarify the federal law, the Fifth Circuit in *Gates* established guidelines that caseworkers must follow when investigating or removing a child in a child abuse or neglect case. To enter or remain in a private home, transport a child for an interview, or remove a child from a parent's custody, a caseworker must have consent, a court order, or exigent circumstances. In general, this is not a significant departure from the Texas Family Code or CPS policy before *Gates*. But in practice, the *Gates* definition of exigent circumstances may be stricter than what caseworkers were using before *Gates*. Additionally, the Fifth Circuit clarified that the definition of exigent circumstances varies depending on what the caseworker is doing.

### **Entering and Remaining in a Private Home**

Under *Gates*, for the purposes of entering or remaining in a private home, exigent circumstances exist when a child is in immediate danger. In *Gates*, the Fifth Circuit found there was no immediate danger to the children when the caseworker entered the home. The alleged abuser was not at home, and the stated purpose for entering was to interview the children rather than to immediately protect them. With respect to remaining in the home, to make the exigent circumstances determination, a caseworker can use

any information gained after entry into the home including any interviews with the children or any physical evidence observed in the home.

### **Removing Children from School to Interview Them at Another Location**

Under *Gates*, to remove a child from a public school for an interview absent a court order or consent, a caseworker must have a reasonable belief that the child was abused and probably will be abused again if they go home at the end of the school day. Although not controlling, the child's express desires about being transported are also a factor to consider.

An anonymous tip, absent some showing that it is reliable, is insufficient to justify removal for an interview. Instead, the tip must be corroborated through a preliminary investigation that can include an interview of the child's teachers or peers or an interview of the child at the school or by looking for injuries on the child without removing any clothing (e.g., on the face or hands).

### **Removing Children from Parents' Custody**

For the purposes of removing a child, the Fifth Circuit in *Gates* explained that exigent circumstances exist when there is reasonable cause to believe that the child is in imminent danger of physical or sexual abuse if they remain in the parent's custody. In making this determination, no one factor is dispositive. Instead, a caseworker must take into account all of the circumstances including:

- (1) Whether there is time to get a court order;<sup>9</sup>
- (2) The nature of the abuse (its severity, duration and frequency);
- (3) The strength of the evidence supporting the abuse allegations;
- (4) The risk that the parent will flee with the child;
- (5) Whether less extreme alternatives are available; and
- (6) Possible harm to the child if removed.

In *Gates*, the Fifth Circuit found that the removal was justified because there was evidence of wounds on one child, several of the children corroborated that the father recently punched, kicked and hit several of the children and there was no time to get a court order before the courts closed for the day. If sufficient grounds to remove a child from a parent's custody exist but the child is currently located somewhere else (e.g., at school), the child can still be removed.

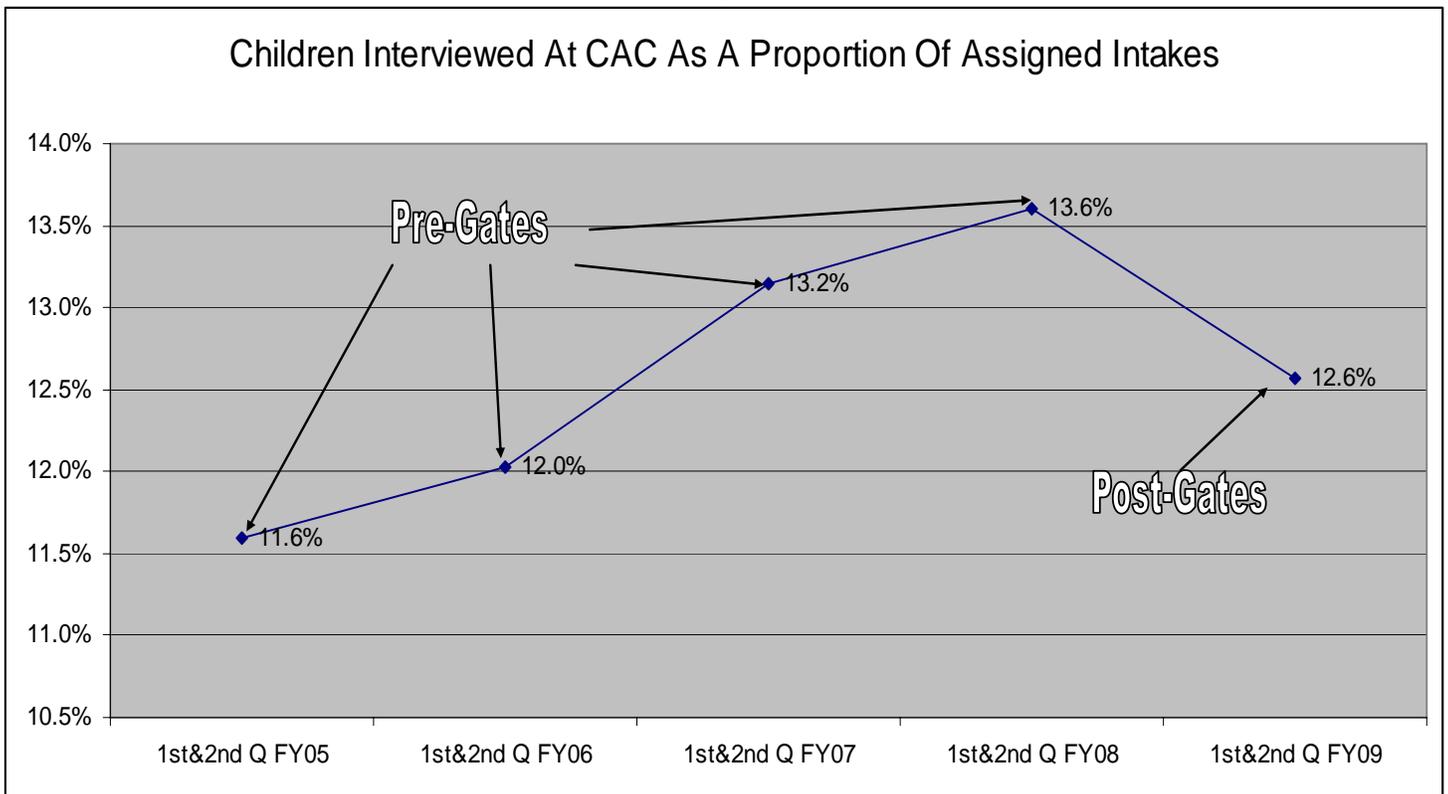
### Since *Gates*, Caseworkers Are Using Child Advocacy Centers Less Frequently.

Texas created Child Advocacy Centers (CACs) to facilitate child abuse investigations.<sup>10</sup> A CAC has child-friendly, non-institutional facilities designed to put a child at ease and facilitate any necessary interviews. Various agencies (e.g., law enforcement and CPS) also coordinate their efforts through the CAC to reduce the number of times a child is interviewed. In practice, it appears that before *Gates*, absent an express parental objection, caseworkers often transported children from school to a CAC for an interview without a court order.<sup>11</sup>

In *Gates*, however, the Fifth Circuit stated that to remove a child from a public school for an interview without consent or a court order, a caseworker must have a reasonable belief that the child has been abused and probably will be abused again when going home at the end of the school day. In a DFPS memorandum to caseworkers regarding *Gates*, it adopted this policy.

As illustrated in the chart below, after DFPS issued its memo, the proportion of children interviewed at CACs dropped noticeably.<sup>12</sup>

Presumably, this means that caseworkers are conducting more interviews at the school or at the child's home. But a child may not feel as comfortable disclosing abuse in a school or home setting, which is one reason why CACs were created. As a result, children may be denying allegations when a problem actually exists.



## Since *Gates*, Caseworkers Are Ruling Out Abuse and Neglect in a Larger Proportion of Cases.

After an investigation, CPS is required to determine by a preponderance of the evidence whether each allegation made in the case is<sup>13</sup>:

- (1) Reason to believe (abuse or neglect has occurred);
- (2) Ruled out (abuse or neglect has not occurred);
- (3) Moved (before staff could draw a conclusion, the persons involved in the allegation moved and could not be located); or
- (4) Unable-to-determine (none of the above dispositions is appropriate).

The proportion of cases with a ruled out designation increased after DFPS released its memo regarding *Gates*.

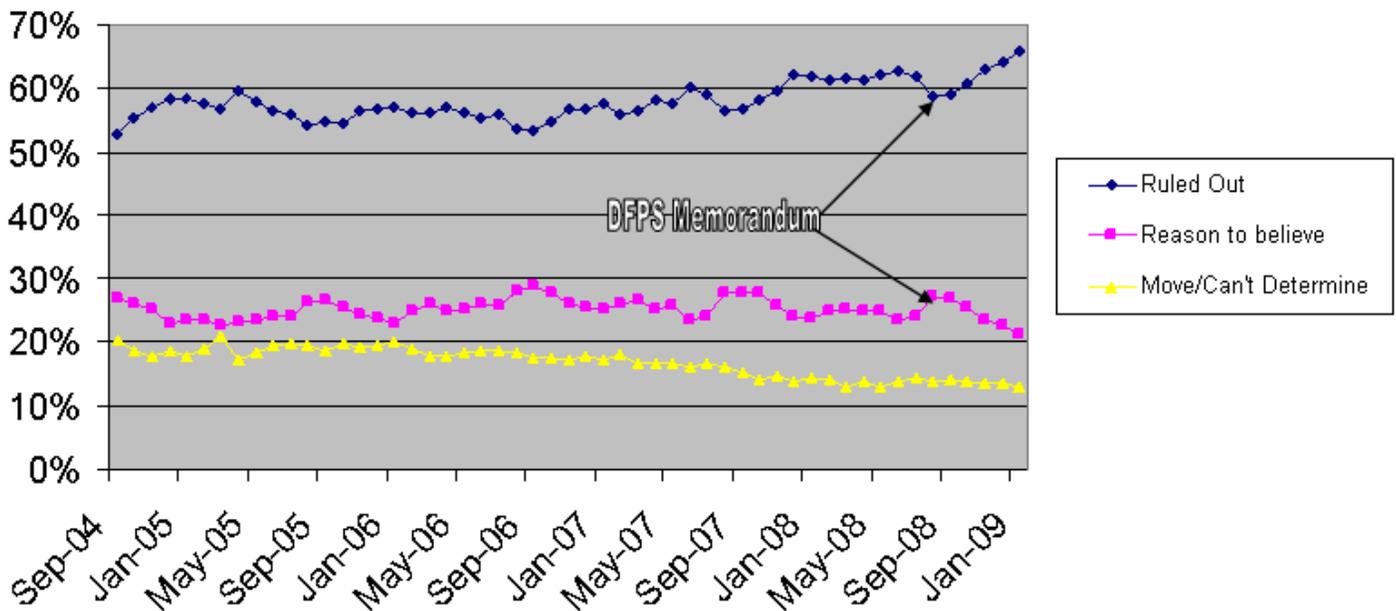
The exact reason for this trend is unclear but given the timing, it seems likely that it is related to *Gates*. It may be that, after *Gates*, caseworkers became more cautious about

giving a “reason to believe” determination. Or it may be that restrictions on transporting children to a CAC for an interview made it more difficult to elicit evidence to support a “reason to believe” designation. If so, one might expect a higher proportion of “unable to determine” designations. But, in fact, looking the chart below, that did not happen. It may be that caseworkers are reticent to use an “unable to determine” designation feeling it indicates an inability do their job. So instead, they may have designated these cases as “ruled out.”

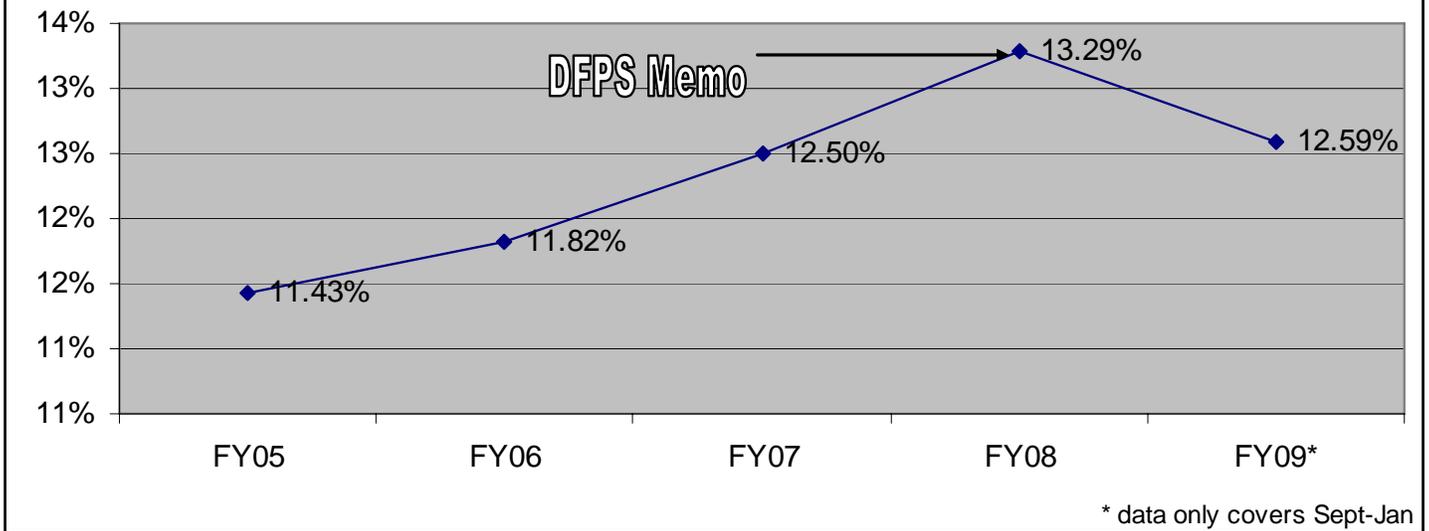
The distinction between designating a case as “unable to determine” and “ruled out” is important. With a “ruled out” designation, the alleged perpetrators can require CPS to remove from its records all information about their alleged role in the abuse or neglect.<sup>14</sup> This option is not available with an “unable to determine” designation. If caseworkers are designating cases as “ruled out” when they really should get a “reason to believe” or “unable to determine” designation, CPS records may be affected, inhibiting it from fully evaluating any future reports of abuse.

### Dispositions Of Completed Investigations

(*Gates* Decided July 28, 2008; DFPS Memo Aug 22, 2008)



### Cases Opened for Services as a Proportion of Cases Assigned for Investigation

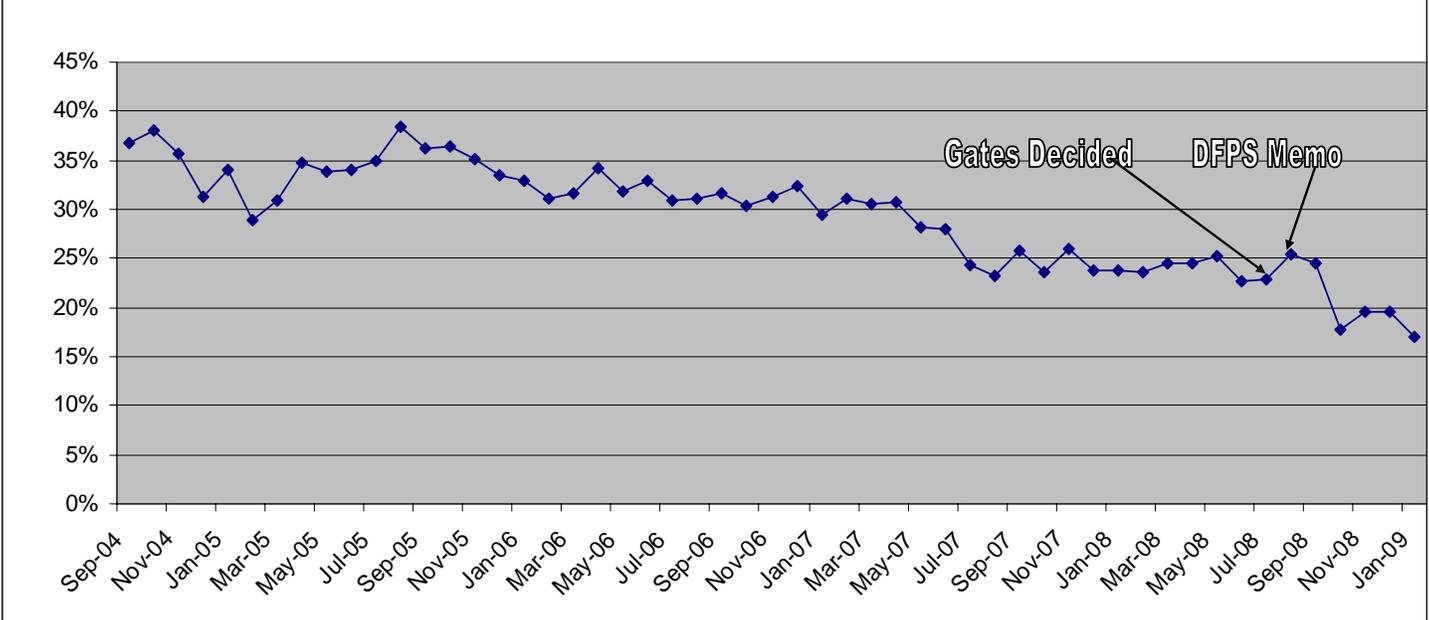


#### Since Gates, a Smaller Proportion of Cases Have Been Opened for Services

The investigative designation does not itself determine whether a case is opened for services. That decision is

based on an assessment of whether the child is at risk of harm.<sup>15</sup> But in practice, the designation does matter as very few “ruled out” cases are opened for services. Even after *Gates*, less than 3 percent of “ruled out” cases were

### Percentage Of Cases Opened For Services Involving Removals (July 28, 2008 Gates Decided; August 22, 2008 DFPS Gates Memo)



opened.<sup>16</sup> As a result, the increase in “ruled out” cases means that overall, fewer cases were opened for services.<sup>17</sup>

### **Since *Gates*, Caseworkers Are Removing Children Less Often**

Removals have dropped significantly since *Gates*. In August 2008, 25 percent of cases opened for services involved placing a child out-of-the home in substitute care and by January 2009, only 18 percent of opened cases involved substitute care.<sup>18</sup>

As the graph above shows, part of the decline in removals is from a recent trend towards keeping more children in their homes as part of CPS’ reform efforts. But given the sharp decline right after the DFPS memo, it is likely that part of the recent decline is also due to both the official practice changes in the DFPS memo and caseworkers’ unofficial interpretation and implementation of those practice changes.

In February 2009, the new Texas Supreme Court Permanent Commission on Children, Youth and Families held its first multi-disciplinary roundtable discussion. The topic was the *Gates* case and its practice implications. DFPS participated in the discussion and has already made some changes in its practice and is evaluating others.

### **CPS’ New Policies Are More Restrictive than *Gates***

Without consent or a court order, the *Gates* court held that “immediate” danger to a child is required to enter and remain in a private home for investigative purposes, while “imminent” danger is required to remove a child from a parent’s custody. Neither term was defined in the *Gates* decision, but the use of two different terms indicates that they should be used distinctly rather than interchangeably. In fact, the law draws a distinction between the two. Black’s Law Dictionary defines “immediate” as: “Present; at once; without delay; not deferred by any interval of

time.” Black’s defines “imminent” as: “Near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous.” Simply put: immediate is closer in time to the danger than imminent.

Although *Gates* only requires imminent danger for removal without consent or a court order, the Texas Family Code requires immediate danger, at least with respect to a child’s physical health or safety.<sup>19</sup> In this case, the Texas law is more restrictive and so is the prevailing standard.

But under the Texas Family Code, there is no need for immediate danger with respect to a removal for alleged sexual abuse. Instead, there only need be evidence that sexual abuse has occurred.<sup>20</sup> In this case, the Texas law is more permissive than *Gates* and so *Gates*, as constitutional law, is the prevailing standard.

In short, after *Gates*, immediate danger is required for a removal without a court order or consent when there is a threat to a child’s physical health or safety but danger need only be imminent for removal with an allegation of sexual abuse. The CPS policy adopted in response to *Gates*, however, collapses the two standards stating that imminent means immediate.<sup>21</sup> CPS chose this approach to avoid confusing caseworkers who may not understand the legal distinction between the two terms. But avoiding caseworker confusion should be weighed against the potential harm of delay in removing a child who may be sexually abused. Under CPS policy, without consent or a court order, a caseworker has to wait until the threat of sexual abuse is immediate before removing a child while *Gates* only requires that the threat be imminent.

CPS policy is also stricter than *Gates* with respect to a visual examination of a child. The *Gates* court explicitly stated a caseworker could inspect a child for injuries “that can be seen without the removal of the child’s clothing” even without consent, a court order, or exigent circumstances. Indeed, the Fifth Circuit expressly acknowledged that such visual examination is a necessary part of the preliminary investigation to justify subsequent transportation for an interview. Although the new CPS

policy in one section of the CPS manual adopts this same standard,<sup>22</sup> in another section the policy provides that a visual examination can only be conducted with a court order or consent.<sup>23</sup> As a result of the conflicting provisions, caseworkers may be confused and failing to conduct proper visual examinations of children.

### **Caseworkers Should Do Their Job without Fear of Personally Liability**

Just like peace officers in criminal cases, CPS caseworkers in civil cases deal with people who may be disgruntled and who may sue. That risk comes with the job. Fortunately, it is not a big risk. Even if a caseworker is sued after *Gates*, it is unlikely that they will lose any money. First, the state attorney general will defend them at no cost.<sup>24</sup> Second, even if a parent wins the case (i.e., the parent establishes that the caseworker violated a clearly established law and that the caseworker did not act in good faith), the state generally will pay any monetary judgment against the caseworker<sup>25</sup> up to \$100,000 as long as they did not act in bad faith.<sup>26</sup> (Failing to act in good faith is not the same as acting in bad faith.) In short, caseworkers should not fear litigation.

### **Courts Must Develop a Process for CPS to Obtain Orders in Aid Investigations**

No clear process exists to obtain orders in aid of an investigation. The only standard is “good cause shown.”<sup>27</sup> This lack of specificity has not been a big problem in the past as CPS rarely pursued such orders. But *Gates* will likely change CPS practice and increase requests for investigative orders. Clear standards and an efficient process for requesting orders are necessary to protect children and to observe parental rights. To meet these needs, the 81<sup>st</sup> legislature passed SB 1440,<sup>28</sup> but the governor vetoed it.

Consequently, state judges must now use the framework of current law to address these issues. To do so, the judiciary must answer five questions:

1. What does “good cause” mean?
2. Can CPS merely apply for an order in aid of investigation or must it file a suit affecting the parent-child relationship?
3. How does CPS establish a record of “good cause”?
4. When should an order be issued without giving the parent prior notice and a hearing?
5. How can the court meet the need for emergency access?

### **Good Cause Means Probable Cause**

On the one hand, whether “good cause” ever means more than probable cause under the Fourth Amendment, it must at least include probable cause because state law must conform to the U.S. Constitution. On the other hand, it is hard to imagine a case where a judge would find probable cause in a child abuse case but refuse an order in aid of investigation. Good cause is therefore probably synonymous with probable cause.

What is probable cause under the Fourth Amendment? Answering that question is beyond the scope of this paper, though a few general observations are important. While an extensive body of law exists regarding probable cause in a criminal context, it is not necessarily directly applicable in a civil child protection context. As the Fifth Circuit acknowledged in *Gates*, Fourth Amendment considerations in a CPS case differ from those in criminal case because “the courts are dealing with a child who likely resides in the same house as, and is under the control of, the alleged abuser.” Moreover, the interests of CPS and the child may actually be aligned as the child may need protection. As a result, the constitutional standards for an investigative order in a CPS case may differ from those for a search warrant in a criminal case. In other words, what is “reasonable” under the Fourth Amendment varies depending upon the context. For example, CPS does not need to allege that a crime has been committed; CPS need only show abuse or neglect as defined in the Texas Family Code.

## Courts Should Require Only an Application, Not a Suit Affecting the Parent-Child Relationship

Texas Family Code § 261.303 requires only an application that establishes good cause to secure an investigative order, not a suit affecting the parent-child relationship. Indeed, requiring a formal suit affecting the parent-child relationship for an investigative order would be inappropriate and does parents no favor. At the time it applies for the order, CPS will not have completed its investigation and so cannot know whether a formal suit is warranted.

## Courts Should Require an Affidavit to Support the Application

Somehow CPS must establish “good cause” as part of the record supporting its application. Courts should follow the procedure used in obtaining a criminal search warrant and require CPS submit a written statement signed under penalty of perjury with the facts establishing good cause.

## Giving a Parent Prior Notice and a Hearing Should Depend Upon the Circumstances

Criminal search warrants are routinely issued *ex parte*, meaning the suspect is not given prior notice and an opportunity to be heard. The reason for this is obvious. If a suspect were given advance warning of a warrant, he would have the opportunity to destroy evidence or flee the jurisdiction.

For the same reasons, CPS needs the ability to obtain an *ex parte* investigative order. For example, if a parent had prior notice that CPS wanted to interview their child about alleged abuse, they would have the opportunity to coerce the child into recanting or refusing to cooperate.

*Ex parte* orders are routinely used in other contexts in family law. CPS can obtain an order to remove a child without giving the parent prior notice and an opportunity to be heard.<sup>29</sup> *Ex parte* orders are also issued in cases of

family violence<sup>30</sup> and in divorce cases for the safety and welfare of the child<sup>31</sup>.

But that does not mean that every circumstance in a child abuse or neglect investigation requires an *ex parte* order. For example, CPS may want to obtain copies of a child’s medical records. Because a neutral third party keeps those records (e.g. the doctor), a parent would not have an opportunity to destroy the records if given notice. In that case, giving the parent notice and an opportunity to be heard may be appropriate, as long as it does not compromise the child’s safety.

## A Judge Should Be Available When Needed

Just like a criminal search warrant, the need for an order in aid of an investigation may arise at any time. As a result, each jurisdiction should develop a plan to make someone available whenever needed.

## Recommendations

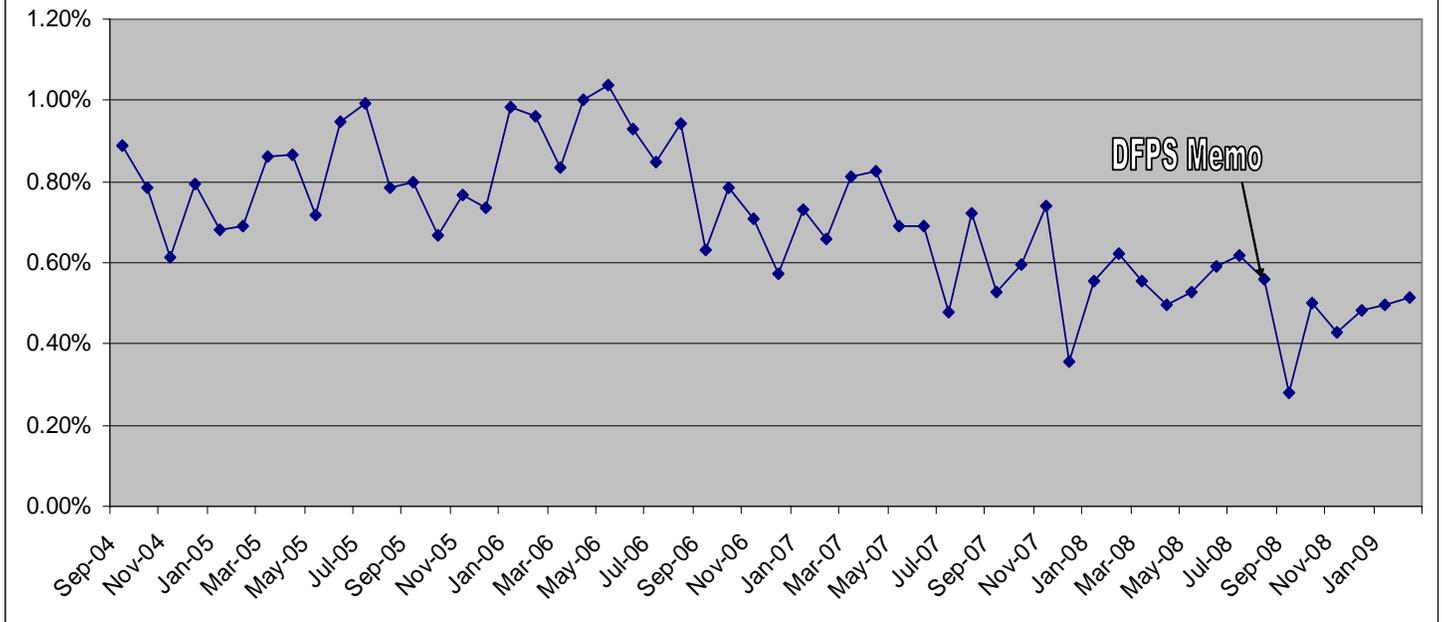
### 1. Closely track data regarding children’s safety.

The important issue is not the number of removals, CAC interviews, or ruled out designations, but the effect of these changes on children and families. To the extent that children remain safe in their parents’ home and receive appropriate supervision and services, the changes are not a problem. But if children are being left in unsafe situations or families are not receiving the services they need, CPS needs to make adjustments.

If children were being left in unsafe situations, one would expect an increase in the proportion of in-home cases that fail, meaning that the child is subsequently removed and placed in DFPS custody. So far, as illustrated in the chart below, there is no evidence that this is happening.

But it may be too soon to detect any real trends or it may be that the *Gates* decision is affecting removals for in-home cases as well. It is a measure that CPS should continue to track.

## Proportion of Children in In-Home Cases Who Were Removed



If families who need services are not receiving them, one would expect an increase in repeated child abuse and neglect referrals.<sup>32</sup> It is too soon, however, to detect such a trend. But it is something that CPS should track, keeping in mind that it may be like finding a needle in a haystack, so that the absence of repeated referrals does not necessarily mean that children are safe.

### 2. Start tracking “voluntary” placements.

If caseworkers are reticent to formally remove a child because of *Gates*, they may be using “voluntary” placements instead. A voluntary placement does not constitute a removal because, in response to a child abuse investigation, the parent “chooses” to have the child live with a relative or other designated caretaker.

CPS does not currently track any information regarding voluntary placements. As a result, there is no way to determine if their use increased after *Gates*.

CPS needs to develop ways to track such placements because if their use is increasing after *Gates*, children may be at risk. There is no financial assistance to support the voluntary placements and the relative often has no legal authority to take care of the child (e.g., enroll the child in

school or obtain medical treatment).<sup>33</sup> As a result, these placements may be unstable and ultimately result in a formal removal or, worse, in the relative simply returning the child to the offending parent.

Moreover, there is no court oversight of these placements and neither the parents nor the children have attorneys to protect their rights.

### 3. Investigate the reasons for the increased proportion of ruled out cases.

It is unclear exactly why abuse and neglect is being ruled out in a larger proportion of cases, but the timing of the change suggests that it is related to *Gates*. Given the potential problems discussed above (e.g., expunging of CPS records and fewer families receiving services), CPS needs to investigate this recent trend and make any necessary changes to ensure that cases are receiving a proper investigative designation.

### 4. Train caseworkers regarding the protections from personal liability.

To ensure that caseworkers are not making decisions based on fears of personal liability, CPS should include in its

caseworker training information regarding the various ways they are protected from personal liability.

### 5. Look at conforming CPS policy to *Gates*.

Current CPS policy applies a stricter standard for removals in sexual abuse cases than *Gates* requires. Although there are legitimate practice concerns supporting this policy decision, CPS should carefully consider possible unintended consequences.

CPS should also clarify that a caseworker can conduct a visual inspection of a child without removing the child's clothes even without a court order, consent or exigent circumstances.

### 6. Courts must develop a process for CPS to obtain court orders to support investigations and removals.

Courts must CPS and the courts need to work together to ensure that CPS has prompt access to the orders it needs to effectively investigate child abuse and neglect and that the processes are consistently applied in conformity with the Fourth Amendment.

### 7. Explore ways to make in-school interviews better.

As a result of *Gates*, it is likely that more interviews will need to be conducted at the child's school. CPS needs to train its workers on how to interview a child in this environment. It also needs to explore creating a CAC-like environment at the school or developing a mobile CAC using modern technology.

## Conclusion

*Gates* appears to have impacted CPS practice with respect to removals and investigations. Use of CACs as an investigative resource has declined, abuse and neglect is

being ruled out in a larger proportion of cases, fewer cases are opened for services and removals have dropped. At this point, however, it is too soon to determine the effect, if any, of these changes on families and children.

It is also too soon to determine whether the changes represent a temporary overreaction or a permanent transformation. Conducting an investigation or removing a child based on exigent circumstances may now be less frequent. If so, CPS must use court orders in support of more of its investigations and removals. It will take time to develop consistent policies and procedures for such court access and training and practice for caseworkers and judges to become comfortable with using them. Once the process is in place, however, and the use of the process has become ingrained in the culture and practice of CPS and the courts, removals and investigations may return to pre-*Gates* levels.

In the meantime, CPS needs to closely monitor data regarding children's safety to ensure that the changes, even if temporary, are not placing children at risk of harm.



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<sup>1</sup> 2008 U S App (5<sup>th</sup>) 1675. At the time of the initial lawsuit, DFPS was called the Department of Protective and Regulatory Services.

<sup>2</sup> 711 S.W.2<sup>nd</sup> 64, 68 (Tex.App.-Dallas 1986).

<sup>3</sup> The caseworker must also be acting within the scope of their authority. Texas Human Resources Code §40.061. Texas law requires DFPS to investigate reports of child abuse or neglect. (Texas Family Code §261.301). The investigation may include visits to the child's home and interviews with the child, parents and other children in the home. (Texas Family Code §261.302). Texas law also allows a caseworker to remove a child even without a court order. (Texas Family Code §262.104). As a result, caseworkers' actions in investigating a child abuse report, including visits to the home or interviewing the child, or removing a child from a parent's custody fall within the scope of their authority. There is also a specific immunity from civil liability for caseworkers who take a child into custody without a court order if there is reasonable cause to believe there is an immediate danger to the physical health or safety of the child. (Texas Family Code §262.003).

<sup>4</sup> See *City of Lancaster v. Chambers*, 883 S.W.2<sup>nd</sup> 652, 656 (Tex. 1994).

<sup>5</sup> See *City of Lancaster v. Chambers*, 883 S.W.2<sup>nd</sup> 652, 656 (Tex. 1994).

<sup>6</sup> *Hare v. City of Cornith*, 330 F.3d 320, 325 (5<sup>th</sup> Cir. 1998). Under a recent United States Supreme Court case, a court does not have to address the elements in any particular order (e.g., it can determine whether there was a clearly established law before determining whether a constitutional violation occurred). *Pearson v. Callahan*, No. 07-751 (2009).

<sup>7</sup> *Evelt v. Dentnff*, 330 F.3d 681, 687 (5<sup>th</sup> Cir. 2003).

<sup>8</sup> The United States Constitution only provides the minimum requirements. There may be other federal or state laws that have additional requirements.

<sup>9</sup> State law requires that there is no time to get a court order. Texas Family Code §262.104.

<sup>10</sup> Texas Family Code §264.401, et seq.

<sup>11</sup> CPS policy dictated that if a parent objected to the child's transportation, the caseworker would only proceed with a court order or if exigent circumstances were present.

<sup>12</sup> CPPP analysis of data provided by CAC.

<sup>13</sup> 40 Tex. Admin. Code §700.511(a); CPS Handbook Item 2271.

<sup>14</sup> Texas Family Code §261.315.

<sup>15</sup> DFPS 2008 databook.

<sup>16</sup> CPPP analysis of DFPS data: Number of ruled out cases opened for services/Number of ruled out cases.

<sup>17</sup> The proportion of "unable to determine" cases opened for services has increased.

<sup>18</sup> Based on data provided by DFPS.

<sup>19</sup> Texas Family Code §262.104(a).

<sup>20</sup> Texas Family Code §262.104(a).

<sup>21</sup> CPS Handbook sec. 1230.

<sup>22</sup> CPS Handbook sec. 2247.12.

<sup>23</sup> CPS Handbook sec. 1230.

<sup>24</sup> The Attorney General's Role. Available at: [http://www.oag.state.tx.us/AG\\_Publications/txts/2002adminlaw5.shtml](http://www.oag.state.tx.us/AG_Publications/txts/2002adminlaw5.shtml) (Accessed on February 23, 2009).

<sup>25</sup> The indemnity is limited to claims of negligence or violations of constitutional rights. Texas Civil Practice And Remedies Code §104.002.

<sup>26</sup> Texas Civil Practice And Remedies Code §104.001 and §104.003. The attorney general has to determine that the indemnification is in the state's best interests. Texas Civil Practice And Remedies Code §104.002. For constitutional violations, the indemnity does not apply if the caseworker acted in bad faith, with conscious indifference or with reckless disregard. Texas Civil Practice And Remedies Code §104.002.

<sup>27</sup> Texas Family Code §262.303.

<sup>28</sup> The process for orders in aid of investigation was originally in Senate Bill 1064 (text of bill available at: <http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=81R&Bill=SB1064>). SB 1064 passed the Senate and passed out of the House committee. But it got trapped behind the voter identification bill. So it was amended onto SB 1440 (text of bill is available at: <http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=81R&Bill=SB1440>), which was passed on the House Local and Consent calendar. The bill is awaiting the governor's signature.

<sup>29</sup> Texas Family Code §262.101.

<sup>30</sup> Texas Family Code § 83.001.

<sup>31</sup> Texas Family Code §105.001.

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<sup>32</sup> Looking at previous confirmed abuse may not be an accurate standard given the rising proportion of “ruled out” cases.

<sup>33</sup> The legislature recently passed SB 1598 which may alleviate this problem. It creates a process for a parent to give an informal caregiver legal authority to obtain medical treatment and enroll a child in school. It is awaiting the governor’s signature.