Children, DCF/law enforcement taking into custody

Number: INFORMAL

Date: December 28, 2006

The Honorable Thad Altman
Representative, District 30
Post Office Box 411780
7025 North Wickham Road # 108
Melbourne, Florida 32941-1780

Dear Representative Altman:

You ask about the authority of the Department of Children and Families to take custody of a child pursuant to section 39.401(1)(b), Florida Statutes. Attorney General Crist has asked me to respond to your inquiry.

Section 39.401(1), Florida Statutes, authorizes law enforcement officers and authorized agents of the Department of Children and Families to take custody of a child alleged to be dependent under the circumstances set forth therein. Subsection (1)(b) of the statute provides:

"(1) A child may only be taken into custody:

* * *

(b) By a law enforcement officer, or an authorized agent of the department, if the officer or authorized agent has probable cause to support a finding:
1. That the child has been abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment;
2. That the parent or legal custodian of the child has materially violated a condition of placement imposed by the court; or
3. That the child has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care."

In *Doe v. Kearney*,[1] the Eleventh Circuit Court of Appeal recognized that under the statute the state does not have to wait to gain judicial authorization in order to remove a child from parental custody where there is "probable cause to believe the child is threatened with imminent harm." In the event the state determines a child needs to be sheltered, a hearing must be held no more than 24 hours after the removal.[2]

This office has contacted the Department of Children and Families and been advised that it is the department's position that section 39.301, Florida Statutes, also controls the actions of its agents. Subsection (12) of that statute provides:

"If the department or its agent is denied reasonable access to a child by the parents, legal custodians, or caregivers and the department deems that the best interests of the child so

require, it shall seek an appropriate court order or other legal authority prior to examining and interviewing the child."

Thus, in the event that an agent of the department seeks to take custody of a child pursuant to section 39.401(1)(b), Florida Statutes, and is denied access to the child by the parent, legal custodian or caregiver, the agent will either seek an appropriate court order or will contact local law enforcement. If local law enforcement is contacted and the law enforcement officer has probable cause to support a finding that the criteria set forth in section 39.401(1)(b) is applicable, the officer may take custody of the child.[3]

I trust the above informal comments may be of assistance to you. Thank you for contacting the Attorney General's Office.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

---

[1] 329 F.3d 1286 (11th Cir. 2003), *cert. denied sub nom.*, 540 U.S. 947, 124 S. Ct. 389 (2003) ("Consistent with s. 39.401(1), DCF's policy is to remove a child from a parent or legal guardian without prior judicial authorization when there is probable cause to believe the child has been abused or is in imminent danger of abuse).

[2] Section 39.401(3), Fla. Stat.

[3] *See generally Vanslyke v. State*, 936 So. 2d 121 (Fla. 2nd DCA 2006), quoting *Brigham City v. Stuart*, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006), which states:

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Nevertheless, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. . . . [W]arrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.

One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."

And see Seibert v. State, 923 So. 2d 460, 468 (Fla. 2006) (police may enter a residence without a warrant if an objectively reasonable basis exists for the police to believe that there is an

immediate need for police assistance for the protection of life).