

City of South Lake Tahoe
SOUTH LAKE TAHOE POLICE DEPARTMENT
General Order 11-06 Temporary Custody of Juveniles

To: All Employees
Date: September 6, 2011
From: Martin Hewlett, Captain
Concerning: General Order

The purpose of this General Order is to inform you of important changes to our policy concerning the taking of juveniles into temporary custody. In addition to this General Order there is a training memo which follows the order that provides some background as to the need for this change.

330.6 TEMPORARY CUSTODY OF JUVENILES

Under specified circumstances ~~described below~~, a minor may be taken into protective custody if he/she is the victim of suspected child abuse (Welfare and Institutions Code § 300 et seq.). ~~Before taking any minor into protective custody the officer should make reasonable attempts to contact the appropriate child welfare authorities to ascertain any applicable history or current information concerning the minor.~~ **In circumstances where a minor is taken into temporary custody a warrant shall first be obtained for that custody. Only under limited circumstances shall a minor be taken into temporary custody without first obtaining a custody warrant.** Before taking any minor into protective custody the officer should make reasonable attempts to contact the appropriate child welfare authorities to ascertain any applicable history or current information concerning the minor.

An officer should consider taking a minor into protective custody under any of the following circumstances (Welfare and Institutions Code § 305 and Penal Code 279.6):

- (a) The officer reasonably believes the minor is a person described in Welfare and Institutions § 300, and further has good cause to believe that any of the following conditions exist:
1. The minor has an immediate need for medical care; **and the immediate need for medical attention cannot wait until a warrant is obtained.**
 2. The minor is in immediate danger of physical or sexual abuse **causing an exigency, and that any delay for the time it would take to obtain a warrant would result in actual physical harm to the minor.**

3. The physical environment or the fact that the child is left unattended poses an immediate threat to the child's health or safety. **For this section immediate threat to the child's safety must be defined as that the child will suffer actual physical harm should any delay in order to obtain a warrant occur. If there is no immediate (immanent) danger to the child then a warrant must first be obtained. In the case of a minor left unattended the officer shall first attempt to locate and determine if a responsible parent or guardian is available and capable of assuming custody before taking the minor into protective custody.**
- (b) It reasonably appears to the officer that a person is likely to conceal the child, flee the jurisdiction with the child or, by flight or concealment, evade the authority of the court. **All attempts should be made to first obtain a warrant to take temporary custody of the minor prior to removal. The field supervisor shall be notified prior to taking the child into custody or as soon as practicable afterwards.**
- (c) There is no lawful custodian available to take custody of the child. **In the case of a minor left unattended the officer shall first attempt to locate and determine if a responsible parent or guardian is available and capable of assuming custody before taking the minor into protective custody.**
- (d) There are conflicting custody orders or conflicting claims to custody and the parties cannot agree which party should take custody of the child. **In cases such as this the officer shall notify the supervisor immediately and obtain a custody warrant for the minor prior to taking the minor into temporary custody.**
- (e) The child is an abducted child.
- (f) The child is in the company of, or under the control of, a person arrested for Penal Code § 278 or 278.5.

Prior to taking a child into protective custody, the officer should take reasonable steps to deliver the child to another qualified parent or legal guardian unless it reasonably appears that the release would endanger the minor or result in abduction. If this is not a reasonable option, the officer shall **obtain a warrant to take the minor into temporary custody and** ensure the minor is delivered to the appropriate child welfare authority.

Whenever practicable, the officer should inform a supervisor of the circumstances prior to taking a child into protective custody. If prior notification is not practicable, officers should contact a supervisor promptly after taking a child into protective custody.

TIME

This general order will remain in effect until it is added to the Departmental manual at the next revision cycle.

Martin D. Hewlett

To: South Lake Tahoe Police Department
From: South Lake Tahoe City Attorney's Office
Date: August 24, 2011
Re: City Attorney's Training Memo
(Regarding South Lake Tahoe Police Department Policy 330)

This memo is the first training memo issued by the South Lake Tahoe City Attorney's office addressing changes to the South Lake Tahoe Police Department's Policy 330.6 addressing the temporary custody of juveniles. Recent case law has indicated that the Department's policies articulated in subsection 330.6 require clarification. This training memo clarifies the Department's policies regarding the warrantless detainment and custody of juveniles and shall serve to augment General Order 11-06 amending Policy 330.6.

What is the current state of the law regarding removal of children without a warrant?

A 2007 Ninth Circuit decision states the prevailing legal standard in California for removal of children without a warrant:

Officials violate parents' constitutional rights if they remove a child from the home absent information at the time of the seizure establishing reasonable cause to believe that the child is in imminent danger of serious bodily injury and that warrantless removal of the child is necessary to avoid that specific injury. Officials, including social workers, who remove a child from its home without a warrant, must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant. Taking a child without a warrant is justified when officers have investigated and corroborated allegations which show that the child might be beaten or molested during the time it would take to get a warrant. (Rogers, 487 F.3d at 1294-95).

California cases decided since 2007 have become increasingly strict in interpreting the meaning of "imminent danger." As a result, the existing legal standard is clear -- it is *very* unlikely that public officials will prevail in a lawsuit in which they have removed children without a warrant, *unless* they can show that there was *near certainty* that the child would have been harmed during the time it takes to get a warrant to remove the children. In essence, our California courts have made it very clear that *you need to get a warrant before removing a child*.

How do courts interpret "imminent danger?"

Imminent danger means *extreme likelihood* that a child will experience *physical harm*. This *physical harm* does not mean emotional abuse, deplorable living conditions, or mere possibilities that a child could get hurt. *Physical harm* means beating and/or molesting. The following cases show how the courts are currently interpreting the meaning of "imminent danger."

→ Rogers v. County of San Joaquin (487 F.3d (9th Cir. 2007))

In this case, child protective services removed two children from their home without a warrant after visiting the home and noticing that the children were malnourished, were living in

unsanitary living conditions, and had been locked in their room for what appeared to be hours of the day and the night. The parents sued and the court determined that CPS had violated the parents' constitutional rights. The court stated that:

"The chances of accidental injury or of a fire breaking out at the Rogerses' workplace during the few hours it would take [the CPS worker] to obtain a warrant were very low. So remote a risk does not establish reasonable cause to believe that the children were in immediate danger. Similarly, the conditions of the home, even if as unsanitary as Royal asserts, fail to indicate any imminent risk of serious bodily harm. Like the bottle rot, the mess in the Rogers living quarters, to the extent that it may have existed, was a chronic, ongoing problem."

The bottom line: Here, the CPS worker were able to determine that certain abuses were occurring, but the court decided that because the abuses were "ongoing" and were related to the family's economic status (i.e. the deplorable living conditions), there was no "immediate danger," and the CPS worker should have acquired a warrant. The court also discussed that because the CPS worker had been investigating these parents for some time (there had been a 14 day delay before CPS was able to come to the home), this also showed that no exigency existed, and CPS could have spent just a few more hours to get the warrant. This case is an important example of how the court treats "imminent" and "exigent" circumstances – the court suggested that because the risks of the children being harmed by being locked in their rooms was so low, there was no *immediate* need to remove the children. The court's decision essentially held that there was plenty of time to get a warrant, and therefore there was no justification for removing the children without one.

→ Risso v. County of El Dorado (2008 WL 110959 (E.D. Cal.))

In this case, a nurse discovered that a child had been burned with a car cigarette lighter. The nurse made a referral to CPS and CPS removed the child from the father's custody and placed the child in the mother's custody without a warrant (the parents were separated and the father had sole physical custody rights of the child).

The bottom line: This case cites the rule that public officials cannot claim absolute immunity when they take actions to detain children prior to any dependency proceedings. This means that public officials may be liable if they remove children without a warrant and the general immunities provided to public officials will not apply in such situations.

→ Anderson-Francois v. County of Sonoma (2009 WL 1458240 (N.D. Cal.))

In this case, a foster mother was accused by two of her foster children of beating her foster children. Santa Rosa Police removed two of her foster children without a warrant. At the dependency proceedings, the court determined that the children should remain detained because the mother had physically abused minors with excessive corporal punishment, that there was substantial danger to the children's physical health, and that remaining in the mother's care would be contrary to the children's welfare. The juvenile court later denied reunification with her children on the grounds that returning the children to her custody would be create a substantial risk of harm to them. Despite these proceedings, when the foster mother sued the Santa Rosa police officers' for the initial warrantless detainment, the trial court found that there was "no specific evidence indicating that the children were in *imminent danger* of abuse – only the mere possibility that, because plaintiff (allegedly) had abused her children in the past, she might do so again. No known

danger required [the officers] to forego the few hours it would have taken to secure a warrant in order to prevent further abuse.”

The bottom line: Allegations and evidence of past physical abuse does not mean “imminent danger.” Additionally, the fact that a judge determines a child should be further detained, does not affect the question of whether an officer may initially remove that child without a warrant. In other words, if an officer detains a child without a warrant, and a juvenile court judge later determines that this child should continue to be detained (and placed in foster care or a group home) this *does not* help the officer in a lawsuit contesting the original warrantless detention.

→ Watson v. County of Santa Clara (2010 WL 2077171 (N.D. Cal.))

In this case, school officials suspected a child of being sexually molested by her father. City officials removed her and her siblings without a warrant. At the dependency proceedings, the court determined that the children should remain detained, and they were returned to their parents a year and half after the initial seizure by city officials. The parents sued in federal court and in its decision, the court stated that the officials provided no explanation as to why a warrant could not have been obtained, and that a reasonable officer should not have concluded that there was any exigency present sufficient to justify taking the children without a warrant. The court awarded the parents \$3.25 million in damages which the City of San Jose was responsible for paying because they of the initial warrantless detention of the children.

The bottom line: Again, the fact that the judge determined the parents were unfit to be parents and ordered the continued detention of the children did *not* help the city of San Jose win this lawsuit. Of the \$3.25 million judgment, approximately \$1.25 million was assessed based on injury to the parents for the 4 days between the warrantless removal of the children and the detention proceedings in which the judge ruled that the parents were unfit.

How does this impact Police Officers' interactions with child welfare authorities?

The City Attorney's office is aware of the reality that in most situations involving the temporary custody of juveniles, child welfare authorities are involved. This office also understands that the City Police Department often defers or heavily weights the opinion of child welfare authorities regarding the decision of whether a child should be removed without a warrant. It is very important that, despite the decision of child welfare authorities, City Police urge, and instruct child welfare authorities to not remove a child without a warrant (unless, as explained above, it is imminently likely that the child will be physically harmed during the time it takes to acquire a warrant).

It is important to note in all Incident Reports that you instructed the child welfare authorities not to remove the child without a warrant. If the Police Department is sued over removal of a child without a warrant, it will be extremely important to have a written record of the Police Department having stated that the child cannot be removed without a warrant.

What does all this mean for the Police Department and its policies regarding removal of children?

The City Attorney's office advises that each member of the Police Department use *extreme* caution in situations involving the removal of a child. It is *very* unlikely that public officials will prevail in a lawsuit in which they have removed children without a warrant, *unless* they can show that there was *near certainty* that the child would have been harmed during the time it takes to get a warrant to remove the child. In essence, unless you are *very confident* that the child will be harmed within a 2-3 hour period after arriving on scene, *you need to get a warrant before removing that child.*

Please contact your supervisor if you have any questions regarding this policy.