Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change

Katherine C. Pearson
kcp4@psu.edu

Follow this and additional works at: [https://ideas.dickinsonlaw.psu.edu/fac-works](https://ideas.dickinsonlaw.psu.edu/fac-works)

Recommended Citation
I. INTRODUCTION

The national increase in reporting of suspected child abuse has put pressure on states to find safe and affordable shelters for children, particularly during the early stages of the investigation. One response to

---

1. See NATIONAL CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1994: REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT at ix (1996) ("The number of children [nationally] who were the subjects of reports of alleged maltreatment increased from 2.6 million in 1990 to 2.9 million in 1994.").

2. The increase in reporting of suspected abuse is not, however, a reliable indicator.
this challenge has been for state authorities to suggest a so-called voluntary agreement. The investigating agency approaches the parents, one or both of whom may be suspected of abuse, with a superficially benign proposal that the suspect separate from the child during the pendency of the investigation.\(^3\)

The voluntary label is often misleading when applied to such agreements. The agency usually insists that the parents make an immediate decision, and may use tactics or threats that can be characterized as "blatantly coercive."\(^4\) In addition, the agency may fail to give the often frightened and unsophisticated parents the information they need to understand the serious consequences of such an emergency decision.\(^5\) Unfortunately, such agreements are sometimes treated as routine, voluntary waivers of parental rights.

In this article, I begin with background about the practical and due process implications of voluntary separation or placement agreements.\(^6\) Following the background section, I outline a typical statutory framework for emergency removal or separation of the child and parent.\(^7\) Next, I compare the way a voluntary separation agreement may result in circumvention, whether or not intentional, of the protections provided by such statutes. In particular, I explain how these agreements may negatively impact an innocent parent’s ability to defend herself.\(^8\) Next, I review *Croft* of an increase in the existence of abuse. In Pennsylvania, for example, for the three year period of 1983, 1984, and 1985, an average of 18,982 suspected child abuse reports were made yearly to state and county authorities. *See* PENNSYLVANIA DEP’T OF PUB. WELFARE, 1995 CHILD ABUSE REPORT 7-8 (1995) [hereinafter 1995 PA. REPORT]. Ten years later, the three-year average was 24,246, representing a 28% increase in the reporting of incidents. *Id.* However, by comparison, the three-year average for “substantiated” reports rose from 6,925 (1983-1985) to only 7,248 (1993-1995), an overall increase in substantiated reports of 5%, but a decrease of 17% in the ratio of substantiated reports to total reports of child abuse. *Id.*

3. E.g., *Croft* v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1124 (3d Cir. 1997); *Gottlieb* v. County of Orange, 84 F.3d 511, 515 (2d Cir. 1996).

4. *See* *Croft*, 103 F.3d at 1125 n.1; *see also* Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (holding that a defendant’s confession was involuntary when “made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not ‘cooperate’”); United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981) (holding that a defendant’s confession was involuntary: “When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit ‘cooperation,’ they exert the ‘improper influence’ proscribed by [prior case law]. . . . Viewed in that light, [the officer’s] statements were patently coercive.”).

5. *See* Lynumn, 372 U.S. at 534 (listing the following factors as contributing to a finding of involuntary confession: “There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.”).

6. *See* discussion *infra* Part II.

7. *See* discussion *infra* Part III.

8. *See* discussion *infra* Part III. I use Pennsylvania as a model for this examination.
v. Westmoreland County Children & Youth Services, a recent, important civil rights decision from the Third Circuit. This decision condemns the voluntary label, thus opening the door to recovery of damages from the social worker because of violations of the parents' rights to substantive and procedural due process under the Fourteenth Amendment.

This article also examines the criteria used by courts to address voluntariness concerns in analogous contexts and proposes a model for review of this issue in child welfare proceedings. When parents claim they were forced to separate from the child during an investigation, I propose that courts should provide them with standards and an opportunity for an effective hearing to resolve the voluntariness issues.

Finally, this article concludes that legislative changes are necessary to facilitate temporary separations and placements that better address the needs of the whole family. I urge states to mandate the use of written temporary placement plans and to provide indigent parents with counsel before asking them to make an emergency decision. At a minimum, agencies should be required to give parents specific information necessary for them to make an informed choice.

II. BACKGROUND

Careful examination of the pressures the state imposes upon parents to enter into a separation agreement reveals the often fictional nature of the voluntary label and the consequent need for concern. As early as 1977, the Supreme Court noted an already long-standing complaint that states were using fictional voluntary agreements to avoid statutory process: "The extent to which supposedly 'voluntary' placements are in fact voluntary has been questioned . . . For example, it has been said that many 'voluntary' placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent."

Despite the passage of twenty years since the Supreme Court's comment, the need for concern about voluntary agreements has only grown stronger, particularly when used during investigations. These agreements

for two reasons: (1) Pennsylvania follows the Model Juvenile Act; and (2) the manner in which Pennsylvania authorities have obtained voluntary placements from parents raises concerns about coercion and serious disruption of the family.

9. 103 F.3d 1123 (3d Cir. 1997).
10. Id.; see discussion infra Part IV.
11. See discussion infra Part V.
12. See discussion infra Part V.D.
13. See discussion infra Part VI.
14. Id.
hide under various “voluntary” labels, including “voluntary” or “consensual” placements, separations, removals or relinquishments, and care must be taken to examine their true nature. Case histories demonstrate that throughout the country parents feel unduly pressured by well-meaning, although perhaps overzealous, social workers to enter into voluntary agreements, which have serious, but poorly explained, consequences.16

16. Several cases reveal parents’ concerns arising out of pressure-ridden agreements. In Thomason v. SCAN Volunteer Services, Inc., 85 F.3d 1365 (8th Cir. 1996), the agency removed the child from the mother’s home during an investigation of child abuse. Id. at 1369. The County claimed that the mother “voluntarily consented” to the removal as its initial defense in a subsequent civil rights suit. Id. at 1369 n.2. The court refused to consider the voluntary consent defense: “We hold that defendants have not established beyond genuine dispute that [the mother] voluntarily consented to the removal of [the child] from plaintiffs’ home. If anything, the evidence indicates that [the case worker] never gave [the mother] a choice in the matter.” Id. The court held, however, that the mother’s due process rights were not violated because other facts established reasonable suspicion justifying emergency removal of the child. Id. at 1371-73.

In Gottlieb v. County of Orange, 84 F.3d 511 (2d Cir. 1996), during a protracted investigation, the social worker informed the parents that “the County would seek to take [the children] into custody . . . unless [the mother] could make suitable arrangements to separate the children from [the father]. . . . [R]ather than have the children moved or removed, [the father] left the home.” Id. at 515. The court found no due process violation since the father could have initiated his own hearing or notified the County of his intention to return home, thus forcing the County to seek a court order. Id. at 522.

In Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987), parents raised various complaints about the procedures used in Minnesota to separate children from possible abusers during the investigation following a six-month inquiry into allegations of child sexual abuse. For example, the mother of one child “signed a document authorizing voluntary placement . . . in foster care. However, she state[d] that she was pressured and misled into signing the agreement.” Id. at 1443. The court held that the action of obtaining the mother’s signature was “shielded by qualified immunity from further litigation.” Id. at 1463 n.21.

In Duchesne v. Sugarman, 566 F.2d 817, 822-23 (2d Cir. 1977), a representative of the Bureau of Child Welfare visited a mother in the hospital where the mother was receiving treatment for emotional problems. The representative “attempted to have her sign a form granting consent to the Bureau to obtain custody.” Id. at 822. Despite assurances that “she would not lose any rights as mother” and that she could have the children back when she was out of the hospital, the mother “refused to sign.” Id. The agency proceeded to hold the children without seeking judicial approval. Id. at 823. The court held that the failure of the agency to “obtain judicial ratification of their decision to maintain custody of the children, despite the numerous and vociferous requests of [the mother] for their return, constituted a violation of due process.” Id. at 828.

In Dietz v. Damas, 932 F. Supp. 431 (E.D.N.Y. 1996), the City claimed that “it was agreed by everyone that [the child] would be released to the [grandparents], and that the parents could stay with [the child], subject to the grandparents’ supervision.” Id. at 437. However, the mother claimed that “the arrangement . . . was arranged ‘out of desperation,’ at the suggestion of her father, because [the social worker] told [her] that the baby was not going to be released to [the parent’s] care.” Id. The court held that short-term, informal
Regardless of the label used by the particular jurisdiction, the separation often occurs in one of two ways: (1) the agency tells the parent who is suspected of being an abuser to leave the home; or (2) the agency tells the parents to place the child in the home of another family member for the duration of the investigation. This voluntary separation is attractive to agencies, and perhaps, to the average taxpayer, because on the surface it appears to be a no-cost alternative to state-financed emergency shelter or foster care. Indeed, at first it may seem less threatening to the parents than the imagined horrors of bureaucratic care. However, when the parents later seek reunification of the family, they are often confronted with the placement of the child with the grandparents, which did not put unreasonable restrictions on the parents' access to the child over Christmas holidays, did not rise to the level of constitutional deprivation. *Id.* at 448.

Compare, however, *Greenberg v. Kmetko*, 811 F.2d 1057 (7th Cir. 1987), where an Illinois social worker's successful suit for constructive discharge was based, in part, on an allegation that he was improperly disciplined for failing to comply with agency policy to force parents to sign a voluntary placement agreement. *Id.* at 1071-72.

17. See, e.g., *Gottlieb*, 84 F.3d at 515.

18. See, e.g., *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1126 n.4 (3d Cir. 1997) (concluding that for purposes of testing the voluntariness of the parent's decision, there is no distinction between the forms of separation).

19. Informal separation agreements may, however, involve a lack of sufficient safeguards for the child, thus altering the true "cost" calculation. For example, the substitute family member may be "chosen" without any investigation, and may prove to be an inadequate or even dangerous caretaker. The substitute may also be unable or unwilling to monitor the suspect parent's contacts with the child. For example, in *Powell v. Georgia Department of Human Resources*, 114 F.3d 1074 (11th Cir. 1997), the social worker instructed the maternal grandmother not to allow the suspected mother to have custody of the child during the ongoing investigation; however, within a few days, the child was "returned to the mother's home." *Id.* at 1076. The child died within two weeks of blunt head trauma, and the mother and stepfather were later convicted of the baby's murder. *Id.* at 1076-77. The court held that the social worker's decision could not be the basis for a substantive due process claim. *Id.* at 1080. For another example, see *Estate of Bailey v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985) (permitting civil rights claim by father based on allegation that child was returned to mother without adequate investigation of mother and boyfriend).

20. Even without an explicit threat, the atmosphere in which the investigation begins is often intimidating for the parents, particularly if they are poor, uneducated or have been the focus of government inquiry in the past. See *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 834 (1977) ("The poor have little choice but to submit to state supervised child care when family crises strike."); see also *Richardson v. City of Philadelphia*, No. CIV.A.89-8901, 1992 WL 46899, at *6 (E.D. Pa. Mar. 6, 1992) (finding a reviewable issue of fact on whether the mother's consent was voluntary where the mother was considered "slow"), aff'd, 977 F.2d 569 (3d Cir. 1992); *In re S.A.D.*, 555 A.2d 123, 124-25 (Pa. Super. Ct. 1989) (stating that the mother "had no money and no place to stay").
surprisingly serious and adverse consequences of their initial separation decision.\textsuperscript{21}

Too often, the emergency separation decision is accomplished informally, without a written document, and is treated by the state as a waiver or delay of the usual child welfare or dependency process,\textsuperscript{22} including a waiver or delay of the following:

- the parents’ right to counsel;\textsuperscript{23}
- the parents’ right to have prompt judicial review of the reasons for separation;\textsuperscript{24} and
- the parents’ right to prompt planning for reunification of the child with the family.\textsuperscript{25}

\begin{itemize}
\item[21.] For example, in \textit{In re C.R.S.}, 696 A.2d 840 (Pa. Super. Ct. 1997), the parents’ separation from their child began with a request from a caseworker after thirty days of investigation had passed. \textit{Id.} at 842. After being told their only choice was voluntary separation or immediate removal of the child by the agency and placement in foster care, the parents reluctantly agreed to an informal placement of the child with paternal grandparents with whom they did not have a good relationship. Brief for Appellant at 35-40, \textit{In re C.R.S.} (Nos. 96-00409, 96-00410). The agency eventually filed a dependency action against the parents more than sixty days after the commencement of the investigation. \textit{In re C.R.S.}, No. 95-0601, at 3-6 (Pa. Ct. C.P., Juv. Ct. Div. Jul. 23, 1996). Thus, more than thirty days of voluntary separation was followed by several additional months of court-ordered continuance of the grandparent custody. \textit{Id.} Eventually, on appeal, the parents were able to obtain a reversal on the merits of the lower court’s findings of abuse and dependency. \textit{In re C.R.S.}, 696 A.2d at 846.
\item[22.] \textit{See, e.g.}, \textit{In re S.A.D.}, 555 A.2d at 125 (noting the failure of the agency to submit a copy of the purported voluntary placement agreement but taking the position that the mother had surrendered a “fundamental constitutional right” in the agreement).
\item[23.] \textit{E.g.,} 42 PA. CONS. STAT. ANN. § 6337 (West 1982) (stating that in proceedings under the Juvenile Act, which includes dependency proceedings, “a party is entitled to representation by legal counsel at all stages of any proceedings . . . and if he is without financial resources or otherwise unable to employ counsel, to have the court provide counsel for him”).
\item[24.] \textit{E.g., id.} § 6332(a) (West Supp. 1998).
\item[25.] An informal hearing shall be held promptly by the court or master and not later than 72 hours after the child is placed in detention or shelter care to determine whether his detention or shelter care is required . . . . If the child is alleged to be a dependent child, the court or master shall also determine whether reasonable efforts were made to prevent such placement or, in the case of an emergency placement where services were not offered and could not have prevented the necessity of placement, whether such lack of efforts was reasonable. \textit{Id.}
\item[25.] \textit{See} 55 PA. CODE § 3130.61(b) (1998) (“The service plan . . . shall include . . . [t]he service objectives for the family, identifying changes needed to protect children in the family in need of protection from abuse, neglect and exploitation and to prevent their placement.”).
Further, states have argued that the parents made their decision voluntarily, and that the caretaker was not a state agent. Therefore, the separation did not involve protective custody or other reviewable state action. Nonetheless, the state’s insistence on separation may continue for a few days, a few weeks, or, as occurred in one case, for more than a year, all without independent review of the agency’s reasons for separation. The voluntary agreement circumvents the traditional requirement of a prompt hearing and opportunity for the defendants to present their facts, an opportunity that is contemplated by most child welfare statutes and fundamental concepts of due process. Without careful restrictions on the way agencies may use such agreements, the risk of misuse by harried state authorities exists.

When government agencies seek separation agreements during the investigation of child abuse, the voluntariness issue noted by the Supreme Court in 1977 involves two distinct, but sometimes overlapping, concerns about the actions of the authorities. First, there is a question as to whether social workers are providing necessary information to the parents before asking them to separate from their child. Despite the existence of

26. See DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), where the Court held that the Due Process Clause did not create a substantive right against the investigating government agency where the child was harmed by the father while in the father’s custody. Id. at 200. The Court distinguished the circumstances in this case from one in which the child was in the custody of a state agency. Id. Relying on the decision in DeShaney, the court in Weller v. Department of Social Services, 901 F.2d 387 (4th Cir. 1990), stated,

Although [the plaintiff] attempts to distinguish DeShaney on the ground that [the state agency] created the situation . . . by transferring custody to his grandmother and then to [the child’s] mother, we agree . . . that DeShaney is applicable to the extent that Maryland had no duty to provide [the child] with protective services. Id. at 392.

27. See, e.g., Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1124-25 (3d Cir. 1997) (child not taken into custody).


31. E.g., In re J.H., 480 So. 2d 680, 683 (Fla. Dist. Ct. App. 1985) ("[The mother] stated she eventually signed [a partially blank] agreement 'because they said if I didn't sign it they was [sic] going to tell the judge.'").
procedures in many states that govern the use of specific, written voluntary placement plans that spell out at least some of the parents’ rights and alternatives, authorities may engage in a far more questionable practice of seeking oral, informal agreements.

At a minimum, such informality contributes to parents making uninformed or ill-considered decisions. The informality is often an open invitation for unhealthy disputes, both about what authorities said to persuade the parents to enter into the voluntary agreement, and about the actual terms of the agreement. This informal practice increases the opportunities for manipulation of the parents, perhaps motivated by the authorities’ desire to be seen as taking swift action to “do something” about the possibility of abuse.

Second, authorities sometimes employ coercive tactics. The agency may phrase the parents’ choice in express or implicit terms of “do it our way or else.” Agencies may use the availability of judicial process as a threat rather than as a safeguard, as in “[y]ou are going to go my way or I’ll force


33. See Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997).


35. See Thomason v. SCAN Volunteer Servs., Inc., 85 F.3d 1365, 1369 n.2 (8th Cir. 1996) (identifying factual dispute about voluntary consent to separation); see also Gardiner v. Incorporated Village, 50 F.3d 151, 157 (2d Cir. 1995) (Oakes, J., dissenting) (discussing factual nature of dispute over consent to interview child).


37. See Faulkner v. Reeves, No. CIV.A.91-1880, 1992 WL 96286, at *9 (E.D. Pa. Apr. 23, 1992) (finding a valid, substantive due process claim with allegation that a social worker forced a family to agree to undergo private counseling on abuse issues); see also Croft, 103 F.3d at 1124-25; cf. Hurlman v. Rice, 927 F.2d 74, 78 (2d Cir. 1991) (reversing summary judgment motion against a defendant where conflicting evidence included plaintiff’s testimony that a state trooper threatened arrest if the child was not handed over to the father in a child custody dispute). But see King v. Olmstead Co., 117 F.3d 1065, 1067 (8th Cir. 1997) (holding that “mere verbal threats” to “take” the two younger sons if parents did not “cooperate” with a foster care plan for oldest son did not constitute actionable constitutional violation).
you to go to court and you will go that way!" The intimidating presence of a police officer reinforces the threat. In one instance, the officer who accompanied the social worker admitted making a threat to arrest the mother, not because of any allegation or proof that she was an abuser, but because he viewed her conduct during the interview as "disorderly." After the officer's statement, the mother complied with the social worker's demands. While such an approach creates an interesting dilemma around which to plot a book or movie, drawing comparisons to The Godfather, such tactics are irresponsible, particularly if countenanced by the state as an avoidance of procedural safeguards for the handling of child abuse investigations.

As presented here, the fiction behind many voluntary placement or separation agreements is another reminder of the need for caution when giving police powers to even the best-intentioned public servant. As one commentator on child welfare cases has noted,

A danger exists in child protection [proceedings] that the personal rights of parents and children will not be protected in our well-intentioned zeal to protect and help children and parents. Our good intentions do not alter the need to recognize and respect the personal integrity and autonomy of clients. Mr. Justice Brandeis warned us about the dangers to our liberty presented by the benevolently intended state:

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Justice Brandeis's warning is appropriate in this context. For example, a review of recent federal civil rights suits filed in Pennsylvania reveals a

40. Brief for Appellants at 7, Lindsey v. Warren County Children & Youth Servs., 149 F.3d 1164 (3d Cir. 1998) (No. 96-3734) (copy in possession of author).
41. Id.
42. "I'll make him an offer he can't refuse." MARIO PUZO, THE GODFATHER 37 (1969).
44. The suits were filed under 42 U.S.C. § 1983 alleging violation of the parents' constitutional rights as a consequence of the initial removal of their child or a parent from the family home at the insistence of state authorities. See cases cited infra note 45. This is a distinct claim from any challenge to the procedural mechanisms by which states have
recurrent concern about the tactics used by various counties’ agencies to obtain voluntary placement decisions during the investigation stages.45

III. A CLOSE LOOK AT THE QUESTIONABLE VOLUNTARY SEPARATION DECISION: THE STATUTORY FRAMEWORK FOR ABUSE INVESTIGATIONS

The governmental role in child abuse investigations is frequently precipitated by a written report or a phone call, often anonymous, to a county agency or a state’s child abuse hotline.46 The agency then dispatches permitted emergency removal actions. See Jordan v. Jackson, 15 F.3d 333, 336 (4th Cir. 1994) (upholding state statute but permitting challenge to removal action). For a partial history of other actions challenging child protective services laws in federal courts, see Martin Guggenheim, State Intervention in the Family: Making a Federal Case Out of It, 45 OHIO ST. L.J. 399 (1984).

45. See Richardson v. City of Philadelphia, No. CIV.A.89-8901, 1992 WL 46899, at *6 (E.D. Pa. Mar. 6, 1992) (“[T]he question before the Court is whether plaintiff has produced sufficient evidence that, although she signed a voluntary placement agreement putting Michael in foster care, her decision was, in fact, involuntary.”); see also Faulkner v. Reeves, No. CIV.A.91-1880, 1992 WL 96286, at *9 (E.D. Pa. Apr. 23, 1992) (“Plaintiffs contend . . . that defendant . . . threatened to take [the child] away from them if they did not comply with their investigation.”); Rinderer v. Delaware County Children & Youth Servs., 703 F. Supp. 358, 361 (E.D. Pa. 1987) (holding that threats by social workers caused wife to remove children from home and husband did not state cause of action against social worker for violation of wife’s constitutional rights because wife was never separated from children; however, complaint did state cause of action on behalf of husband); cf. Lindsey, No. 93-267 Erie (order denying prospective class action certification asserting a county-wide practice of coerced, unwritten voluntary separations). After the court granted partial summary judgment to the defendants on several issues, the Lindsey parents were permitted to proceed on their procedural due process claim that the social worker failed to advise the parents that consent to informal adjustment was not obligatory, resulting in many months of forced separation of father and children without judicial review. Id. Following a non-jury trial in November of 1996 and a decision upholding the actions of the social workers, the parents filed an appeal in the Third Circuit. See Lindsey v. Warren County Children & Youth Servs., 149 F.3d 1164 (3d Cir. 1998) (No. 96-3734) (affirming, without opinion, the decision of the district court in favor of the defendant social workers).

46. The U.S. Department of Health and Human Services (HHS) is authorized by the Social Security Act to cooperate with state agencies in the creation and support of child welfare services and foster care. 42 U.S.C. §§ 620-628, 670-679a (1994). To obtain federal funding, states must develop a plan for such services. See id. §§ 622, 671; 45 C.F.R. §§ 1355.21, 1356.30, 1357.15, 1357.20, 1357.25 (1997). In Pennsylvania, for example, an allegation of abuse involves processes governed by two separate statutes, the Child Protective Services Law, 23 PA. CONS. STAT. ANN. §§ 6301-6384 (West 1991 & Supp. 1998), and the Juvenile Act, 42 PA. CONS. STAT. ANN. §§ 6301-6365 (West 1982 & Supp. 1998). The Child Protective Services Law is a reporting statute, designed to facilitate identification, investigation, emergency protection and record-keeping of child abuse. 23 PA. CONS. STAT. ANN. §§ 6301-6345. State custody over the child is governed by the Juvenile Act. 42 PA. CONS. STAT. ANN. §§ 6301-6345. The two statutes should be construed together to
1998] FICTIONAL VOLUNTARY SEPARATION 845

its child protective services caseworker or investigator to make prompt contact with the reporting party and the family, usually within twenty-four hours of the first report.47 When a parent is the suspect of the child abuse report, the investigation will include an early questioning of the parent, frequently without advance notice and without the presence of counsel.48 Although a minority of states recognize that a suspected parent has a right to counsel during early stages of an investigation,49 the caseworker typically insists on an immediate interview while providing the suspected parent with fairly minimal information, such as an oral summary of the anonymous report and description of any appeal rights.50

When making the first contact, the caseworker usually proceeds to the suspect parent’s house accompanied by a law enforcement officer, who may have the power to make a warrantless removal of the child from the home.51 The parent may be subjected to intense “interviews” and multiple examinations, including questioning by several caseworkers or supervisors, the law enforcement official, or medical personnel.52 Inconsistencies in the determine the complete procedural framework for handling a parental abuse allegation. See In re J.R.W., 631 A.2d 1019, 1021-22 (Pa. Super. Ct. 1993); In re R.M.R., 530 A.2d 1381, 1383 (Pa. Super. Ct. 1987).

47. See 23 PA. CONS. STAT. ANN. § 6368(a). The Pennsylvania Child Protective Services Law makes a distinction between “general” protective services for “non-abuse” cases and higher priority protective services and investigation time limits for “child abuse” investigations. See, e.g., id. § 6303 (definitions).

48. See, e.g., Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1124 (3d Cir. 1997).

49. E.g., N.D. CENT. CODE § 27-20-26 (Supp. 1997) (providing that a party’s entitlement to legal counsel exists during “custodial, post-petition, and informal adjustment stages of proceedings”); see also In re W.B., 241 N.W.2d 546, 556 (N.D. 1976) (holding that parents involved in proceedings for the termination of parental rights were entitled to counsel before the initial interview with the investigating social service agency).

50. For example, in 1995, Pennsylvania’s Cumberland County Children and Youth Service Agency used a letter that in pertinent part provided,

Under the law, you have a right to obtain a copy of the reports filed which will exclude any identifying information about the parties who made the report or cooperated in the investigation. To obtain a copy of these reports, you must make a written request to the Agency at the below-listed address. You also have the right within 45 days of being notified of the status of the report to request of the Department of Public Welfare that indicated reports be amended or expunged, and, if your request is denied or not acted upon within 30 days, you have a right to a hearing on the matter. . . .

Form Letter from Cumberland County Children & Youth Servs., Carlisle, Pa. (copy on file with the author).

51. See 42 PA. CONS. STAT. ANN. § 6324(3) (West 1982 & Supp. 1998) (“A child may be taken into custody . . . [b]y a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child is suffering from illness or injury or is in imminent danger from his surroundings, and that his removal is necessary.”).

52. See, e.g., id. § 6339 (investigation and report procedures).
parent's descriptions may be treated as "hallmark" signs of an abuser trying to cover his or her tracks, rather than mere confusion or exhaustion with the process. At this point, the caseworker may believe separation of the child from the parent is the safest course, thus triggering the caseworker's desire for a voluntary separation agreement as an alternative to a judicial proceeding for an emergency removal.

During the investigation, if the law enforcement official believes he or she has sufficient cause to suspect child abuse by a parent, the official may make a warrantless emergency removal of the child and place the child in a shelter for a short period of time; however, an application for prompt judicial review must accompany this removal. The agency's caseworkers may be required to seek a court order before removing the child from the parent and to obtain a prompt hearing after removal. Thus, some type of judicial hearing, often an informal emergency or shelter hearing, is normally required shortly after removal for the agency to establish facts that justify continued state custody over the child.

Properly used, such judicial review serves as an important safeguard for the child and the parents. This informal hearing, such as Pennsylvania's seventy-two hour protective custody hearing, would often be the parents' first opportunity to tell an independent reviewer (i.e., the court) his or her explanation of the child's injury, and to hear a full explanation of his or her

53. As with beauty, inconsistencies are judged subjectively by the eyes of the beholder. See, e.g., In re C.R.S., 696 A.2d 840, 844 (Pa. Super. Ct. 1997); see also Croft, 103 F.3d at 1127 (describing caseworker's red flags as "statements given during the interviews which raised questions in her mind about whether the [anonymous] tip was true"); 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT § 3.9 (2d ed. 1992).

An implausible explanation is critically important for diagnostic purposes. In addition to its medical value, implausible explanations may indicate consciousness of guilt, and may be admitted under that theory.

. . . .

. . . An abusive caretaker who invents an explanation for a child's injuries may have difficulty keeping the story straight. When the explanation differs each time the caretaker describes what happened, suspicion arises.

Id. at 155-56.

54. See, e.g., Croft, 103 F.3d at 1125.

55. 42 PA. CONS. STAT. ANN. § 6324(3).

56. 23 PA. CONS. STAT. ANN. § 6369; 42 PA. CONS. STAT. ANN. § 6324(1).

57. E.g., 23 PA. CONS. STAT. ANN. § 6332(a).

58. Recently, the alleged failure of one state to enforce its statutory requirements for prompt judicial review of child removals opened the door to a class action seeking declaratory and injunctive relief against court officials. Pamela B. v. Ment, 709 A.2d 1089, 1100 (Conn. 1998) ("We have been properly forewarned of the well recognized harm to children caused by delayed hearings. . . . It is thus imperative that parents be given a prompt and meaningful opportunity to challenge an order of temporary custody.").

59. 23 PA. CONS. STAT. ANN. § 6315(a); 42 PA. CONS. STAT. ANN. § 6332(a).
rights in subsequent proceedings. The informal hearing, in turn, ordinarily leads to a more formal evidentiary hearing, sometimes called a “dependency” or “adjudication” hearing. The dependency hearing is often the first time that an indigent parent will have access to the assistance of counsel.

Statutes frequently call for the dependency hearing to occur within ten days of the removal, unless the parent waives the time periods. The dependency hearing often imposes a fairly strict burden of proof on the state seeking continued custody over the child, such as a requirement that the agency prove by clear and convincing evidence that the child has been “abused” and that the child is presently without proper parental care.

The state statutory framework for judicial supervision of child separations for removals is an important response to constitutional due process concerns. As the Connecticut Supreme Court recently emphasized:

Courts and state agencies, therefore, must keep in mind the constitutional limitations imposed on a state that undertakes any form of coercive intervention in family affairs. Some of the same constraints have been imposed upon the state by the legislature, recognizing the importance of the prompt adjudication of cases in which the state has interfered with the family unit.

---

60. See 42 PA. CONS. STAT. ANN. § 6332.
61. Id. § 6335(a).
62. See id. § 6337.
63. See, e.g., Pamela B., 709 A.2d at 1104 (discussing the importance of a properly conducted “ten-day hearing”).
64. 42 PA. CONS. STAT. ANN. § 6341(c); In re C.R.S., 696 A.2d 840, 843 (Pa. Super. Ct. 1997).
65. Pennsylvania defines child abuse to include:
   (i) Any recent act or failure to act by a perpetrator which causes nonaccidental serious physical injury to a child under 18 years of age.
   (ii) An act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age.
   (iii) Any recent act, failure to act or series of such acts or failures to act by a perpetrator which creates an imminent risk of serious physical injury to or sexual abuse or sexual exploitation of a child under 18 years of age.
   (iv) Serious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care, which endangers a child’s life or development or impairs the child’s functioning.
   23 PA. CONS. STAT. ANN. § 6303(b).
66. See 42 PA. CONS. STAT. ANN. § 6302 (defining “dependent child”).
68. Pamela B., 709 A.2d at 1098.
If the parent, however, participates in some type of voluntary plan for separation from the child, the agency may treat the parent's cooperation as a voluntary waiver of the traditional statutory safeguards, including any prompt judicial review or appointment of counsel. The consequences of the voluntary participation can be dramatic, particularly if the parent's defense to allegations of abuse requires a timely and sophisticated counter-investigation.

For example, in one reported instance, a so-called voluntary separation agreement led to separation of parent and child for several months—months when the indigent parent had no access to the sophisticated legal and medical investigation necessary to challenge the agency's charges of "shaken baby syndrome." Evidence was eventually uncovered which indicated that the symptoms were likely to have been caused by routine, emergency medical procedures and not by the alleged parental abuse. As another example, one overworked emergency room doctor may determine that a dislocated elbow was caused by abuse, while a specially trained physician would recognize the injury as part of a family pattern of radial head subluxations.

An even more disturbing outcome of an indeterminate voluntary separation occurs when the separated family is shuffled aside and ignored by caseworkers whose priorities are court cases. Such "agreed" separations can drift for months with no clear plan for treatment of the child, rehabilitation of the suspected abuser, or reunification of the family. While an initial emergency removal may be justified, prolonged and unsupervised disruptions are rarely helpful to the parents or the overall concerns of the family.

In some states, a voluntary separation may result in the state acquiring an unlimited amount of time to complete its investigation while still achieving separation of the suspected parent from the child—a result that

---

69. In re C.R.S., 696 A.2d at 844.
70. Id.
71. Dale J. Townsend & George S. Bassett, Common Elbow Fractures in Children, 53 AM. FAM. PHYSICIAN 2031, 2040-41 (1996) (stating that a radial head subluxation "refers to an injury of the upper extremity in children in which the radial head, under forces of forearm pronation and axial traction, slides under the annular ligament and becomes entrapped"). These subluxations can occur in young children, either "spontaneously or with inadvertent manipulation" such as "removing a shirt." Stephen J. Teach & Sara A. Schutzman, Prospective Study of Recurrent Radial Head Subluxation, 150 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 164, 165 (1996).
72. E.g., Pamela B., 709 A.2d at 1095.
74. Pamela B., 709 A.2d at 1099-100 ("There can be no doubt that . . . prolonged delays resulting in disruption to families, in the absence of careful and exacting judicial oversight, substantially interfere with the constitutional right of family integrity.").
neither the state legislature nor the parent intended. In Pennsylvania, for example, the agency is required by statute to complete its administrative investigation within sixty days; thereafter, the administrative label for the allegation must be reported as “unfounded” and cannot be reported as “indicated.” The sixty-day limit attempts to avoid interminable investigations that can leave both the child and the family at risk. However, Pennsylvania’s Child Protective Services Law arguably creates a loophole for the agency: if the agency fails to complete its investigation and report any “indicated” finding within sixty days, the agency may actually continue its investigation and eventually initiate a dependency lawsuit.

In Pennsylvania, the courts have refused to dismiss a subsequent dependency action under the Pennsylvania Juvenile Act, even though such a delayed investigation may result in the parent being the subject of a much delayed “founded” report of child abuse, and labeled as such in the administrative records maintained under the Child Protective Services Law.

An agency concerned about the safety of a child is likely to conduct a prompt investigation. A voluntary separation, however, reduces the agency’s concern about safety or promptness. Thus, the Pennsylvania agencies may have incentives to buy time with voluntary separations because the caseworkers may believe they are accomplishing several goals: protecting the child, giving the worker more time to investigate and, if necessary, building a court case that will lead to a “founded” conclusion.

In some instances, the state’s statutes may not provide for voluntary separation agreements in the context of child abuse investigations. The absence of clear statutory provisions governing the use of voluntary agreements makes them particularly susceptible to misuse. In Pennsylvania, for example, the two statutes governing child protective proceedings have vaguely worded provisions for “informal adjustment” and “voluntary

75. 23 PA. CONS. STAT. ANN. § 6368(c) (West Supp. 1998) (“The investigation by the county agency to determine whether the report is ‘founded,’ ‘indicated’ or ‘unfounded’ and whether to accept the family for service shall be completed within 60 days in all cases.”).
76. Id.
77. 42 PA. CONS. STAT. ANN. §§ 6301-6365.
79. 42 PA. CONS. STAT. ANN. § 6323.
services,"\(^{80}\) neither of which provide adequate guidance for voluntary separation agreements.\(^{81}\)

Pennsylvania's Juvenile Act, for example, provides for an "informal adjustment" process that appears to serve as a type of pre-trial diversion process for youthful offenders if no "detention" is necessary.\(^{82}\) Although the statutory provision for "informal adjustments" does not appear to have been drafted with child abuse investigations in mind, the wording of the Pennsylvania Juvenile Act sheds light on what should be included in any voluntary agreement that affects the parent-child relationship.

For example, under Pennsylvania's informal adjustment provision, "social agencies . . . may give counsel and advice to the parties" in proceedings under the Juvenile Act, "with a view to an informal adjustment."\(^{83}\) The informal process has a specific maximum time period and "shall not extend beyond six months" without a court order.\(^{84}\) The parties must be advised that consent to the informal adjustment is "not obligatory."\(^{85}\) The informal adjustment process is not intended to be a free discovery period — "admissions" made by the participants during the informal process are defined as "privileged."\(^{86}\) Thus, the informal adjustment process involves three key features: a specific maximum duration with a clear opportunity for judicial review, notice to the parties of their right to reject the proposal, and clear benefits to family participants.

Interestingly, state officials have failed to recognize that the rationale for placing limitations on informal adjustments applies equally well to voluntary agreements for child abuse investigations. The rationale is summarized in the history to the Model Juvenile Act,\(^ {87}\) on which Pennsylvania's law is based:

There is . . . danger that, unless controlled, the prospect that court proceedings will be commenced and the fear of their consequences may make the participation of parties an involuntary one, and their agreeing to prescribed terms a product of compulsion. The provisions of this section are intended to avoid possible abuse of these otherwise desirable efforts.\(^ {88}\)

---

80. 23 PA. CONS. STAT. ANN. § 6370.
81. Id.; 42 PA. CONS. STAT. ANN. § 6323; cf. 55 PA. CODE § 3130.65 (1996).
82. 42 PA. CONS. STAT. ANN. § 6323.
83. Id. § 6323(b).
84. Id. § 6323(c).
85. Id. § 6323(b)(2).
86. Id. § 6323(c).
88. Id.
Similarly, although the Pennsylvania Child Protective Services Law contains references to voluntary services available to families in abuse or neglect cases, no statutory definition of voluntary participation is included nor is there any statutory requirement that the state use a written agreement. Pennsylvania county agencies are subject to child protective service regulations that authorize but fail to mandate the use of detailed, written “voluntary placement agreements.” Agencies appear to use these agreements rarely and only for “placements” of the child into formal foster care or state facilities. Experienced attorneys in some areas report that they have never seen a written plan for parent/child separations.

On occasion, Pennsylvania's county agencies have attempted to distinguish the need for written “voluntary placement agreements” in foster care from situations where the mere separation of child and parent during investigation requires only an unwritten “voluntary separation decision." Officials may assert that the written, restricted agreements are necessary only if “placement” occurs with a state or county agency’s shelter or with a formal foster family. Such a distinction reflects the agency’s decision to give a technical, narrow reading for “placement,” which does not exist under the statute.

More importantly, the distinction ignores the apparent purpose behind the regulation, which provides very specific terms for written “voluntary placement agreements.” It seems nonsensical to ignore the sound reasons for providing clear notice to the parents of the terms and consequences of

89. 23 PA. CONS. STAT. ANN. § 6370.
90. 55 PA. CODE § 3130.65 (1998). The agreement requires judicial approval after thirty days and is required to contain the following:
(1) A statement of the parents’ or legal guardian’s right to be represented by legal counsel or other spokesperson during conferences with the county agency about voluntary placement.
(2) A statement of the parents’ or legal guardian’s right to refuse to place the child.
(3) A statement of the parents’ or legal guardian’s right to visit the child, to obtain information about the child, and to be consulted about and approve medical and educational decisions concerning the child while the child is in voluntary placement.
(4) A statement of the parents’ or legal guardian’s right to the immediate return of the child upon request of the parent or guardian, unless the court orders the legal custody of the child to be transferred to the county agency.

Id.
91. See Brief for Appellants at 36-37, Lindsey v. Warren County Children & Youth Servs., 149 F.3d 1164 (3d Cir. 1998) (No. 96-3734) (copy in possession of author).
92. See id.
93. See id.; see also In re C.R.S., 696 A.2d 840, 841 (Pa. Super. Ct. 1997) (noting that the agency made no efforts to reunify the family after the children were voluntarily placed with their grandparents).
94. See 23 PA. CONS. STAT. ANN. § 6303.
95. 55 PA. CODE § 3130.65.
their decision to separate from the child because of the mere location of the
child or parent during the separation.96

Unfortunately, little statistical evidence exists to track the frequency of
use of voluntary agreements and thus provide a national record of fairness
or abuse in the consequences that follow. For example, the Pennsylvania
Department of Public Welfare does not collect statistics to track the
frequency of use of unwritten voluntary agreements, apparently on the
theory that such separations do not involve state costs.97 One court focused
on the concern that county agencies were misusing the dependency process
to protect funding and to place children with “better” families than their
troubled, biological families.98 The court noted with apparent disapproval
the potential significance of one Pennsylvania agency’s failure to provide a
copy of any written plan despite the agency’s position that the mother had
voluntarily surrendered a “fundamental constitutional right.”99

Because of the closed nature of child abuse and juvenile case
records,100 it has often been difficult to obtain clear information about the various
approaches to investigation and the impact of so-called voluntary separation
decisions. In the past, courts have sometimes noted, but declined to address,
issues of voluntariness, treating them as merely “procedural.”101 On other
occasions, courts have characterized the parents’ decisions as “voluntary,”
but without giving sufficient factual histories to provide guidance on
whether such conclusions are appropriate.102 In contrast to this history of
judicial tolerance of voluntary agreements, the Third Circuit in 1997
expressly rejected an agency’s argument that a suspected parent’s
compliance with its request to separate from his child during an
investigation created a voluntary waiver of the parent’s rights to due
process.103

96. See id. (defining “placement” as simply “[t]wenty-four hours out-of-home care
and supervision of a child”). But see id. § 3130.39 (regarding services and facilities which
may be used by the county).
97. E.g., 1995 PA. REPORT, supra note 2.
99. Id.; see supra text accompanying note 22.
100. E.g., 42 PA. CONS. STAT. ANN. § 6307 (limiting the inspection of all juvenile
court files and records).
102. E.g., Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087,
1094-95 (3d Cir. 1989) (reversing summary judgment despite district court’s determination
that it was undisputed that plaintiff consented to admitting the social worker and the police
officer into her home). The court stated, “It is, of course, not our place to accept or reject
[the plaintiff’s] sworn version of the facts, but the district court was not entitled to disregard
it.” Id.
103. Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1126
n.4 (3d Cir. 1997).
IV. The Croft Case: The Third Circuit’s Rejection of the Voluntary Agreement as a Waiver of Due Process

A. Summary

In the recent case of Croft v. Westmoreland County Children and Youth Services, the United States Court of Appeals for the Third Circuit rejected the use of the “voluntary” label as justification for Pennsylvania’s interference with the family unit at the commencement of the investigation:

Defendants repeatedly have characterized [the father’s] decision to leave as “voluntary.” This notion we explicitly reject. The threat that unless [the father] left his home, the state would take this four-year-old daughter and place her in foster care was blatantly coercive. The attempt to color his decision in this light is not well taken.104

In Croft, the county’s caseworker, acting as an investigator, went to the home with a state trooper in response to an anonymous “hotline” call suggesting possible sexual abuse of the daughter by the father.105 After interviews of the parents and the child, the caseworker felt she did not have enough information.106 On the same night as the interviews she initiated the separation of the father and child, by means of what the Third Circuit viewed as an ultimatum,107 to give the county more time to complete the investigation without immediate concern for the child’s safety.108 The Third Circuit concluded that the county’s demand for separation occurred without adequate grounds on which to base an objective belief in the likelihood of imminent abuse or harm.109 The conduct could not be excused or justified as being a voluntary parental action.110 The court viewed such state action as a violation of the parents’ substantive due process rights:111

104. Id. at 1125 n.1.
105. Id. at 1124. The agency “was further told that the [four-year-old] child slept with her parents and that she had recently been out of the house naked, walked to a neighbor’s house ... and told [them] that she was ‘sleeping with mommy and daddy.’” Id.
106. Id. at 1127 (“Most damaging to Defendants is [the caseworker’s] deposition testimony that, after the interviews, she had no opinion one way or the other whether sexual abuse had occurred.”).
107. Id. at 1124 (“[The caseworker] gave [the father] an ultimatum: unless he left his home and separated himself from his daughter until the investigation was complete, she would take [the daughter] physically from the home that night and place her in foster care.”).
108. See id. at 1124-25.
109. Id. at 1126-27.
110. Id.
111. Id. at 1127.
The Due Process Clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process. In determining whether the Crofts' constitutionally protected interests were violated, we must balance the fundamental liberty interests of the family unit with the compelling interests of the state in protecting children from abuse. Whatever disruption or disintegration of family life the Crofts may have suffered as a result of the county's child abuse investigation does not, in and of itself, constitute a constitutional deprivation.

... However, a state has no interest in protecting the children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.\textsuperscript{12}

Further, the court found that the state's apparent failure to seek any post-separation judicial review, again relying on the fiction of the parents' voluntary separation decision, created a procedural due process claim.\textsuperscript{13} The court concluded that the worker's conduct amounted to an arbitrary abuse of power:

Considered in light of the circumstances surrounding the [caseworker's] ultimatum, [the caseworker's] conduct was an arbitrary abuse of government power. Based on her lack of an opinion regarding whether sexual abuse had occurred, we hold that she lacked objectively reasonable grounds to believe the child had been sexually abused or was in imminent danger of sexual abuse.\textsuperscript{14}

Therefore, the Third Circuit reversed the district court's entry of summary judgment for the county and remanded the case for further proceedings.\textsuperscript{15} Although not discussed in the appellate opinion, Dr. Croft was separated from his child for the relatively short period of ten days as a result of the "blatantly coerced" agreement.\textsuperscript{16} The separation ended after a psychologist interviewed the child.\textsuperscript{17} Dr. Croft, a veterinarian, is presumably a fairly

\textsuperscript{12} Id. at 1125-26.
\textsuperscript{13} Id. at 1125 n.3 ("We note here only that the policy of removing the suspected parent from the family home during the pendency of child abuse investigations absent any procedural safeguards raises a procedural due process issue.").
\textsuperscript{14} Id. at 1127.
\textsuperscript{15} Id.
\textsuperscript{17} Man Pushing for Change in Child Abuse Probes, supra note 116.
sophisticated person and apparently had sufficient economic resources to secure expert help to resolve the allegations and reunite his family.\textsuperscript{118}

Following remand, the county settled before trial for a reported $200,000 and claimed to have spent around $50,000 on attorney’s fees during the four-year court battle.\textsuperscript{119} After the settlement, Dr. Croft commented to the media about the effect of his separation from his daughter during the emotional investigation: “If you want a nice, easy way to destroy someone’s life, this is it.”\textsuperscript{120} Being forced to separate was unfair, he said, because the investigation was based entirely on the anonymous tip. “It’s harder to order a pizza than report a child abuse case. . . . With a pizza, at least they call back to verify it just to make sure it’s not a prank call.”\textsuperscript{121}

Prior to \textit{Croft}, complaints that challenged a state’s role in the separation of child and suspected parent were often dismissed on the basis of the qualified nature of the parent’s rights\textsuperscript{122} or because the defendants’ had successfully asserted immunity.\textsuperscript{123} The forcefulness, not to mention the dispatch,\textsuperscript{124} with which the Third Circuit reached the due process issues by rejecting the county’s argument about the existence and effect of a voluntary agreement is potentially ground-breaking.\textsuperscript{125} The parameters of the Third Circuit’s decision in \textit{Croft} are yet to be tested. Interestingly, one member of the three-judge panel joined in “the preceding portions of the opinion,” but was not “prepared at this juncture to hold that [the social worker’s] conduct violated the Crofts’ constitutional rights, or that, on remand, the Crofts are entitled to an automatic summary judgment . . . as the majority opinion seems to suggest.”\textsuperscript{126}

\begin{footnotes}
\textsuperscript{118} See $200,000 Payment Settles Lawsuit, supra note 116.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} E.g., Myers v. Morris, 810 F.2d 1437, 1462-63 (8th Cir. 1987) (“In our view, the parental liberty interest in keeping the family unit intact is not a clearly established right in the context of reasonable suspicion that parents may be abusing children.”).
\textsuperscript{123} See Defore v. Premore, 86 F.3d 48 (2d Cir. 1996); Thomason v. SCAN Volunteer Servs., 85 F.3d 1365, 1371 (8th Cir. 1996); Gottlieb v. County of Orange, 84 F.3d 511, 517 (2d Cir. 1996); Frazier v. Bailey, 957 F.2d 920, 931 (1st Cir. 1992); see also Ernst v. Child & Youth Servs., 108 F.3d 486, 496-97 (3d Cir. 1997) (recognizing absolute immunity for certain actions of caseworkers); Myers v. Contra Costa County Dep’t of Soc. Servs., 812 F.2d 1154 (9th Cir. 1987) (recognizing absolute immunity).
\textsuperscript{124} The County’s defense that the search was voluntary was rejected by the Third Circuit in a single footnote of less than sixty words. \textit{Croft} v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1125 n.1 (3d Cir. 1997).
\textsuperscript{125} E.g., Miller v. City of Philadelphia, 954 F. Supp. 1056, 1064 (E.D. Pa. 1997) (“[T]he Third Circuit appears to break new ground . . . . Prior to \textit{Croft} there were no clearly established legal norms regarding the degree of suspicion a child welfare worker must possess before initiating custody proceedings.”).
\textsuperscript{126} \textit{Croft}, 103 F.3d at 1127 n.6.
\end{footnotes}
B. Analysis

The *Croft* case is important in at least three respects. First, the Third Circuit recognized both a substantive and procedural due process violation arising out of a short-term separation despite the fact that the caseworker's action was motivated, if not justified, by concern for the child's safety. The court determined that even this degree of separation interferes with the fundamental right of family integrity when initiated without an objectively reasonable suspicion of imminent danger to the child.

Second, in recognizing both substantive and procedural due process violations, the court rejected the qualified immunity defense raised by the caseworker. Thus, the court came close to stating that, as a matter of law, caseworkers should not seek voluntary removal of a parent or child based wholly on an anonymous tip of abuse, at least not if the parents deny the abuse and no physical corroboration exists. Such a holding has important ramifications because this fact pattern is not uncommon during the early stages of an investigation.

These two points depend on the third important aspect of the *Croft* case—the Third Circuit's threshold rejection, apparently as a matter of law, of the government's argument that there was no constitutional issue because the parents had consented to a separation plan. The placement of this key point in a footnote potentially masks the significance of the Court's clear rejection of the voluntary label.

The Third Circuit's decision provides a basis for parents to contend in future suits that the law is "clearly established" that social workers must have an articulable, reasonable suspicion that the child is in imminent danger before initiating any emergency separation or even an "agreement"

127. *Id.* at 1125-26.
128. *Id.* at 1125 ("We recognize the constitutionally protected liberty interests that parents have in the custody, care[,] and management of their children.... [T]his liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children — particularly where the children need to be protected from their own parents.").
129. *Id.* at 1125, 1127.
130. *See id.* at 1126-27.
131. *See* Doug Brown, *Abuse Cases Test Skills, Emotions of Investigators*, *ALBUQUERQUE TRIB.*, Sept. 15, 1997, at A1, A3. The cases are difficult to pursue because the only witness is usually the young victim, and frequently there is no physical evidence. [E]xperts say, some of the children spend so much time with different "caretakers"—parents, uncles, aunts, grandparents, siblings, babysitters[,] and neighbors—that even if police and prosecutors can determine abuse occurred, it is almost impossible to pin the crime on an offender.
132. *Croft*, 103 F.3d at 1125 n.1.
133. *Id.*
to separate.\textsuperscript{134} Certainly, this decision suggests that agencies should not feel safe in relying on “agreements” as justification for ignoring the due process requirements of most child welfare laws. The Third Circuit decided a few months after \textit{Croft} to recognize absolute immunity for “prosecutorial” actions taken by social workers “in preparing for, initiating, and prosecuting” dependency actions.\textsuperscript{135} However, this expansion of immunity does not appear to include the “police-like” actions of investigating abuse and removing children prior to initiating judicial process.\textsuperscript{136}

The Third Circuit cited no direct precedent for its holding that rejected a caseworker’s solicitation of voluntary agreements and recognized her liability for failing to have an independent basis for emergency removal.\textsuperscript{137} The major cases cited in \textit{Croft} decline to accept consensual or voluntary labels as a primary justification for separating a parent and child, but they do accept those labels in the context of other facts that establish an independent basis for the caseworkers’ emergency action.\textsuperscript{138}

Taken together, the Third Circuit’s decision and prior circuit court decisions may provide an incentive for caseworkers to deviate from the truth if called upon to testify. A caseworker may feel compelled to manufacture “alternative” grounds for removal or separation if called upon to justify his or her actions in seeking a questionable voluntary agreement. The candor with which the caseworker testified in the \textit{Croft} case about her desire for more information before seeking judicial approval of any removal is unlikely to happen again, at least not if agencies counsel their employees to avoid the \textit{Croft} trap.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{135} Ernst v. Child & Youth Servs., 108 F.3d 486, 493-98 (3d Cir. 1997) (“With this holding, we join the courts of appeals of the Fourth, Sixth, Seventh, Eighth, and Ninth Circuits [in recognizing absolute immunity].”).
\item \textsuperscript{136} Id. at 497 n.7 (“We emphasize that our holding concerns only actions taken by child welfare workers in the context of dependency proceedings. Like our sister courts . . . we would be unwilling to accord absolute immunity to ‘investigative or administrative’ actions taken by child welfare workers outside the context of a judicial proceeding.”); see also Good v. Dauphin County Soc. Servs., 891 F.2d 1087 (3d Cir. 1989) (holding that the social worker and police officer were not entitled to qualified immunity for alleged entry into the home without a warrant); Robinson v. Via, 821 F.2d 913, 919-20 (2d Cir. 1987) (“[The assistant state’s attorney] and [the state trooper] have not sustained their burden of showing that the seizure, without a court order, of children in order to pursue an investigation of alleged child abuse should be accorded absolute immunity.”); Myers v. Morris, 810 F.2d 1437, 1462 n.20 (8th Cir. 1987) (“[T]he removal of children from the homes of persons arrested for sexual abuse is not case initiation, presentation or even preparation, at least when the arrests were not for the abuse of the children being removed.”).
\item \textsuperscript{137} \textit{Croft}, 103 F.3d at 1126.
\item \textsuperscript{138} Thomason v. SCAN Volunteer Servs., Inc., 85 F.3d 1365, 1369 n.2, 1371 (8th Cir. 1996); Gottlieb v. County of Orange, 84 F.3d 511, 520 (2d Cir. 1996).
\end{enumerate}
\end{footnotesize}
In Croft, the court overlooked the likely reason the social worker failed to develop additional facts before seeking separation—her belief, however poorly based, that there was a valid voluntary agreement in place. Thus, while parents' rights advocates will be tempted to embrace the Croft decision with open arms, the decision leaves the door open to questions about how courts should analyze parental issues of voluntariness in the future. As a practical matter, government officials in future cases will likely (1) continue to urge some form of voluntary separation agreements; (2) raise such agreements as a defense to due process claims; (3) attempt to distinguish Croft by asserting facts that they believe are less indicative of government intimidation; and (4) encourage post hoc rationalization by their caseworkers, pushing them to express "alternative" grounds for taking protective action. Thus, after Croft, the question remains: should caseworkers ever rely on the parents' agreement to separate during the investigation as a waiver of the traditional child welfare process?

As the Second Circuit has noted, the use of agreements, whereby the investigated parent separates from the child temporarily without court involvement, may be useful for all parties. The Second Circuit was unwilling to reject categorically the use of such a tool during child abuse investigations in New York:

[F]rom the departing parent's standpoint, judicial review may not be the preferred method of resolving the matter, for the statutory procedures envision a hearing within three days, and the evidence or allegations may be such that the parent believes the matter likely cannot be adjudicated quickly. He may well consider it in his or his family's best interest to have the investigation proceed on a cooperative basis rather than by adjudication. The imposition of an automatic requirement that the agency seek a court order even after a parental departure would deprive the parent of the option to proceed on a nonadjudicative basis.

For example, in another New York case, the parents arguably were able to use their willingness to cooperate and to separate temporarily from the child as a way to encourage the agency to investigate immediately the other possible sources of injury, successfully diverting the spotlight from

139. See, e.g., Weller v. Department of Soc. Servs., 901 F.2d 387 (4th Cir. 1990) (dismissing one claim of civil rights violation because of a "voluntary surrender" of the parent's liberty interest by sending child to grandmother in March 1986, but permitting claim for removal from custody to go forward in July 1986 where pleadings established no agreement and no post-removal hearing).
140. Gottlieb, 84 F.3d at 522.
141. Id.
themselves as the suspected abusers.\footnote{Dietz v. Damas, 932 F. Supp. 431, 434-41 (E.D.N.Y. 1996).} If, however, all such arrangements are void or voidable, under the Third Circuit’s approach, agencies risk economic suicide, in a civil rights litigation sense, by suggesting them. In turn, parents may lose the opportunity to choose a voluntary separation as a non-litigation tool to facilitate a careful investigation of the allegations.

The Second and Third Circuits appear to have fundamentally different philosophies on the viability of a voluntary separation agreement entered into by suspected parents during an abuse investigation. The Second Circuit recognizes a potential value to the parents and the child from entering into such an agreement and thereby avoiding immediate litigation.\footnote{See Gottlieb, 84 F.3d at 522.} When such separations are challenged in a civil rights suit, the Second Circuit appears to ignore the factual nature of the voluntariness issues, at least as long as the state can show there was an independent factual basis for emergency removal. In contrast, the Third Circuit in \textit{Croft} appeared to condemn any such agreement as inherently coerced. The inconsistency in the approaches flows from an incomplete analysis of voluntary or consensual actions. Although the Third Circuit seems to have the more persuasive reaction to the fictional voluntary label, its analysis seemingly misses a step.

Significantly, in \textit{Croft}, the Third Circuit failed to acknowledge that consent has traditionally been a lawful, alternative basis for otherwise intrusive governmental action. For example, sometimes the individual and the state have mutual interests in the individual’s consent to otherwise intrusive government action, such as vehicle searches and home searches.\footnote{See Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) ("[A car] search pursuant to consent may result in considerably less inconvenience for the subject of the search, and properly conducted is a constitutionally permissible and wholly legitimate aspect of effective police activity.").} Where consent is validly obtained and can be established in court, the government entity does not also need to prove the existence of reasonable suspicion.\footnote{Id.}

\[[O]ften ... an effort is made to obtain consent for a search in circumstances where probable cause is lacking and thus no search warrant could be obtained. If consent is given, evidence may thereby be uncovered in a situation where there was no other lawful basis for making the search. Or, if consent is given but nothing incriminating is found, this will likewise be of benefit to the police, for often the fruitless search will clear the suspect and permit the police to divert their efforts elsewhere.\footnote{3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 8.1, at 597 (3d ed. 1996 & Supp. 1998) (citations omitted).} \]
Similarly, when parents give confessions outside the confines of custodial interrogations, the court may, depending on the circumstances, treat the confessions as voluntary waivers of the Fifth Amendment privilege against self-incrimination, even in the absence of *Miranda* warnings.\(^{147}\)

In the context of a criminal proceeding, a defendant’s challenge to the voluntariness of a consent to search or to the waiver of the privilege against self-incrimination is usually resolved in a factual hearing.\(^{148}\) The Third Circuit, however, did not remand for a factual hearing on the voluntariness issue. It simply concluded that this father’s agreement to leave his home was non-voluntary without explaining whether such a conclusion was limited to the facts of the *Croft* case or whether all such agreements are to be condemned as a matter of law.\(^{149}\) Thus, *Croft* generates important policy questions:

- Should voluntary separation decisions ever be considered a valid basis for bypassing the steps for emergency separations found in the typical child welfare statutory scheme?
- If voluntary agreements are potentially valid, by what standard should voluntariness be tested?\(^{150}\)

Before answering these questions, it is first helpful to review other contexts in which voluntary citizen actions may be treated as waivers of important rights.

V. TESTING THE VOLUNTARINESS OF THE PARENTS’ SEPARATION DECISION

The Third Circuit rejected the fiction of a voluntary separation when offered by the state as justification for its avoidance of statutory due process

\(^{147}\) OneWayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.7, at 514 (1984) (“It is thus clear that a statement not preceded by the *Miranda* warnings will be admissible when, for example, the defendant walks into a police station and confesses or blurts out an admission when approached by an officer near a crime scene.”).

\(^{148}\) See, e.g., United States v. Thompson, 106 F.3d 794, 796-97 (7th Cir. 1997) (reviewing facts shown at hearing and trial establishing voluntariness of consent to search a vehicle); United States v. White, 750 F.2d 726, 728 (8th Cir. 1984) (reviewing facts that show a clear waiver of the privilege against self-incrimination).

\(^{149}\) See *Croft* v. Westmoreland County Children & Youth Servs., 103 F.3d 1123 (3d Cir. 1997).

requirements. In contrast, the Second Circuit recognized that parents may actually benefit from entering into a separation agreement, particularly if it permits the parents time to marshal their defense for any later judicial proceeding. Therefore, the Second Circuit appeared to tolerate the fiction, at least as long as the facts supported the need for emergency action.

Neither of these all-or-nothing approaches is entirely satisfactory. Rather than simply condemning or ignoring the voluntary agreement, the courts should instead recognize standards by which an agreement can be created that protects the interests of both the state and the suspected parents. Factors should be identified to guide authorities in determining whether an alternative to judicial review should be offered to parents. Once the legal standard is determined, the court can then determine the factual issues on a case-by-case basis. Therefore, historical perspective on the legal tests for voluntary actions and consent to intrusive government actions is helpful.

A. Comparison: Voluntariness as a Concern in Civil Cases

The inherent power of certain parties to coerce or force cooperation from individuals has often been the focus of judicial concern in civil matters. In civil transactions, courts most often raise this concern when one party has great economic or political power over another weaker or less sophisticated party. Thus, for example, at common law, courts have been willing to examine contracts of adhesion, recognizing that severe disparities in power may invalidate otherwise “agreed upon” terms.

151. See Croft, 103 F.3d at 1125 n.1.
152. See Gottlieb v. County of Orange, 84 F.3d 511, 517 (2d Cir. 1996).
153. Id. at 520, 522.
154. See Thomason v. SCAN Volunteer Servs., Inc., 85 F.3d 1365, 1369 n.2 (8th Cir. 1996) (concluding that the defendants failed to establish “beyond genuine dispute” the fact of voluntary consent to separation); see also Hurlman v. Rice, 927 F.2d 74, 79 (2d Cir. 1991) (noting that existence of genuine issue of material fact as to whether parent’s release of child to state trooper was voluntary precluded summary judgment).

[C]ontracts of “adhesion” have frequently been denied their intended effect by a process of strained interpretation. In the landmark case of Henningsen v. Bloomfield Motors, Inc., [161 A.2d 69 (1960)], the court dealt with the matter in more forthright fashion, denying any effect to a clause in an adhesion contract deemed to be unfair.
In modern times, the related issues of voluntariness, waiver, and consent have often led to judicial review and the creation of common law standards to evaluate the weaker or less sophisticated party’s “voluntary consent.” Where the party claiming waiver in a civil transaction is a government entity, the courts have found it reasonable to require the state to prove that it first informed the private individual of the relevant law. Courts have put the burden on the party who relies on the civil waiver or consent to establish the “knowing and intelligent” nature of the opposing party’s action. “To make proof of waiver of a legal right there must be clear, unequivocal and decisive action of the party with knowledge of such right showing a purpose to surrender such right on his part.” For example, courts have required insurance companies to use specific written terms to obtain a valid waiver by a policy holder of uninsured motorist coverage. Often legislators later replace or supplement the judicial standards by enacting statutes that require even more stringent efforts to ensure “knowing and intelligent” waivers. The voluntariness of a questionable waiver of rights is usually treated as a question of fact.

157. See, e.g., Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 819 (11th Cir. 1998) (“The waiver of . . . remedial rights [under the ADA] . . . ‘must be closely scrutinized,’ and a court must look to the totality of the circumstances to determine whether the release is knowing and voluntary.”); Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1096 (3d Cir. 1988) (setting forth standard of review for contractual waiver of certain constitutional rights).

158. See Wohlgemuth v. Armacost, 336 A.2d 455, 456-57, 458 n.1 (Pa. Commw. Ct. 1975) (rejecting Department of Public Welfare’s argument that benefit recipient had waived refund because officials failed to inform her of change of law: “By way of analogy, we note the well-established principle that the waiver of a legal right requires a ‘clear . . . act of the party with knowledge of such right’”).

159. See, e.g., First Nat’l Bank v. Department of Banking, 286 A.2d 480 (Pa. Commw. Ct. 1972) (involving the effect of recent change of law on opponent’s right to obtain information; holding that the proponent of waiver failed to prove waiver had occurred in a dispute over application for a branch bank); see also Cole v. Philadelphia Co., 26 A.2d 920, 921, 924 (Pa. 1942) (holding that lessee’s purported waiver of royalty payments under oil and gas lease is question of fact, and not of law).

160. Cole, 26 A.2d at 924.


162. See, e.g., 29 U.S.C. § 626(f) (1994) (providing specific release procedures adopted by Older Workers Benefits Protection Act); see also Tukovits v. Prudential Ins. Co., 672 A.2d 786, 789-91 (Pa. Super. Ct. 1996) (holding waiver invalid where insurer failed to use language mandated by statute for waiver of uninsured motorist coverage and could not provide specific evidence that insured read or had explained to him the limited coverage).

163. See, e.g., Jordan v. Fox, 20 F.3d 1250, 1272 (3d Cir. 1994) (“Swarb and Overmyer plainly decide a debtor can waive its due process rights . . . when it voluntarily and intelligently consents to an agreement containing a cognovit clause. Nevertheless [these
In the civil context, where waivers of important rights are at issue, the courts have often listed factors that the court will consider in determining whether there was a "knowing and intelligent" action that created an enforceable a voluntary waiver. For example, in determining whether an employee's waiver of a right to claim job discrimination is enforceable, the courts have considered the following factors:

- whether the waiver is in writing;
- whether the agreement is clear;
- whether the waiver specifically acknowledges that the employee's action is voluntary;
- whether the employee has any formal education or is relatively sophisticated;
- whether the employee had any time to study the waiver before entering into the agreement;
- whether the employee had the assistance of independent advice, and specifically, of legal counsel;
- whether the specific consideration received by the employee for agreeing to the waiver exceeded what he would have received without the waiver; and
- whether the employer attempted to encourage or discourage the employee to consult with a lawyer.

The courts have recognized that civil waivers or consent are valuable tools for both the relatively powerful and the relatively weak to reach agreements that avoid protracted litigation. Nonetheless, where important personal rights are involved, the courts have stressed the need to establish

---

164. See Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 819-20 (11th Cir. 1998) (holding that summary judgment was inappropriate where "factors raised a genuine issue of material fact as to whether plaintiffs voluntarily and knowingly executed the release agreements"); Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 12 (1st Cir. 1997) ("This court has endorsed a 'totality of circumstances' approach to determining the validity of the waiver [of civil rights under Title VII and ADA]. We have found helpful, but not exclusive, a set of six factors . . . ."); Finz v. Schlesinger, 957 F.2d 78, 82 (2d Cir. 1992) (identifying six factors).

165. Finz, 957 F.2d at 82.

166. See Rivera-Flores, 112 F.3d at 11 ("Such releases provide a means of voluntary resolution of potential and actual legal disputes, and mete out a type of industrial justice.").
the "knowing" character of the action and have been reluctant to adopt a mechanical, single-factor rule that presumes voluntary waiver.167

B. Comparison: Voluntariness as a Constitutional Concern in Criminal Cases

In the criminal context, an individual may waive many of the most fundamental protections afforded by the Constitution:168 "The most basic rights of criminal defendants are . . . subject to waiver."169 As with civil cases in which there is a disparity of power between parties, in criminal matters, courts have routinely expressed concern that the government should prove that purported waivers of important rights were voluntary and knowing.170 Generally, as the demonstrated potential for the governmental authority to overwhelm the individual's will increases, the court's willingness to scrutinize the voluntariness issue increases.171 In some instances, courts have adopted a prophylactic approach, requiring specific steps, including detailed warnings or written waivers, to establish a minimum threshold of protection for the individual.172

A review of the various nuances in testing voluntariness in criminal cases is beyond the scope of this article. However, the test for voluntary consent to search under the Fourth Amendment seems particularly relevant.173 Some courts have specifically used a Fourth Amendment analysis to test the constitutionality of state actions when police have assisted private parties in resolving child custody disputes, noting that "officials may remove the child from the custody of the parent without consent or a prior court order only in 'emergency' circumstances."174

167. See Bledsoe, 133 F.3d at 820 ("The district court should not have summarily adopted a decision from another case, even though it dealt with the exact same release form. Each factor should be independently analyzed. . . . [W]e conclude that a jury question exists about whether Bledsoe voluntarily and knowingly released ADA and Rehabilitation Act claims.").

168. E.g., Ricketts v. Adamson, 483 U.S. 1, 10 (1987) (holding that a double jeopardy defense is waivable by pre-trial agreement); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (noting that a knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers); Johnson v. Zerbst, 304 U.S. 458 (1938) (holding that the Sixth Amendment right to counsel is waivable).


170. See Ricketts, 483 U.S. at 9-10; Boykin, 395 U.S. at 242-43; Johnson, 304 U.S. at 467-69.

171. See Miranda v. Arizona, 384 U.S. 436 (1966) (requiring that warnings be given to suspects prior to custodial interrogation).

172. Id.


174. Hurlman v. Rice, 927 F.2d 74, 80 (2d Cir. 1991) (emphasis added); see also Bennett v. Town of Riverhead, 940 F. Supp. 481, 488 (E.D.N.Y. 1996) (officer removed
On the issue of voluntary consent to search under the Fourth Amendment, the Supreme Court has differentiated between a standard which would require proof that the individual's action was "knowing and intelligent" and a standard which requires merely that the individual's action be shown to be a product of "free choice." In *Schneckloth v. Bustamonte*, the Supreme Court addressed the standard of review to determine the validity of a "consensual" search of a car during a traffic stop. The majority reviewed the law on voluntary confessions, noting that the ultimate test is whether a confession is the product of an "essentially free and unconstrained choice by its maker," a determination that requires an assessment of the "totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."

Ultimately, the *Schneckloth* majority adopted a "totality of circumstances" approach and rejected a "knowing and intelligent waiver" approach, distinguishing the more threatening custodial interrogation that requires a stricter standard from supposedly less threatening situations such as field questioning and searches. The majority concluded that the latter standard requires only a "demonstrat[ion] that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."

When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent... voluntariness is a question of fact to be determined from all the circumstances, and while the subject's...
knowledge of a right to refuse is a factor to be taken into account, the
prosecution is not required to demonstrate such knowledge as a prerequisite
to establishing a voluntary consent.\textsuperscript{183}

The \textit{Schneckloth} majority's adoption of a "totality of circumstances test" has
been widely criticized by those who prefer the analysis of Justice Marshall's
dissent,\textsuperscript{184} which would impose upon the prosecution the more specific
burden of showing that there was a knowing and intelligent waiver.\textsuperscript{185}

Following \textit{Schneckloth}, courts have evaluated consents to search by
looking at several factors, in much the same way that courts have identified
factors which affect the decision to waive important rights in civil contexts.
For example, in "search" cases, courts have evaluated the conduct of the
government actors to see whether the authorities made any express or
implied false claim that no consent was necessary; whether there was a show
of force; whether there was any "threat" to "obtain a warrant"; or whether
there was any other deceitful practice.\textsuperscript{186} In addition, courts have looked to
the characteristics of the waiving party, including factors such as the
maturity or sophistication of the consenting party; any prior or subsequent
refusals; whether \textit{Miranda} warnings were given; and whether the individual
had an effective opportunity to consult with counsel.\textsuperscript{187} These factual
inquiries may lead to a somewhat burdensome process for the courts;
however, the courts have consistently emphasized the importance of

\textsuperscript{183} \textit{Id.} at 248-49.

\textsuperscript{184} See \textsc{LaFave, supra} note 146, § 8.1(a), at 602-05; \textit{see also} Tracey Maclin, \textit{Justice
Thurgood Marshall: Taking the Fourth Amendment Seriously}, 77 \textsc{Cornell L. Rev.} 723, 794
(1992) ("The majority's analysis is unfair to the average citizen. The Court's crabbed
definition of consent denies a person the knowledge that he or she has a right to refuse a
police officer's request.").

analysis, based in part upon the Court's prior decision in \textit{Bumper v. North Carolina}, 391 U.S.
543 (1968), focuses on the need to put limitations on the implicit authority of the police as
a necessary balance of state power vis-à-vis the individual's basic civil rights:

\textsuperscript{[1]} In \textit{Bumper v. North Carolina}, four law enforcement officers went to the home of
Bumper's grandmother. They announced that they had a search warrant, and she
permitted them to enter. Subsequently, the prosecutor chose not to rely on the warrant,
but attempted to justify the search by the woman's consent. We held that consent
could not be established "by showing no more than acquiescence to a claim of lawful
authority. . . ."

If consent to search means that a person has chosen to forgo his right to exclude the
police from the place they seek to search, it follows that his consent cannot be
considered a meaningful choice unless he knew that he could in fact exclude the police.

\textit{Schneckloth}, 412 U.S. at 283-85.

\textsuperscript{186} See \textsc{LaFave, supra} note 146, § 8.2.

\textsuperscript{187} \textit{Id.}
avoiding the creation of any presumption of waiver where important rights are involved.\textsuperscript{188}

\textbf{C. The Hybrid Nature of Voluntariness in Child Welfare Cases}

Although courts have struggled with the precise definition of parental rights,\textsuperscript{189} they agree that the Constitution recognizes and protects the individual’s essential interest arising out of the status of being a “parent.”\textsuperscript{190} In a frequently quoted passage, the Supreme Court has articulated a constitutionally protected parental interest in the “care, custody, and management of [their] children.”\textsuperscript{191} The protection is founded in the Fourteenth Amendment,\textsuperscript{192} which provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”\textsuperscript{193}

\textsuperscript{188} \textit{Id.} § 8.1(b).

\textsuperscript{189} \textit{E.g.}, Frazier v. Bailey, 957 F.2d 920, 930 (1st Cir. 1992) (“Lower courts have observed the difficulties of finding a ‘clearly established’ constitutional right in the context of family relationships.”).


\textsuperscript{191} Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)); \textit{see also} Lehr, 463 U.S. at 258 (“[T]he court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.”); Santosky v. Kramer, 455 U.S. 745, 754 n.7 (1982) (rejecting the claim that “a parental rights termination proceeding does not interfere with a fundamental liberty interest”).


The parents’ right to be with their child has been described as a “fundamental liberty interest,” Santosky, 455 U.S. at 753, and as an “abstract” liberty interest, Frazier, 957 F.2d at 929, and more specifically as “a fundamental right to family integrity” and as a right to privacy, Alsager v. District Ct., 406 F. Supp. 10, 15 (S.D. Iowa 1975). The parent’s liberty interest is also sometimes defined in terms of “personal choice” or “privacy.” Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974) (discussing freedom of personal choice in matters of family life under the Due Process Clause to the Fourteenth Amendment); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (referred to the “private realm of family life which the state cannot enter”).

Despite this case law, the parent’s fundamental liberty interest remains somewhat imprecise in scope. \textit{See} \textsc{John E. Nowak & Ronald D. Rotunda, Constitutional Law} § 11.7, at 401 (5th ed. 1995) (“All that can be said with certainty is that the Justices have selected a group of individual rights which do not have a specific textual basis in the Constitution or its Amendments and deemed them to be ‘fundamental.’”).

\textsuperscript{193} \textit{U.S. Const. amend. XIV, § 1.}
In familial relationships, the constitutional focus should be on the "liberty" nature of the right, rather than on any "property" characterization.\textsuperscript{194} This "fundamental liberty interest . . . does not evaporate simply because they have not been model parents . . . ."\textsuperscript{195} A claim for denial of due process based on interference with the parents' liberty interest is triggered by the authorities' unjustified and substantial interference with the parents' right to live together with their child as a family.\textsuperscript{196}

However, when the allegation is abuse by a parent, the courts are quick to point out that while the parent's liberty interest enjoys some measure of constitutional protection, it is nonetheless limited by the mutual interest of the child and the state in the child's safety.\textsuperscript{197} Thus, the parent's liberty interest, however fundamental in nature, is "not absolute."\textsuperscript{198} Rather, "[t]he liberty interest in familial relations is limited by the compelling governmental interest in protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves."\textsuperscript{199}

A child abuse investigation can lead to significant criminal and civil consequences, including criminal charges and the temporary—or possibly permanent—loss of the parent-child relationship. As such, caseworkers suggest that parents enter into voluntary agreements that are hybrid in nature, requiring the parent to waive—or at least significantly postpone—fundamental rights. Thus, as suggested by the foregoing discussion of voluntariness in civil and criminal case contexts, the courts should not assume that any parent's action was voluntary, at least not unless certain minimum facts are present. Where factual challenges are made to the voluntariness of the separation decision, the courts should be willing to

\textsuperscript{194} See \textit{Santosky}, 455 U.S. at 759 (recognizing that the parent's interest in child custody is an interest more precious than property rights).
\textsuperscript{195} \textit{Id.} at 753.
\textsuperscript{196} See \textit{Duchesne v. Sugarman}, 566 F.2d 817, 825 (2d Cir. 1977). \textit{But see} \textit{Dietz v. Damas}, 932 F. Supp. 431, 434 (E.D.N.Y. 1996) (holding that nonvoluntary weekend placement of child with grandparents and subsequent twelve-day delay in seeking judicial approval was not a basis for section 1983 suit where parents were "given complete access . . . subject only to supervision by the maternal grandparents").
\textsuperscript{197} \textit{E.g.}, \textit{Frazier}, 957 F.2d at 929-30 ("Within a family itself resides the sometimes competing interests of a parent's right to rear his or her child and the fundamental rights of that child."); \textit{In re William L.}, 383 A.2d 1228, 1236 (Pa. 1978) ("The state may . . . constitutionally require the rights of parents to yield to the child's essential health and safety needs.").
\textsuperscript{198} \textit{Croft v. Westmoreland County Children & Youth Servs.}, 103 F.3d 1123, 1125 (citing \textit{Martinez v. Mafchir}, 35 F.3d 1486, 1490 (10th Cir. 1994); \textit{Myers v. Morris}, 810 F.2d 1437, 1462 (8th Cir. 1987)). For example, if the parent is proven to be unfit, the relationship of parent and child can be terminated by law. \textit{See, e.g.}, \textit{Santosky}, 455 U.S. at 769 (requiring proof by clear and convincing evidence to terminate parental rights).
\textsuperscript{199} \textit{Myers}, 810 F.2d at 1462.
review facts that realistically affect the voluntariness of the particular parent's action. The inquiry into the voluntariness of the parent's separation action should, at a minimum, include:

- whether the caseworker used precise language to describe the parents' alternatives;
- whether the separation idea was initiated by the caseworker or by the parents;
- whether either or both of the parents are suspects in the investigation and whether they have been questioned;
- whether an indication of involuntariness arises either from the timing of any request to separate or from the location where the request is made;
- whether the caseworker had the intimidating "assistance" of law enforcement officials;
- whether the parents are legally unsophisticated, indigent, or emotionally distraught;
- whether the parents were permitted to consult with counsel or are even able to afford legal counsel;
- whether the rights of both parents were described accurately, including the use of any written warnings or notices; and
- whether there is any deceptive language or tactics used by the caseworker.

For example, application of these specific factors in *Croft* lead to the following observations: the social worker and a state trooper appeared at the parents' home suddenly, and at night, thus creating an intimidating atmosphere; they questioned the parents extensively as the suspects of an anonymous tip about sexual abuse of their four year-old daughter, a situation that was undoubtedly frightening; the parents denied any abuse and there was no physical corroboration of abuse. Nonetheless, the caseworker

---

201. *See* King v. Olmstead Co. 117 F.2d 1065, 1067 (8th Cir. 1997) (holding mere verbal threats are not actionable, especially since parents had counsel); *see also* Good v. Dauphin County Soc. Servs., 891 F.2d 1087, 1094 (3d Cir. 1989) (rejecting qualified immunity for a social worker and police officer who gained entry through untrue claim that they had warrant); *cf.* Whisman v. Rinehart, 119 F.3d 1303, 1310 (8th Cir. 1997) (court noting with disapproval that social worker allegedly gave false information to parent on how to obtain the return of their child).
202. *Croft*, 103 F.3d at 1124.
203. *Id.*
204. *Id.* at 1127.
pushed for separation, using words that both the parents and the court found to be threatening. The defendant apparently presented no evidence that the parents were given specific notice of their rights under the law to have a judicial review, or that if such a hearing was held, that the state would have a very significant burden of proof. These factors, if separately considered, would have supported the Third Circuit’s conclusion that the father’s pressure-ridden agreement to leave the home was nonvoluntary.

However, it also appears that the Crofts were sophisticated professionals and had the money or means necessary to consult a lawyer within hours of the “consented” separation. A more complete factual hearing could have led to a finding that the separation was voluntary. By contrast, the typical parent identified as a suspect in a child abuse investigation is unsophisticated and often has no funds with which to consult an attorney. While there may be no overt show of force in the typical parent’s case, as a practical matter, many voluntary separation decisions should more correctly be labeled as involuntary.

D. Answering the Questions Raised by Croft

An involuntary separation of a child and parent, for even a temporary period, involves a greater potential for harmful interference with individual rights—and for long-term negative effects on the entire family—than does any confession or search. “Among the state’s many powers, none is more fearsome than the power to take a child away from a parent. Challenged exercises of this power deserve close judicial scrutiny.” This need for scrutiny is particularly true in a time when high numbers of child abuse allegations are being reported, but without a direct correlation to proven instances of abuse. When the cycle of public and media attention focuses on child abuse, county agencies may feel pressured to use overly intimidating approaches to investigation and may be tempted to use voluntary separation decisions for improper purposes.

205. Id. at 1124.
206. Id.
207. Id.; see also supra text accompanying note 118.
208. See sources cited, supra note 20.
210. See NATIONAL CTR. ON CHILD ABUSE & NEGLECT, supra note 1. For example, in Pennsylvania, hospitals are among the most frequent sources reporting suspected abuse, and courts pay great attention to the opinions of treating doctors; however, the mere suspicions of careful doctors are sometimes overemphasized. See, e.g., In re C.R.S., 696 A.2d at 843-45 (emphasizing that doctors eventually conceded the possibility of accidental injury and admitted that they had been unaware of key facts supporting a conclusion of accidental injury). Finally, sixty percent of the hospitals’ reports on suspected abuse in 1995 led to no “findings” or “indications” of abuse. See 1995 PA. REPORT, supra note 2, at 7.
Where evidence of imminent threat or danger to the child clearly exists, government authorities are already armed with the potent tool of immediate, warrantless removal of the child followed by judicial review. In the majority of instances, the government pressure on a parent for an amorphous voluntary separation agreement is inappropriate. 211 Certainly, in some instances, parents can and should make a separation decision in response to the request of an investigating government authority; if, however, state authorities wish to avoid future challenges to such decisions, they should adopt and utilize clear written agreements. 212 Such separation agreements should be limited to a reasonable, specific maximum duration.

The parent should be given clear notice of the right to consult with counsel, should be provided with counsel if indigent, and should be given notice of the right to terminate the separation or placement with a simple request. 213 Clear, written temporary separation agreements should help alleviate concerns that parents and courts have expressed about the need for informed consent to government actions that interfere with fundamental parental rights.

If disputes arise, the voluntary separation should end and the family should be reunited within a specific number of hours. If the state wishes to continue state control over the child, it should be promptly required to present supporting evidence. 214 Any challenge to the voluntariness of the agreement will usually occur in the context of a civil rights suit. 215 If the government authorities have not adopted minimum safeguards, such as a written separation agreement, courts may summarily reject the reasonableness of the state action as a matter of law, as occurred in Croft. However, in a factual dispute, and even if the government used a written separation agreement, the government must still satisfy a heavy burden to show that the particular parents were given notice of the information necessary to make an informed decision to separate. This burden is similar to burdens allocated in routine civil matters such as informed consent for

211. Cf. Meyers v. Contra Costa County Dep’t of Soc. Servs., 812 F.2d 1154, 1158 (9th Cir. 1987) (rejecting absolute immunity for social worker alleged to have ordered father’s separation from child). “[The social worker’s] alleged decision to order Meyers away from his house was made in the absence of such ‘safeguards built into the judicial process.’” Id. (quoting Butz v. Economou, 438 U.S. 478, 512 (1978)).


213. See, e.g., id.


215. See, e.g., supra note 44 and accompanying text.
medical treatment,\textsuperscript{216} consumer transactions, and waivers of government benefits.\textsuperscript{217}

In answer to the questions raised by Croft,\textsuperscript{218} parental separation agreements should be available to fully informed parents during investigations. To avoid abuse of such agreements, however, their use must be carefully defined by legislation or regulation, and the courts must be willing to undertake the factual inquiry necessary to respond to an issue of misuse.

VI. CONCLUSION: THE NEED FOR LEGISLATIVE ENFORCEMENT

In 1981, the Supreme Court in \textit{Lassiter v. Department of Social Services}\textsuperscript{219} held that constitutional principles of due process do not automatically require appointment of counsel for indigent parents in termination cases.\textsuperscript{220} Some commentators expressed surprise and dismay over this perceived failure of the justices to recognize a critical need for legal advice.\textsuperscript{221} Critics anticipated that the case-by-case approach to deciding the need for counsel would be unwieldy and that states would take advantage of every opportunity to avoid the expense of appointed counsel, however great the need.\textsuperscript{222}

A large number of states have not given in to such efficiency temptations because of heightened due process tests under state constitutions and because of the subsequent action of many state legislatures that mandate appointed counsel for indigent parents.\textsuperscript{223} The practical need to provide

\textsuperscript{216} As one article noted, The [medical-legal] doctrine which has evolved is predicated on a recognition that a patient has a right — sometimes this is acknowledged to be a constitutional guarantee — to decide what happens to his or her body. The decision can be made only after a person knows what a health care provider proposes to do, what the risks are from this treatment, and what alternatives exist.


\textsuperscript{217} See supra text accompanying notes 156-67.

\textsuperscript{218} See text accompanying supra note 150.

\textsuperscript{219} 452 U.S. 18 (1981).

\textsuperscript{220} \textit{Id.} at 33-34.


\textsuperscript{222} See id.; see also Thomas Ross, \textit{The Rhetoric of Poverty: Their Immorality, Our Helplessness}, 79 GEO. L.J. 1499 (1991) (discussing the Supreme Court's characterization of the needs of the poor).

\textsuperscript{223} E.g., \textit{In re K.L.J.}, 813 P.2d 276 (Alaska 1991) (holding that the denial of a biological father's request for court-appointed counsel violated procedural due process under the state constitution where a stepparent sought termination of his parental rights in order to accomplish adoption); \textit{In re J.C.}, Jr., 781 S.W.2d 226 (Mo. Ct. App. 1989) (holding that the
counsel for parents is clear. In similar fashion, after *Croft*, additional courts should not have to identify the due process implications of fictional voluntary separation decisions. States should act quickly to mandate the use of fair, written temporary placement or separation agreements during investigations of child abuse or neglect. The essential elements of such written documents include:

- a reasonable and specific maximum time period for the temporary separation;
- notice of the parent’s opportunity to explain his or her position to the court and to revoke or terminate the temporary placement;
- notice of the right to consult with counsel and of any right to appointment of counsel if indigent;
- a specific process by which revocation of the voluntary placement agreement will result in an end to the separation, without such revocation being used as adverse evidence against the parent; and
- information regarding the government’s obligation to prove that any continued state involvement is necessary, if and when the parent believes reunification is appropriate.

Workable descriptions of such agreements already exist in some states. As with the need to provide counsel in termination cases, the practical need to provide notice of the parent’s rights during the abuse and neglect investigation is clear. Written, temporary placement or separation agreements are straight-forward alternatives to the doubts and suspicions about caseworker intimidation which presently flourish. As was simply and eloquently stated by Justice Marshall in his dissenting opinion in *Schneckloth*:

> My approach to the case is straight-forward and, to me, obviously required by the notion of consent as a relinquishment of Fourth Amendment rights. I am at a loss to understand why consent “cannot be taken literally to mean a ‘knowing’ choice.” In fact, I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all.\(^{225}\)

statutory right to counsel in the context of termination of parental rights gives the parent the right to effective counsel, which is judged by whether the attorney provided a meaningful hearing); *State ex rel. E.H. v. A.H.*, 880 P.2d 11 (Utah Ct. App. 1994) (holding that parent was entitled to effective assistance of counsel under statute providing right to counsel).

\(^{224}\) See, e.g., 55 PA. CODE § 3130.65 (1996).