

OPINION NO. 87-105**Syllabus:**

Under Ohio law, unless matters of public safety are involved, a child alleged to be abused, neglected, or dependent may be removed from his home by court order only upon a judicial determination that continuation in the home would be contrary to the child's best interests.

To: Patricia Barry, Director, Department of Human Services, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1987

I have before me your request for an opinion on the question whether Ohio juvenile law is consistent with the requirements of Title IV-E of the Federal Social Security Act, 42 U.S.C.A. §§670-679a (1983 & Supp. 1987). Your letter of request states, in part:

Title IV-E authorizes federal reimbursement for a portion of the state's cost of providing foster care for a child who, because of his abuse, neglect or dependency, has been removed from the home and is in the custody of a public children services agency. However in order to qualify for reimbursement the removal from the home must have occurred either "pursuant to a voluntary placement agreement entered into by the child's parent..." or as the result of "a judicial determination to the effect that continuation therein would be contrary to the welfare of such child..." [42 U.S.C. §672 (a)(1) (1982).]

Your specific question is whether, under Ohio law, a child alleged to be abused, neglected, or dependent may be removed from his home by court order only upon a judicial determination that continuation in the home would be contrary to the child's best interests. Your letter states that this question has arisen because, under 42 U.S.C. §672(a)(1), federal reimbursement for foster care maintenance payments may be made only if "the removal from the home...was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child."¹ Representatives of your office have indicated that you are concerned with situations in which a court order does not reflect an explicit finding on this subject, and have further indicated that the position of the federal government is that federal reimbursement may be given in those circumstances if a state's law clearly allows removal under no circumstances except where continuation in the home would be contrary to the child's best interests.² Your use of the word "alleged" indicates that you are concerned with removal from a home after there has been a complaint that a child is abused, neglected, or dependent, and before there has been a judicial determination as to whether the child is abused, neglected, or dependent. See, e.g., R.C. 2151.27 (filing of complaint alleging that a child is abused, neglected, or dependent); R.C. 2151.28 (hearing on the complaint); R.C. 2151.31-.311 (taking a child into custody); R.C. 2151.312 (place of detention of a

¹ 42 U.S.C. §672(a)(1)(1982) also provides that, effective October 1, 1983, federal reimbursement for foster care maintenance payments may be made only if reasonable efforts have been made as described in 42 U.S.C. §671(a)(15) (1982 & Supp. III 1985): "(A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." Members of your staff have informed me that you are not requesting advice concerning compliance with this provision.

² You have not asked for an interpretation of federal law, and I am not providing any such interpretation.

child); R.C. 2151.314 (detention hearing); R.C. 2151.33 (temporary care of a child); R.C. 2151.34 (treatment of a child in custody); R.C. 2151.353 (disposition of a child adjudged abused, neglected, or dependent); R. Juv. Proc. 6 (taking a child into custody); R. Juv. Proc. 7 (detention and shelter care); R. Juv. Proc. 10 (complaint); R. Juv. Proc. 13 (temporary disposition); R. Juv. Proc. 34 (dispositional hearing). Statutory definitions of "neglected," "abused," and "dependent" children appear in R.C. 2151.03-.04. The definition of a "dependent child" includes any child "[w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship." R.C. 2151.04(C).

Pursuant to R.C. 2151.23(A), the juvenile court has exclusive original jurisdiction:

- (1) Concerning any child who on or about the date specified in the complaint is alleged to be...[an] abused, neglected, or dependent child;
- (2) To determine the custody of any child not a ward of another court of this state....

R. Juv. Proc. 10 and R.C. 2151.27 provide for the filing of a complaint alleging that a child is abused, neglected, or dependent. Pending hearing on such a complaint, "the court may make such temporary orders concerning the custody or care of a child who is the subject of the complaint as the child's interest and welfare may require." R. Juv. Proc. 13(A). See also R.C. 2151.33 (pending hearing of a complaint, "the juvenile court may make such temporary disposition of any child as it deems best").

Under R. Juv. Proc. 6, a child may be taken into custody, inter alia, "when there are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, or is in immediate danger from his surroundings, and that his removal is necessary." Accord, R.C. 2151.31(C). A child may also be taken into custody "where, during the pendency of court proceedings, it appears to the court that the conduct, condition or surroundings of the child are endangering the health, welfare, person or property of himself or others, or that he may abscond or be removed from the jurisdiction of the court or will not be brought to the court." R. Juv. Proc. 6.

Once in custody, a child "shall not be placed in detention or shelter care prior to final disposition unless his detention or care is required to protect the person and property of others or those of the child, or the child may abscond or be removed from the jurisdiction of the court, or he has no parent, guardian, or custodian or other person able to provide supervision and care for him and return him to the court when required." R. Juv. Proc. 7(A). See also R.C. 2151.31. "Shelter care" is defined by R. Juv. Proc. 2(20) to mean "the temporary care of children in physically unrestricted facilities, pending court adjudication or disposition, or execution of a court order," and appears to include a foster home arrangement. Cf. R. Juv. Proc. 2(6) (defining "detention" as "the temporary care of children in restricted facilities pending court adjudication or disposition, or execution of a court order"). Thus, unless a child must be placed in detention or shelter care for the protection of others or to assure that the child remains within the jurisdiction of the

court - factors that are more likely to be relevant in the case of a child alleged to be delinquent than of one alleged to be abused, neglected or dependent - such placement pending a dispositional hearing may be ordered only to protect the child or to assure him of supervision and care. See also R.C. 2151.311; R. Juv. Proc. 7(D). The purposes of protecting the child and assuring him of care are clearly purposes that promote the best interests of the child.

R.C. 2151.01 defines the purposes of R.C. Chapter 2151 and the manner in which it is to be construed, as follows:

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code;

(B) To protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care, and rehabilitation;

(C) To achieve the foregoing purposes, whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety;

(D) To provide judicial procedures through which Chapter 2151. of the Revised Code is executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced. (Emphasis added.)

R.C. 2151.01(C) states that R.C. Chapter 2151 shall be construed to permit the separation of a child from his parents "only when necessary for [the child's] welfare or in the interests of public safety." R.C. 2151.01(C) thus provides that, unless matters of public safety are involved, a child may be removed from his home only when such removal is necessary for the child's welfare. Such a standard appears to be equivalent to the standard established under 42 U.S.C. §672(a)(1) - that continuation in the home would be contrary to the welfare of the child. See generally Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985), cert. denied, 106 S.Ct. 1640 (1986) (a determination that removal is in the best interests of the child satisfies 42 U.S.C. §672(a)). It has been determined that R.C. 2151.011(C) establishes a standard for removal of a child that satisfies due process requirements. See Doe v. Staples, 706 F.2d 985 (6th Cir. 1983), cert. denied, 465 U.S. 1033 (1984). That standard is binding upon the courts of the state. See In re Cunningham, 59 Ohio St. 2d 100, 391 N.E.2d 1034 (1979) (considering R.C. 2151.011(C) and concluding that an award of permanent custody terminating the rights of a natural parent is justified only when it is in the best interests of the child). Thus, unless matters of public safety are involved, no court order for removal of a child from his home may be made unless the court finds, in accordance with R.C. 2151.01, that separating the child from his parents is necessary for the child's welfare.

The rule that a child may not be removed from his home unless such removal would serve the best interests of the child

is consistent with a long line of Ohio case law. It was stated in Clark v. Bayer, 32 Ohio St. 299 (1877) (syllabus, paragraph 1), that "[a]s a general rule the parents are entitled to the custody of their minor children...but in all cases of controverted right to custody the welfare of the minor child is first to be considered." See also Gishwiler v. Dodez, 4 Ohio St. 615 (1855) (syllabus) (in a habeas corpus proceeding for custody of a child, the order of the court "should be made with a single reference to [the child's] best interests"). Considering specifically the disposition of a neglected child, the court stated: "The discretion of the juvenile court in relation to the care, custody and control of a delinquent or neglected child is a judicial discretion that must be exercised in good faith, and in the interest of the child...." State ex rel. Tailford v. Bristline, 96 Ohio St. 581, 581, 119 N.E. 138, 138 (1917). In Pruitt v. Jones, 62 Ohio St. 2d 237, 238, 405 N.E.2d 276, 276 (1980) (quoting In re Cunningham, 59 Ohio St. 2d 100, 105, 391 N.E.2d 1034, 1038), the court recognized the "time-honored precedent in this state that the 'best interests' of the child are the primary consideration in questions of possession or custody of children." See also, e.g., In re Perales, 52 Ohio St.2d 89, 98, 369 N.E.2d 1047, 1052 (1977) ("parents may be denied custody only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable - that is, that an award of custody would be detrimental to the child" (footnote omitted)); In re Bibb, 70 Ohio App. 2d 117, 122, 435 N.E.2d 96, 100 (Hamilton County 1980) (citing In re Brown, No. C-77730 (Ct. App. Hamilton County Nov. 1, 1978) (unreported)) ("a parent's primary rights to the care and custody of a child are rights that must be protected, and parental custody will be terminated only when necessary for the mental and physical development of the child").

None of the cases referenced above directly addressed the precise question with which you are concerned. It is, nonetheless, clear that Ohio law provides for consideration of the best interests of a child whenever the custody of that child is at issue. Further, under R.C. 2151.01(C), R.C. 2151.31, R.C. 2151.33, R. Juv. Proc. 6, R. Juv. Proc. 7, and R. Juv. Proc. 13, a child may be removed from his home pending a hearing on a complaint that he is abused, neglected, or dependent only if such removal is required to protect the person and property of the child or others, to assure that the child remain within the jurisdiction of the court, or to provide the child with necessary supervision and care. It follows that, unless matters of public safety are involved, a child alleged to be abused, neglected, or dependent may be removed from his house by court order only if the court has made a determination that the removal is necessary for the welfare of the child. Such a determination is required as a matter of law, even if it is not expressly set forth in the court order. See generally In re Perales, 52 Ohio St. 2d at 99-100, 369 N.E.2d at 1053 (Herbert, J., concurring in the syllabus) ("the welfare of this child should be the touchstone of our inquiry...[A] parent would be considered 'unsuitable' for custody if such an award would be detrimental to the child...I cannot believe that the trial judge did not arrive at this same conclusion, even though he may not have employed the words or phrases we now find appropriate").

It is, therefore, my opinion, and you are hereby advised, that under Ohio law, unless matters of public safety are

involved, a child alleged to be abused, neglected, or dependent may be removed from his home by court order only upon a judicial determination that continuation in the home would be contrary to the child's best interests.