



Government Workers Wrongly Seize A Child From Parents. Should They Be Made To Pay?

By John Hill

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The principle of qualified immunity protects workers in their official actions. But as a recent Hawaii case shows, not always.

Imagine this scenario: A public official conspires with the biological father of a 10-year-old girl to seize the girl from the mother who is raising her. By withholding a crucial fact, they mislead a judge into issuing a restraining order against the mother that prohibits her from contact with the daughter who lives with her.

On the strength of that order, the girl is taken from her school and flown across the state to live with a father she never knew. Should that public official be liable for damages in a civil suit? It was the latest 9th Circuit decision addressing the question of “qualified immunity,” the principle that public officials generally cannot be held liable for official actions. The exception is when they violate clearly established rights that they ought to have known about.

The idea in recent years has come under attack by police reformers who argue that officers should not enjoy special protection when they cross the line, such as using excessive force.

But it often also plays out in child protection cases, when social workers remove children from their parents without a court order. That’s only supposed to happen when children are in so much danger that they could be injured in the short time it would take to get a judge to issue a warrant.

One prominent recent case involves Arizona parents who left photos at Walmart for printing, including nude pictures of their small children — leading a social worker to remove the children. Another major precedent, in Hawaii, involved a state official and police officer who removed children from a Big Island man without a court order two years after initial accusations that he had sexually abused a boy, even after two investigations had gone nowhere.

The most recent decision involves Hannah David, a Big Island mother who filed a lawsuit alleging that her daughter’s father teamed up with an employee of the Kauai Police Department in 2019 to get a restraining order that allowed her daughter to be seized from her school and flown back to Kauai with the father. Three weeks later, a judge ordered the girl to be returned. [A Civil Beat story](#) in March detailed the case.

The court upheld an earlier decision by U.S. District Court Judge J. Michael Seabright. It did not rule on the lawsuit's claims per se. "Whether these shocking allegations are true is for another day," the court stated.

But it agreed with David that the police department employee, Gina Kaulukukui, should not be dismissed from the lawsuit because as a public servant she is entitled to qualified immunity.

"If what Plaintiff Hannah David alleges is true," the opinion begins, "she and her daughter suffered a blatant abuse of government power."

The opinion by Judge Danielle Forrest continues, "David and her daughter deserve nothing less than the opportunity to have their claims heard."

The decision allows David's lawsuit, which also names the state Department of Human Services, to go forward.

Her lawyer, Eric Seitz, said it will likely put pressure on the state to settle for a substantial amount. "It's going to haunt them throughout this litigation," he said.

Qualified immunity for police has been a hot topic in the past few years. But the protection applies to all public servants acting in their official capacities.

The largest percentage of cases, in fact, involve prison guard treatment of inmates, said Jay Schweikert, a research fellow at the Cato Institute – in part, perhaps, because prisoners have the time and inclination to file such lawsuits.

The libertarian think tank in Washington, D.C., advocates getting rid of qualified immunity altogether, arguing that public servants who violate constitutional rights are no more deserving of a special court-created protection than any other citizens.

Another big share of qualified immunity cases involve government officials removing children from their parents, Schweikert said. In Hawaii, Civil Beat identified a handful of cases that have dealt with police and child protection workers taking children.

These cases involve officials seizing children without first obtaining an order from a judge, which is legal only if the danger is so great that there's no time. If the removal had been OK'd by a court, there'd be no question of government workers being held liable for taking actions that infringe on parents' constitutional rights.

In Hawaii, 85% of children were removed without a court order in the fiscal year that ended in July 2021 – a figure far higher than most other states in the 9th Circuit.

The recent decision in the Hannah David case, Schweikert said, can be seen in the context of recent trends in qualified immunity decisions. From the 1980s until a couple years ago, he said, the Supreme Court has instructed lower courts to apply a narrow approach to waiving qualified immunity, directing them to rely on earlier cases that hewed closely to similar facts.

But in the past couple of years, he said, courts have relaxed that standard a bit. The Hannah David case, he said, could have gone either way.

Nude Photos Lead To Children's Removal

In 2018, the 9th Circuit reversed a lower court judge's opinion that a child protection worker in Arizona was entitled to qualified immunity when she removed three children from their parents.

The case began when a Walmart worker noticed that photos the father had dropped off for printing included nude pictures of their children, ages 5, 4 and 1. The father explained that he and his wife took the pictures "so when we look back on them years later, look at their cute little butts." In the midst of a police investigation, a child protection worker decided to remove the children without an order from a judge and place them in foster care.

The parents were never charged and the state never opened a child protection case. About a month later, the children were returned to the parents, who later sued.

The 9th Circuit found that the social worker and her supervisor, based just on the nude photos, did not have reasonable cause to believe that the children were at risk of injury or molestation – the standard for removing children without a court order. As a result, the social workers had arguably violated their constitutional rights.

What's more, the court said, its earlier decisions on when it's permissible to remove a child without a court order should have made that clear.

But the case was a close call. In a dissenting opinion, one judge did not agree that the social worker and her supervisor should have known that what they were doing was unconstitutional, since none of the precedents involved similar circumstances.

The social worker "faced a tough judgment call on that Saturday night: she could err on the side of caution and take the children into temporary custody, or she could wait three days until the courts reopened to seek a removal order," the dissenting judge wrote.

That case, Schweikert said, "kind of illustrates where the line is. It split federal judges."

A Court Deceived?

The Hannah David case also presented the judges with circumstances that didn't line up exactly with precedent.

In 2012, after a bitter custody dispute between David and William Keahiolalo, the biological father of her daughter, a family court granted David full legal and physical custody of the girl, Bella. Keahiolalo was barred from visiting his daughter and ordered to stay away from David. Keahiolalo also agreed not to file any motions in courts "absent a compelling emergency" that affected Bella's health or safety.

In November 2019, Keahiolalo approached David and her daughter at a shopping mall when they were on a trip to Kauai, according to the lawsuit. The next day, David took Bella to the fire station where Keahiolalo worked and demanded an apology, berating him and pushing him. Police arrested her on misdemeanor harassment and third-degree assault charges. She posted bail and returned with her daughter to the Big Island.

A few days later, Keahiolalo met with Kaulukukui, the domestic violence coordinator at the Kauai Police Department, according to the lawsuit. It alleges that they filed a petition for a restraining order against David, prohibiting her from having contact with any of Keahiolalo's family members, including Bella.

But the two neglected to mention the 2012 custody agreement giving David full custody or that Bella was even then living with David on the Big Island, the lawsuit alleges. A family court judge granted the restraining order.

Kaulukukui's attorney did not respond to a request for comment.

The state's Child Welfare Services branch, part of the Department of Human Services, visited David at her home two weeks later and found that Bella was at low risk of being abused or neglected. David informed the CWS worker about the custody agreement, the lawsuit says.

But a few days later, Keahiolalo, along with several CWS officials and police officers, appeared at Bella's school and, with no court order, took the girl out of her classroom and handed her over to Keahiolalo. They escorted them to the airport to fly to Kauai without David knowing.

Three weeks later, after David hired a lawyer and challenged the taking of her daughter, Bella was returned to her mother.

Kaulukukui argued to the 9th Circuit that the rights that David alleged were violated had not been "clearly established" by precedent. In its decision last week, the court disagreed.

It's beyond debate that parents have a right to "be free from judicial deception in matters of child custody," the court wrote.

While the 2012 custody order allowed Keahiolalo to seek judicial relief in a compelling emergency involving Bella, the court wrote, there was no indication that the girl was in danger.

The fact that Kaulukukui even cited that provision of the 2012 order suggests that she knew about it. "Nevertheless, Kaulukukui deliberately chose not to inform the family court of the Custody Order's terms," according to the ruling.

The court also addressed the question of whether Kaulukukui and others were justified in removing Bella from her school – and her mother's custody – without a court order.

Not only did the officials lack "reasonable cause" to seize the girl because she was in imminent danger, the court said. They had no reason whatsoever, considering the fact that a CWS worker had just determined David's home was not a high risk to the girl. Also, CWS officials had surveilled David for several days, according to the lawsuit. In that time, they could have gone before a judge and gotten an order, the judges observed.

A Seizure With No Court Order

Qualified immunity is a standard defense when governments are sued in Hawaii and nationwide, including in child protection cases.

In 1997, the 9th Circuit considered the case of Jay Ram, a Big Island resident who had adopted several children and was fostering another. A boy who was visiting the home accused Ram of sexually abusing him during a weekend visit. The police and CWS investigated, but social workers labeled the allegation "unconfirmed" and police suspended their investigation. A second CWS investigation several months later likewise went nowhere.

A little over a year later, Ram was indicted on two counts of sexual abuse based on the boy's accusation. The charges were later dismissed. But in the meantime, a Hawaii Police Department lieutenant and CWS official took Rams's five adopted sons and one foster son into custody without

a court order. Four days later, in the absence of evidence that they were in immediate danger, they were returned to Ram.um/Civil Beat/2019

The 9th Circuit found that the two government officials were not entitled to qualified immunity. To take Ram's children without a court order, the panel said, required them to have a reasonable belief that the children were in immediate danger. Yet, CWS had investigated the allegations twice and failed to confirm them. And the CWS official's subordinates advised against seizing the children.

Many years later, in 2014, several of Ram's adopted children sued him, saying he had sexually abused them over many years when they were in his care. The case settled out of court for an undisclosed amount.

In another decision in 2009, the 9th Circuit also sided with a plaintiff suing a CWS official who had taken custody of a child without a court order.

The case concerned a baby born prematurely at Tripler Army Medical Center. The teenage mother had been in foster care after a Family Court judge found that her stepfather had sexually abused her. The stepfather was never charged with a crime.

After the baby was born, the teenage girl's mother and stepfather went to Family Court to get custody so that the infant would be entitled to medical coverage at Tripler. But a couple of days later, a CWS social worker, working with police, took the baby into protective custody with no court order. The custody change was just on paper, as the baby remained in the hospital, where he died eight days after being born.

As it did in other cases, the 9th Circuit honed in on allegations that the government social workers bypassed getting a court order even though there was no immediate danger.

In this case, there was no cause to believe that the mother's step-father would sexually abuse the infant, even though a Family Court found he had done so with his step-daughter. And then there was the practical consideration that the baby was being cared for in a hospital.

The social worker was not entitled to qualified immunity, the court found.

When the case went back to District Court, a judge found that the social worker's seizure of the baby unconstitutionally ended the grandparents' rights to make medical decisions for him. The case eventually settled out of court.

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