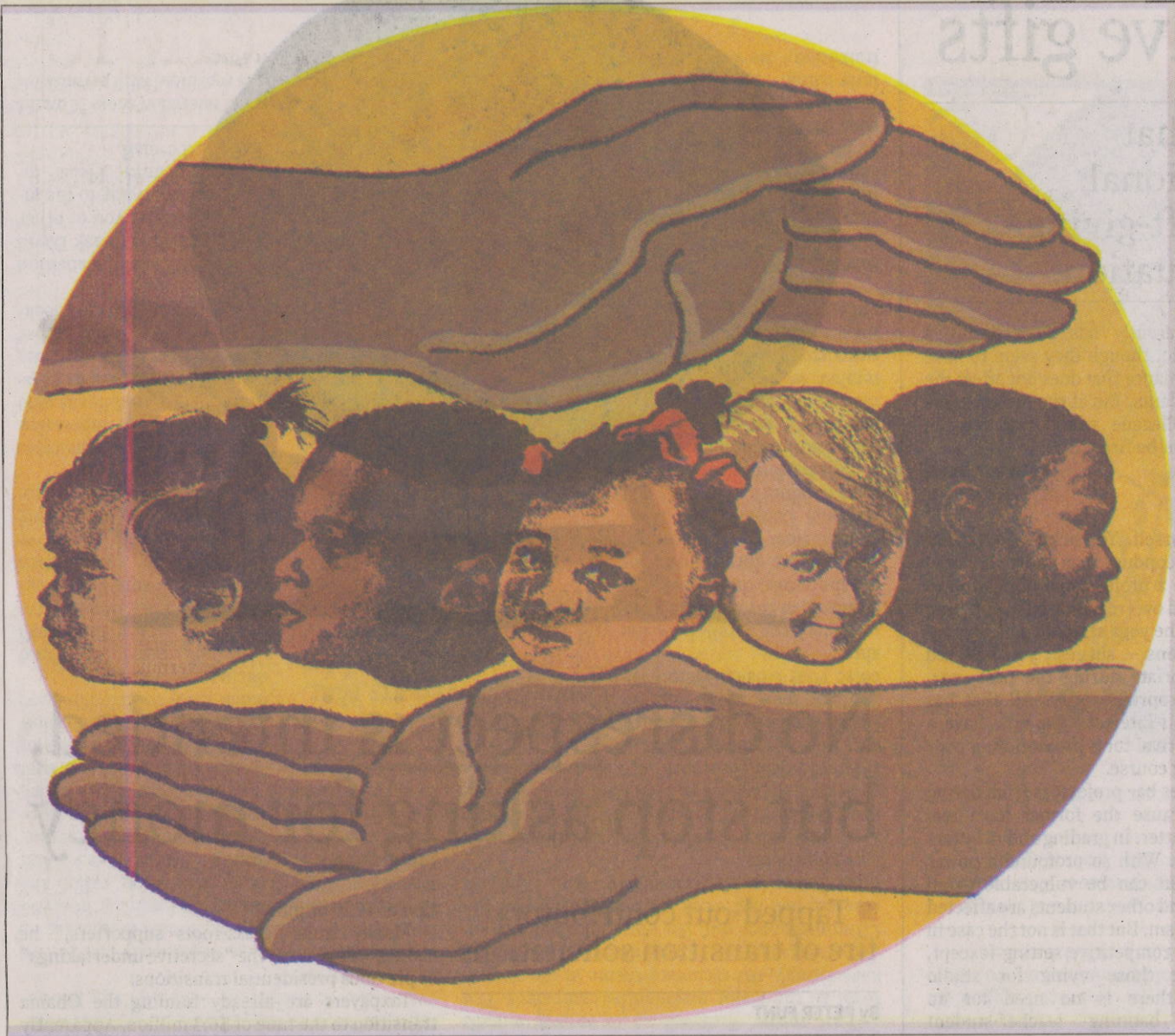


FAMILY LAW



BARRY MAGUIRE

Treating children as property

■ CPS overreacts to court decision

By **RANDY BURTON**

CHILDREN are not property and parents relinquish their "right" to be a parent the minute they abuse a child.

But two recent court actions have given me cause for concern.

The first incident began last spring when Child Protective Services was called to investigate the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) compound in El Dorado, Texas.

CPS found pregnant children living in a remote, guarded compound.

They had no choice but to remove the children from the dangerous environment. CPS' actions were supported at the trial level, but appellate courts subsequently returned the children to the men who molested them.

The Texas Supreme Court held that the rights of the parents overshadowed the rights of the child and the duty of society to protect the children, even from their own parents.

CPS is legally mandated to remove all children from the family when felonious abuse is suspected.

Given that the FLDS

members do not recognize a traditional definition of the family, going so far as to remove mothers and children from one man and "reassign" them to another, how can the government or the courts determine where the family starts and where it ends?

The second example of our judiciary's wrong-headedness occurred last summer. Several years ago, CPS removed children from a home in Brazoria County. The father, a Mr. Gates, went on a crusade to punish CPS and filed a civil suit against CPS because he felt CPS abused its power. Gates lost in trial court, lost on appeal and lost again in the 5th Circuit Court of Appeals three months ago. That's where the case went terribly wrong.

Even though the 5th Circuit ruled against Gates, it took the opportunity to write an opinion that essentially said that CPS should follow procedures like those law enforcement follows when investigating crimes. The court failed to recognize the extraordinary powers we have given to CPS to protect children.

The opinion in the Gates case is an example of a disturbing trend to legislate children's rights as though children were property. The right to be safe from a warrantless search and the 4th amendment prohibition on unlawful "search and seizure"

is being used to protect a parent's "right" to treat their children like property.

The problem is that this protection comes at the expense of children's rights — the right to be protected by the state from parental abuse.

The Gates case is troubling for two reasons:

■ The 5th Circuit Court of Appeals did not make any change to the basic CPS policy by its ruling ("We hold that the government may not seize a child from his or her parents absent a court order, parental consent or exigent circumstances"). CPS policy has always allowed removal of children only under circumstances that show that a child is in "imminent danger" of abuse or harm. The 5th Circuit's analysis, though, seems to say that CPS needs to be more than extremely careful when deciding to remove children and implicates liability for state employees who overstep their bounds. The bottom line is that this is still a fact-based inquiry and will vary from case to case.

■ The reaction of the general counsel of the state office of CPS to the Gates ruling is too extreme, mandating a policy change where none is required. CPS has attempted to redefine "exigent circumstances" and "imminent harm" only to cases where "life or limb is in immediate jeopardy or sexual

abuse is about to occur." Otherwise, the argument goes, CPS would need a court order to interview and remove the child. Apparently, CPS is unwilling to rely on the judgment of its caseworkers and investigators in determining what constitutes an immediate danger to the child. Gates is bad precedent in this regard because it does not deal with sexual abuse, and "imminent danger" could be defined now to a ridiculous extent that would literally require a rape in progress.

Contrary to the alarmist overreaction, Gates does NOT do away with anonymous tips from witnesses who don't know the family nor does it require a search warrant to investigate abuse. Nor should it. If the state were required to obtain a probable cause warrant in order to investigate and remove a child from a home, it would virtually never be able to make a case.

This opinion has had a chilling effect on CPS. The CPS workers I have talked to say they now feel that they have no power to protect children.

Hogwash! We cannot allow the protections for children we have in place to be eroded by courts that treat children as if they are property.

Burton is the founder of the national child advocacy group, Justice for Children.