

IN THE SUPREME COURT OF TEXAS

=====
No. 08-0391
=====

IN RE TEXAS DEPARTMENT OF
FAMILY AND PROTECTIVE SERVICES, RELATOR

=====
ON PETITION FOR MANDAMUS
=====

PER CURIAM

JUSTICE O'NEILL filed an opinion concurring in part and dissenting in part, in which JUSTICE JOHNSON and JUSTICE WILLETT joined.

The Yearning for Zion Ranch is a 1,700-acre complex near Eldorado, Texas, that is home to a large community associated with the Fundamentalist Church of Jesus Christ of Latter Day Saints. On March 29, 2008, the Texas Department of Family Protective Services received a telephone call reporting that a sixteen-year-old girl named Sarah was being physically and sexually abused at the Ranch. On April 3, about 9:00 p.m., Department investigators and law enforcement officials entered the Ranch, and throughout the night they interviewed adults and children and searched for documents. Concerned that the community had a culture of polygamy and of directing girls younger than eighteen to enter spiritual unions with older men and have children, the

Department took possession of all 468 children at the Ranch without a court order.¹ The Department calls this “the largest child protection case documented in the history of the United States.” It never located the girl Sarah who was the subject of the March 29 call.

The Department then filed several suits affecting the parent-child relationship (“SAPCRs”)² requesting emergency orders removing the children from their parents and limiting the parents’ access to the children. The Department also requested appointment as temporary sole managing conservator of the children, genetic testing, and permanent relief. On April 17-18, the district court conducted the adversary hearing required by section 262.201(a) of the Texas Family Code.³

Subsections (b) and (c) state in relevant part:

(b) At the conclusion of the full adversary hearing, the court shall order the return of the child to the parent . . . entitled to possession unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that:

¹ See TEX. FAM. CODE § 262.104(a) (“If there is no time to obtain a temporary restraining order or attachment before taking possession of a child consistent with the health and safety of that child, an authorized representative of the Department of Family and Protective Services . . . may take possession of a child without a court order under the following conditions, only: (1) on personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child; (2) on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child; (3) on personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse; (4) on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse”)

² See TEX. FAM. CODE § 262.105(a) (“When a child is taken into possession without a court order, the person taking the child into possession, without unnecessary delay, shall: (1) file a suit affecting the parent-child relationship; (2) request the court to appoint an attorney ad litem for the child; and (3) request an initial hearing to be held by no later than the first working day after the date the child is taken into possession.”).

³ Section 262.201(a) provides: “Unless the child has already been returned to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession and the temporary order, if any, has been dissolved, a full adversary hearing shall be held not later than the 14th day after the date the child was taken into possession by the governmental entity.”

(1) there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child;

(2) the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal; and

(3) reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home.

(c) If the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that there is a continuing danger to the physical health or safety of the child and for the child to remain in the home is contrary to the welfare of the child, the court shall issue an appropriate temporary order under Chapter 105.

The hearing was attended by scores of attorneys for the parties, attorneys ad litem, guardians ad litem, Texas Court Appointed Special Advocates (CASA), and many others. The hearing was conducted in the courtroom in San Angelo with overflow participants in the city auditorium. At the conclusion of the hearing, the district court issued temporary orders continuing the Department's custody of the children and allowing for visitation by the parents only with the Department's agreement.

Thirty-eight mothers petitioned the court of appeals for review by mandamus, seeking return of their 126 children. The record reflects that at least 117 of the children are under 13 and that two boys are 13 and 17. The ages of the other seven, at least two of whom are boys, are not shown. Concluding that the Department had failed to meet its burden of proof under section 262.201(b)(1),

the court of appeals directed the district to vacate its temporary orders granting the Department custody. *In re Steed*, ___ S.W.3d ___ (Tex. App.–Austin 2008, orig. proceeding) (mem. op.).

The Department petitioned this Court for review by mandamus. Having carefully examined the testimony at the adversary hearing and the other evidence before us, we are not inclined to disturb the court of appeals’ decision. On the record before us, removal of the children was not warranted. The Department argues without explanation that the court of appeals’ decision leaves the Department unable to protect the children’s safety, but the Family Code gives the district court broad authority to protect children short of separating them from their parents and placing them in foster care. The court may make and modify temporary orders “for the safety and welfare of the child”,⁴ including an order “restraining a party from removing the child beyond a geographical area identified by the court”.⁵ The court may also order the removal of an alleged perpetrator from the child’s home⁶ and may issue orders to assist the Department in its investigation.⁷ The Code prohibits interference with an investigation,⁸ and a person who relocates a residence or conceals a child with the intent to interfere with an investigation commits an offense.⁹

⁴ TEX. FAM. CODE § 105.001(a); *see id.* § 262.205.

⁵ *Id.* § 105.001(a)(4).

⁶ *Id.* § 262.1015.

⁷ *Id.* § 261.303(b)-(c).

⁸ *Id.* § 261.303(a).

⁹ *Id.* § 261.3032.

While the district court must vacate the current temporary custody orders as directed by the court of appeals, it need not do so without granting other appropriate relief to protect the children, as the mothers involved in this proceeding concede in response to the Department's motion for emergency relief. The court of appeals' decision does not conclude the SAPCR proceedings.

Although the SAPCRs involve important, fundamental issues concerning parental rights and the State's interest in protecting children, it is premature for us to address those issues. The Department's petition for mandamus is denied.

Opinion issued: May 29, 2008