NO. 05-19-00911-CV

IN THE COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

IN RE ASHLEY PARDO AND DANIEL PARDO, INDIVIDUALLY AND AS NEXT FRIEND FOR K.D.P., A MINOR CHILD, Relators

Original Proceeding from Cause No. 102717-CC
in the 422nd Judicial District Court
Kaufman County, Texas

BRIEF OF TEXAS STATE SENATOR BOB HALL AND TEXAS STATE REPRESENTATIVES VALOREE SWANSON, MATT KRAUSE, MAYES MIDDLETON, SCOTT SANFORD, AND MATT SCHAEFER AS *AMICUS CURIAE* IN SUPPORT OF RELATORS' PETITION FOR WRIT OF MANDAMUS

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INTEREST OF *AMICUS CURIAE*[1]

This brief is filed on behalf of Texas State Senator Bob Hall and Texas State Representatives Valoree Swanson, Matt Krause, Mayes Middleton, Scott Sanford, and Matt Schaefer. As elected representatives of the people of the State of Texas, *amici* have a vital interest in ensuring that the fundamental rights of the children and families they represent are respected by agencies of the State of Texas and protected against unnecessary and unconstitutional government interference.

Amici recognize that the Department of Family and Protective Services is tasked with the important and difficult job of protecting children who are in imminent danger of abuse. However, the department is also required to carry out its responsibilities in a restrained, limited manner that respects the constitutional rights of families. It is for this reason that the United States Congress and Texas Legislature have enacted laws that place critical limits on the department and provide guidance to its employees on how to execute these responsibilities in compliance with the requirements of the United States Constitution and the Texas Constitution.

Given the evidence in this case, *amici* are concerned with how DFPS employees handled the investigation of the allegations against Relators.

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. The Foundation has paid all of the costs and fees incurred in the preparation of this brief. *See* Tex. R. App. P. 11(c).

Accordingly, *amici* have a profound interest in how this case is resolved because the Court's decision may impact legislative options that *amici* can pursue to better protect their constituents from harm and guide the department in performing its vital role.

SUMMARY OF ARGUMENT

In the present case, the State of Texas, through its Department of Family and Protective Services ("DFPS" or "the Department"), disregarded Relators' fundamental rights as well as both state and federal statutes securing those rights. The harm caused by the Department's actions was later compounded by Respondent's abuse of discretion in rubber stamping the illegal and unconstitutional removal of K.D.P. from his parents and awarding the department temporary conservatorship of the child.

The United States Constitution and the Texas Constitution recognize that the parent-child relationship is a fundamental right requiring broad protection against state actions that interfere with this relationship. As the United States Supreme Court has made abundantly clear over nearly a century of precedent, "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Likewise, the Texas Supreme Court has affirmed that "the natural right which exists between parents and their children is one of constitutional dimensions" and any action by the state impacting this relationship, particularly those "which break the ties between a parent and child 'can never be justified without the most solid and substantial reasons.'" *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (quoting *State v. Deaton*, 93 Tex. 243, 248 (1900)). The Court in *Wiley*

further underscored the importance of the parent-child relationship by explaining that an action by the state, "which permanently sunders those ties" should be "strictly scrutinized." *Id*.

Given that "few forms of state action are both so severe and so irreversible" as permanently severing the relationship between a parent and child, due process requires that the government be held to a substantial burden to maintain the proper balance of power between citizens and the state and protect the commanding private interests of families. *See Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982). The Court in *Santosky* held that in cases where "the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than a mere loss of money'" the state must prove its case by at least clear and convincing evidence. *Id.* at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)). It is undisputed that the relationship between a parent and child is an individual interest of utmost importance deserving of constitutional protection. *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

It is clear from the record in this case that not only did DFPS fail to meet the statutory burden imposed upon it by Texas law, its conduct of the investigation into the allegations against Ashley and Daniel Pardo violated both state and federal laws intended to protect the Pardos' constitutional rights in the care, custody, and control of K.D.P. Because the District Court's ruling was not supported by evidence

sufficient to meet DFPS's burden, failed to strictly scrutinize the Department's actions to break the ties between K.D.P. and his parents, and continues to infringe upon the family's fundamental rights by placing them under threat of having their parental rights terminated, the ruling constitutes an abuse of discretion that can only be cured by this Court granting Relators' petition for mandamus relief and ordering the immediate return of K.D.P. to his parents.

ARGUMENT

I. THE PARENT-CHILD RELATIONSHIP IS A FUNDAMENTAL RIGHT UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS AND MAY NOT BE INTERFERED WITH ABSENT DUE PROCESS OF LAW.

The United States Supreme Court and the Texas Supreme Court have long recognized that the parent-child relationship is a fundamental right and provided expansive protections against government interventions into the private realm of the family. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (recognizing that the liberty interest of "parents in the care, custody, and control of their children […] is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (vindicating the "presumptive right of parents" in the custody of their children as a "natural right […] of constitutional dimensions."). Yet, these fundamental rights, although colloquially referred to as "parental rights," do not just belong to the parent. Children, likewise, have a constitutionally protected interest in maintaining the "emotional attachments

that derive from the intimacy of daily association" with parents and siblings that the government may not interfere with absent a compelling interest. *See Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977).

Whenever the state takes an action that infringes upon fundamental rights, as the State of Texas has in this case, the infringement is invalid unless there is a compelling state interest and the government's actions are narrowly tailored to serve that compelling interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993). Moreover, Courts are required to strictly scrutinize state actions "which break the ties between a parent and child," and particularly those actions that seek to "permanently sunder those ties." *Wiley*, 543 S.W.2d at 352; *see also Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (citing *Cawley v. Allums*, 518 S.W.2d 790 (Tex. 1975) and *Heard v. Bauman*, 443 S.W.2d 715 (Tex. 1969)).

By taking temporary custody of K.D.P., the State of Texas has broken the ties between the child and his parents, an action which constitutes an infringement of Relators' fundamental rights in their relationship with one another. The State is going further, however, by seeking the permanent and irrevocable termination of Mr. and Mrs. Pardo's parental rights, placing the family's fundamental rights at even greater jeopardy. R. at 250 (Tr. 213:23 – 214:12). Because there is an ongoing infringement of Relators' fundamental rights and the very real threat that these rights

will be further infringed if parental rights are terminated, the district court abused its discretion by failing to strictly scrutinize the actions of DFPS in this case.

II. THE DEPARTMENT VIOLATED STATE AND FEDERAL LAW IN THE CONDUCT OF THEIR INVESTIGATION, WHICH CREATED THE ALLEGED "EMERGENCY SITUATION" THAT SERVED AS PRETEXT FOR THE REMOVAL OF K.D.P.

In order to secure the fundamental rights of families against one of the most severe actions government can take against its citizens, both the State of Texas and the federal government have enacted statutes that place stringent guidelines on the conduct of child protective investigations and removals. A review of the record in the present case clearly shows that DFPS staff disregarded state and federal statutes governing the conduct of their investigation, which singlehandedly created the alleged "emergency situation" that served as pretext for the removal of K.D.P.

When DFPS seeks to take possession of a child under an emergency order, as in this case, Texas law requires that the department meet four key elements. *See* Tex. Fam. Code §262.102(a). Foremost among these elements is that "there is an *immediate danger* to the physical health or safety of the child […]." Tex. Fam. Code §262.201(a)(1) (emphasis added). Courts have defined an "immediate danger" as one that is "ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near." *Tex. Dep't of Family & Protective Servs. v. Barlow*, No. 03-05-00469-CV, 2007 Tex. App. LEXIS 5087, at 11 (Tex. App.—Austin June 28, 2007) (quoting *Millslagle v. State*, 81 S.W.3d 895, 898 (Tex. App.—Austin

2002)). A finding of immediate danger requires much more than hypothetical risk or "a situation that is potentially dangerous." *Id.*

In the present case, no evidence was presented that K.D.P. was in immediate danger of harm. The Department's own expert witness, Dr. Suzanne Dakil, even testified that her "concerns" for medical child abuse, which gave rise to the removal, were entirely speculative. (Tr. 140:19-22) (July 2, 2019). Accordingly, the District Court abused its discretion in finding that such a danger existed and continued to exist at the time of the Full Adversary Hearing.

The arbitrary removal of K.D.P. based solely on a hypothetical risk, although disturbing, is far from the most horrifying aspect of the department's conduct in this case. Ms. Tabitha Sims, the investigator who executed the removal of K.D.P., testified that the alleged emergency was based entirely on Mr. and Mrs. Pardo's perceived failure to cooperate. R. at 228 (Tr. 191:19-20) (July 2, 2019). Yet, a closer examination of the record reveals that the Department's violation of state and federal laws governing the investigation made it impossible for the family to cooperate. The alleged emergency would not have existed but for the department's violation of state and federal law.

During questioning, Ms. Sims and her supervisor, Ms. Erica Larry admitted that they both had, on multiple occasions, refused to provide the Pardos or their attorney, Mr. Chris Branson, with notice of the allegations. R. at 222 (Tr. 185:2-

13), 260-261 (Tr. 223:15-224:7) (July 2, 2019). Ms. Sims further testified that the reason for the refusal to provide the allegations was a department policy that requires caseworkers to only discuss allegations in a face-to-face meeting. R at 222-223 (Tr. 185:23-186:1), 225 (Tr. 188:11-17) (July 2, 2019). This policy and practice is a blatant violation of Texas and federal law.

Texas Administrative Code Rule §700.508, which governs the disclosure of allegations during interviews with the parents of an alleged victim of abuse or other alleged perpetrators, requires that the investigator "at first contact with the parents or with the alleged perpetrators […] discuss each allegation in the report; and […] ask for a response to the allegations or an explanation of the alleged victim's situation in light of the report." 40 Tex. Admin. Code § 700.508 (1996) (Tex. Dep't of Family and Protective Svcs., Investigations). This section further requires that the disclosure of allegations occur "at first contact," and provides no exceptions or flexibility. TAC § 700.508(b)(4)-(5). This requirement is derived from the federal Child Abuse Prevention and Treatment Act ("CAPTA"), which requires state child welfare departments to have "provisions and procedures to require that a representative of the child protective services agency shall, **at the time of initial contact** with the individual subject to a child abuse or neglect investigation, advise the individual of the complaints or allegations made against the individual […]."

Child Abuse Prevention and Treatment Act (CAPTA), as amended (42 U.S.C. §5101, et seq.) – section 106(b)(2)(B)(xviii).

The United States Department of Health and Human Services Administration for Children and Families publishes a policy handbook to provide states with guidance in complying with CAPTA. The handbook directly addresses the department's policy of requiring that allegations only be discussed in a face-to-face meeting. In responding the question, "Would a State be out of compliance with CAPTA if it implemented a rule to specify that 'initial contact' in the CAPTA provision at section 106(b)(2)(B)(xviii) meant 'face-to-face' contact only?" ACF responded in the affirmative and clarified that the requirement applies at initial contact "regardless of how that contact is made." U.S. Dep't of Health and Human Svcs., Admin. for Children & Families, *2.1H CAPTA, Assurances and Requirements, Notification of Allegations,* Child Welfare Policy Manual (Sept. 27, 2011), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=353. It is clear that the Department's general policy regarding disclosure of allegations as well as its specific actions in this case constituted a violation of federal law.

The testimony of Ms. Larry further revealed that the perceived "lack of cooperation" on the part of Ashley and Daniel Pardo stemmed from the cancellation

of the Monday, June 10, 2019 meeting. R. at 262 (Tr. 225:6-24) (July 2, 2019). According to Ms. Sims, the purpose of the June 10, 2019 meeting was to have K.D.P. admitted to the hospital for further evaluation by Dr. Dakil. R. at 224 (Tr. 187:8-19) (July 2, 2019). However, the Department never disclosed this information to the Pardos. *Id*.

By failing to provide the Pardos or their attorney with the allegations and by withholding critical information on the purpose of the requested June 10, 2019 meeting, DFPS not only violated Texas and federal law, it created a classic Catch-22 situation that made it impossible for the Pardos to cooperate with the investigation and then used that subsequent "lack of cooperation" against them as justification for obtaining an emergency order for the removal of K.D.P. Accordingly, the District Court abused its discretion by finding that the department's emergency removal of K.D.P. was proper and contributed to the ongoing violation of Relators' constitutional rights.

CONCLUSION

The relationship between a parent and their child is a fundamental liberty interest that the government may not infringe upon "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302. To secure this liberty interest, the State of Texas, through its elected representatives, has established clear guidelines governing the conduct of child welfare investigations,

and imposed a "serious burden of justification before intervention" upon DFPS. *Wiley*, 543 S.W.2d 352. Compliance with these guidelines on the part of DFPS is not optional. Yet, this case is littered with instances of DFPS choosing to disregard its legal obligations in its investigation of the Pardos and removal of K.D.P. into state custody. Rather than "strictly construing" the laws that the State of Texas has put in place to protect the fundamental rights of families in favor of the Pardos as required, the district court instead decided to rubber stamp DFPS's unconstitutional actions and grant the department custody of K.D.P. *Holick*, 685 S.W.2d at 20. This decision is inconsistent with Texas law and constituted an abuse of discretion and an unconstitutional infringement upon Relators' fundamental rights. Accordingly, *amici* respectfully request that this Court grant Relators' request for a writ of mandamus directing the district court to vacate its order dated July 24, 2019 and order DFPS to immediately return K.D.P. to his parents.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 2,276 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/Robert Henneke
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following persons via the Court's electronic filing system this 12th day of August, 2019.

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