

CAUSE NO. 05-19-00911-CV

IN THE
FIFTH COURT OF APPEALS
DALLAS, TEXAS

In Re Ashley P. and Daniel P., individually and
as next friends for KDP, a minor,

Relators

Original Proceeding from Cause No. 102,717-CC
in the 422nd Judicial District Court
Kaufman County, Texas

**BRIEF OF TEXAS HOME SCHOOL COALITION,
AS AMICUS CURIAE
IN SUPPORT OF RELATORS' PETITION FOR MANDAMUS**

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STATEMENT OF INTEREST

Amicus Curiae, Texas Home School Coalition, is a nonprofit organization committed to preserving the fundamental rights of parents to raise their children without unwarranted and unnecessary government interference. Recognizing the attendant and equally important rights and interests of children in maintaining relationship with their natural parents, Texas Home School Coalition provides to its members, in addition to educational opportunities and resources, legislative advocacy and legal support. Texas Home School Coalition was instrumental in affirming the rights of parents to homeschool in *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994). Since that time, Texas Home School Coalition has become increasingly involved in the defense of this precious fundamental right.

As a part of this mission, Texas Home School Coalition works significantly in the Child Protective Services arena. Texas Home School Coalition has drafted, and been instrumental in passing, major legislative reforms in the Texas CPS system. In response to numerous experiences of THSC member families being contacted by CPS, Texas Home School Coalition assists those families in obtaining legal representation through

various sources, including financial assistance and access to volunteer attorneys. This has resulted in the resolution of fifty-nine (59) cases since 2014, with 14 more currently in progress.

Texas Home School Coalition has also worked substantially to advance parental rights in other areas. Texas Home School Coalition was appointed by Gov. Greg Abbott as a member of a CPS policy workgroup during the 2017-2018 legislative interim and was instrumental in aiding the development of the recommendations provided by that workgroup. In December 2018, Texas Home School Coalition filed a detailed brief with the Texas Attorney General's office, detailing the century long history of constitutional case law protecting parental rights. The AG's office subsequently issued opinion KP-0241, giving a comprehensive overview of the constitutional rights of parents.

Texas Home School Coalition's mission is to keep Texas families free by protecting the constitutional right of parents to raise their children, which explains their significant interest in defending against the constitutional claims that Plaintiffs assert here.

To accomplish that goal, Texas Home School Coalition has retained Cecilia M. Wood, Attorney and Counselor at Law, P.C. to file this Amicus

Brief in Support of Relators' Petition for Mandamus and is exclusively paying all legal fees and costs associated with the provision of those services.

Texas Home School Coalition has invited a group of like-minded legislators and non-profit groups with similar concerns and values to support this action. The signatures of those individuals, who are not represented by amicus counsel, but who wish to indicate support, are contained in *Appendix A*.

ISSUES PRESENTED

- I. KDP AND HIS PARENTS WERE DENIED DUE PROCESS IN THIS CASE.
 - A. KDP'S PARENTS, AS WELL AS KDP, POSSESS SUBSTANTIVE DUE PROCESS RIGHTS IN RELATION TO EACH OTHER.
 1. Parents have a fundamental liberty interest in the rearing of their children.
 2. Children have a similar liberty interest in their parents.
 - B. This Family Has Been Wrongfully Deprived of Procedural Due Process.
 1. CPS did not follow the law.
 2. The Trial Court Abused Its Discretion in Failing to Properly Apply the Law.

- II. PENALIZING A SURVIVOR OF DOMESTIC VIOLENCE IS BAD POLICY AND CONTRADICTS OTHER GERMANE STATUTES.
- III. THE NEED FOR MANDAMUS IS MAGNIFIED IN TERMINATION CASES.
 - A. Parental Rights Can Be Terminated Without Any Evidence of Abuse and Neglect.
 - B. The Inclusion of a Gag Order in the Temporary Orders was Improper.
 - C. The Temporary Orders Are Void for Lack of Jurisdiction

STATEMENT OF FACTS

Texas Home School Coalition adopts Relators' Statement of Facts for the purpose of this brief.

SUMMARY OF THE ARGUMENT

KDP, the child the subject of this suit, was removed from his parents as their punishment for having the audacity to make medical decisions for their child and then following the legal advice of counsel, when Child Protective Services (“CPS”) chose to involve itself in a difference of opinion between the parents and one doctor. The type of blatant disregard for the law demonstrated by both CPS and the court in this case, violates the fundamental liberty interests of parents, increases instability for children and

their families, and threatens the independence of the judicial branch, resulting in diminishing respect for the legal system.

Dispositive in this case, is the lack of evidence to meet all the statutory requirements at the full adversary hearing. Tex. Fam. Code Ann. § 262.201 (g). Although Relators, KDP’s parents, did not agree to the entry of Temporary Orders in this case, as implied by CPS, they did, as admitted by CPS, agree that at the time of the hearing and going forward they were willing to subjugate their right to make medical decisions to the will of the doctors at Children’s Hospital and would follow all recommendations of those doctors. (*Objection to Relators’ Emergency Order to Suspend Order Pending Ruling on Petition for Writ of Mandamus* at 4, 7).

Section 262.201(g) of the Texas Family Code requires:

“the court **shall** order the return of the child to the parent....”

“.... unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that:

(1)”

“**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.”

Tex. Fam. Code Ann. § 262.201 (g) (3) (*emphasis added*). CPS failed to meet their burden of proof on any of the three prongs. However, based on

the undisputed testimony of KDP's parents, there was not "a substantial risk of a continuing danger." Consequently, without sufficient evidence to sustain a finding of "a substantial risk of a continuing danger, the trial court had no authority to enter temporary orders. Tex. Fam. Code Ann. § 262.201 (h).

It is also worth noting that CPS created the situation that they then used to justify removing the child. The reporting doctor, Dr. Dakil, made only one request to resolve the situation: that KDP and his parents come to a meeting with Children's Hospital on June 10th to discuss KDP's care. CPS investigator Tabatha Sims testified that she knew of Dr. Dakil's request on June 7th, but intentionally never informed the family or their attorney of that request. (REC 224, 227). There was also testimony from CPS that the family's failure to attend that meeting was a major part of the decision to remove. (REC 220-229). If the failure to attend that meeting in any fashion posed a risk of danger to KDP, then it was CPS, through their employee, Ms. Sims, who caused that danger, not the parents. Either CPS created an excuse to remove KDP or they actually created a dangerous situation for him. Unfortunately, the tragedy and trauma suffered by this family is far too common throughout the state.

“Termination of parental rights, the total and irrevocable dissolution of the parent-child relationship, constitutes the ‘death penalty’ of civil cases.” *In re K.M.L.*, 443 S.W.3d 101, 112 (Tex. 2014). In each case, what Justice O’Connor described as “perhaps the oldest of the fundamental liberty interests recognized by this Court,” “the interest of parents in the care, custody, and control of their children,” are implicated. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also, In re Derzapf*, 219 S.W.3d 327, 334–35 (Tex. 2007); *In the Interest of H.S.*, 550 S.W.3d 151, 164 (Tex. 2018) (Guzman, J., dissenting) (noting that “The right of parents to parent their children—even imperfectly—‘is perhaps the oldest of the fundamental liberty interests’”). Accordingly, Texas has also historically recognized the nature of these rights holding that “the legal system should generally defer” to the parent, “obliging the state to bear a serious burden.” *Wiley v. Spratlin*, 543 S.W.2d 349 (Tex. 1976).

Nevertheless, these precedents are increasingly given little more than lip service while parents’ rights and the attendant rights of their children are increasingly threatened, violated, and assaulted. Despite long recognized constitutional precedent and statutory laws designed to safeguard those rights, parents are presumed guilty based on nothing more than an often

anonymous report and are treated worse than alleged criminals. Ironically, a parent's next-door neighbor accused of committing the same acts or omissions against the same child, is afforded a myriad of constitutional rights not available to the parent of that child.

When a police officer comes to investigate a crime or execute an arrest warrant, the alleged criminal is given “*Miranda*” warnings. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). His choice to remain silent or obtain legal representation cannot be used against him. In comparison, parents are often not informed of their rights until after they have been threatened and bullied into answering whatever questions the caseworker asks. In this case, the parents were not informed of any rights or even told the nature of the allegations until after their child was removed. (REC 114-115). Should a parent, as in this case, discover and try to utilize them or follow legal advice, their children are removed for lack of cooperation. (REC 024, 286 - 288). A criminal defendant is permitted to face and cross-examine his accuser. U.S. Const. amend. 6. Parents may never even know the identity of that person. A criminal defendant may not be forced to testify, and their silence cannot be taken as an admission of any guilt. U.S. Const. amend. 5. As, in this case, the parent can be called as a

witness for the state. (REC 47, 87). The legislature has enacted specific laws to provide some protection to parents and families, however, they are often misinterpreted or disregarded, as they were in this case.

Much more often than in criminal cases, statutory law and internal regulations are ignored. Sanctionable “kitchen sink” pleadings, that include every statutory ground for termination, without any evidence or even a belief that evidence will be discovered to support most of the allegations contained in these pleadings, are standard practice in most counties. Tex. Fam. Code Ann. § 161.001. Although only a small percentage of caseworkers actually perjure themselves¹, affidavits used to support removal too often contain inaccurate and irrelevant information, and reckless or illogical conclusions. Even when, as in this case, it is known that parents are already represented by counsel, that lawyer is not afforded notice of the ex parte hearing to obtain an Order for Removal nor is the judge advised of the attorney’s existence.

¹ Referencing the discrepancies between the caseworker’s supporting affidavit and the evidence presented at trial, as specifically detailed in Relators’ Statement of Facts.

Most alarming is the complicity of trial courts across the state. Realizing the potential for error in these expedited investigations and ex parte hearings, the legislature required the court to hold a full adversarial hearing within fourteen (14) days. Tex. Fam. Code Ann. § 262.201 (a). At the conclusion of the hearing, the court is obligated return the child, if the state is unable to meet its burden on *each* element of a three-prong test. Tex. Fam. Code Ann. § 262.201 (g). In this instance, CPS failed to prove even one of the three statutory elements. Nevertheless, the judge made erroneous factual findings and failed to follow the law and return the child. An individual who kills, injures, sexually assaults, endangers or trafficks a child cannot be convicted if having proved all the other necessary elements, the state fails to prove the county in which the crime was committed. But all too often, these statutory requirements, designed to protect families, are treated as mere suggestions and totally ignored. Children remain in foster care, in situations that can be far more dangerous than the home from which they have been removed. *See, M.D. v. Abbott*, 152 F. Supp. 3d 684 (S.D. Tex. 2015), *aff'd in part, rev'd in part and remanded sub nom. M. D. by Stukenberg v. Abbott*, 907 F.3d 237 (5th Cir. 2018).

During the pendency of this litigation, not only are parents separated from their children, but they must comply with temporary orders, which require them to perform a number of tasks. In addition, these orders often impose restrictions on other constitutional rights and privileges, i.e. freedom of association, freedom of religion; and as in this case, freedom of speech and the physician-patient privilege. More importantly, these orders expose them to having their rights terminated, not for abuse or neglect, but because they failed to comply with each and every term of the temporary order. Tex. Fam. Code Ann. § 161.001(O). In every case, the mere existence of the litigation burdens the fundamental rights of parents, as noted by the United States Supreme Court. *Troxel*, 57 U. S. at 58. Far more burdensome and unconstitutional is the ability of each individual trial court throughout the state to “legislate” additional grounds for termination, on a case by case basis. In this case, the temporary orders require the parents to undergo a psychological or psychiatric evaluation performed by CPS’ expert without privilege. (*Relators’ Petition*, Exhibit A, page 5). It also prohibits them from revealing any facts related to the case in any form of media. (*Relators’ Petition*, Exhibit A, page 5).

The trial court also made findings of family violence against the mother, as the result of violence perpetrated against her by a previous husband. (REC 286). This finding is inconsistent with the statutes regarding family violence. Tex. Fam. Code Ann. § 153.004. Further, it sets a dangerous precedent as survivors of family violence will be unwilling to identify and report their abusers, if they know it will result in the loss of their children.

Slowly, but surely, the government that is charged with protecting our rights has systematically adopted a course of consistently eroding parental rights so that all that is left is the right to procreate and the obligation to pay the bills. In fact, the government is directly infringing on these rights. This task is often accomplished through CPS, which is tasked, like other law enforcement agencies, with investigating and enforcing laws against child abuse and neglect. It is empowered to act with much less obligation or expectation to protect the constitutional rights of the citizens involved. The fact that a physician who has never treated or even met the child or his parents and with no obligation to reveal the potential conflict raised by the complaint filed by the parents, can launch a government investigation into a family, without court order or warrant, simply because she fears the parent

may seek a second opinion is frightening. Even more terrifying is the fact that this family may remain temporarily separated for a period of twelve to eighteen months and the parent-child relationship could be permanently terminated, not for abuse or neglect, but because they failed to comply with a “cookie cutter” temporary order, or worse one that violates additional rights. Tex. Fam. Code Ann. § 161.001(O); *see, Grigsby v. Coker*, 904 S.W.2d 619, 621 (Tex.1995) (per curiam) (holding that a trial court abused its discretion by entering a temporary gag order in a child custody modification proceeding that violated the parties' constitutional rights to free speech and due process).

Admittedly, the State has a compelling state interest in protecting the safety of children. However, that interest does not include uniformly implementing better, preferred, or trendy parenting techniques. Given the constitutional rights at stake, statutes designed to further the state’s compelling interest must be narrowly tailored to accomplish the goal in the least restrictive manner. However, no matter how well-crafted those statutes are, they are useless, unless accurately followed or enforced. Failure to do so results in a deprivation of parent’s liberty interests and due process.

So, the constitutional question at the heart of this dispute is whether the State of Texas had the right to interfere with the decisions of and substitute its judgment for that of KDP's parents. The answer is that it did not, and in so doing violated and continues to violate the due process rights of not only his parents, but of KDP himself.

I. KDP AND HIS PARENTS WERE DENIED DUE PROCESS IN THIS CASE.

The Fourteenth Amendment, which guarantees due process, protects not only procedural due process, but substantive due process as well.

Washington v. Glucksberg, 521 U.S. 702, 720 (1997); U.S. Const. amend.

14 § 1. These rights extend to both parents and their children. *Smith v.*

Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977).

“[U]ntil the State proves parental unfitness; the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.” *In re B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003) (quoting, *Santosky*, 455 U.S. at 760). Recognition that “the natural right between a parent and his child is one of constitutional dimensions,” remains unchanged. *In re K.M.L.*, 443 S.W.3d at 112 (citing, *Holick v. Smith*, 685

S.W.2d 18, 20 (Tex.1985). Yet, as noted by Justice Blacklock, there seems to be a difference between this historical precedent and “the modern trends in family law”. *In the Interest of H.S.*, 550 S.W.3d at 66 (J. Blacklock dissenting, joined by J. Johnson, J. Guzman, J. Brown). Those modern trends referred to by Justice Blacklock are never more apparent than in termination cases, in which the state regularly ignores or applies the law in a manner that would imply that the presumption is against, rather than in favor of parents. As in the case at bar, a violation of these rights adversely affects parents and children. *Stanley v. Illinois*, 405 U.S. 645 (1972); *In the Interest of McLean*, 725 S. W. 2d 696 (Tex. 1987); *In re J. W. T.*, 872 S. W. 2d 189 (Tex. 1994).

**A. KDP’S PARENTS, AS WELL AS KDP, POSSESS
SUBSTANTIVE DUE PROCESS RIGHTS IN RELATION
TO EACH OTHER.**

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766–67 (Tex. 2003). Society depends on strong families, where children are nurtured and prepared for future obligations. *See, Prince v. Massachusetts*, 321 U. S. 158

(1944). Protecting the rights of parents and children to maintain these familial relationships benefits the state.

1. Parents have a fundamental liberty interest in the rearing of their children.

Parents possess the fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion). In *Troxel*, the Supreme Court reaffirmed the “interest of parents in the care, custody, and control of their children” as “perhaps the oldest of the fundamental liberty interests.” *Id.*, at 65; (citing, *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (includes the right of parents to “establish a home and bring up children” and “to control the education of their own.”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) (“liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” ... “and to recognize and prepare him for additional obligations.”); *Prince v. Massachusetts*, 321 U. S. 158 (1944) (“right of parents to direct the upbringing of their children”)). This right is an extension of the freedom of personal choice in family matters. *Pierce v. Soc’y of Sisters*, 268 U.S. 510,

534–35 (1925). It specifically includes the right to make medical decisions for one’s child. *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

A parent's rights to “the companionship, care, custody, and management” of his children are constitutional interests “far more precious than any property right.” *Santosky v. Kramer*, 455 U.S. 745, 758–59, (1982) (quoting *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 27, (1981); *Stanley v. Illinois*, 405 U.S. 645 (1972); *In re M.S.*, 115 S.W.3d 534, 547 (Tex.2003). “Protection of one's right to own property is one of most important purposes of government because it is a fundamental, natural, inherent, and inalienable right not derived from legislature and as preexisting even constitutions.” *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977). Obviously, the same is true for the rights of parents. “On multiple occasions, the U.S. Supreme Court has afforded a high degree of constitutional respect to a parent's interest in maintaining the parent-child relationship.” *In re K.M.L.*, 443 S.W.3d at 121 (Lehrman, J. concurring) (citing, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843–45, (1977); *Stanley v. Illinois*, 405 U.S. 645, 651, (1972); *Prince v. Massachusetts*, 321 U.S. 158, 165, (1944).

2. Children have a similar liberty interest in their parents.

A child has a recognized and equally important interest in maintaining a relationship with his or her parents. *Stanley v. Illinois*, 405 U.S. 645, 657 (1972). “A child's right to family integrity is concomitant to that of a parent.” *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000). Therefore, “there is a strong presumption that the best interest of a child is served by keeping the child with a parent.” *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006); Tex. Fam. Code § 153.131(b). In *Gates*, the court discussed the rights of a child not to be removed from school by comparing it to removal from the home, implying that a child has a right not to be removed from his or her home. *Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 432 (5th Cir. 2008).

Due to the magnitude of these fundamental liberty interests the government is forbidden from infringing on these rights, “unless the infringement is narrowly tailored to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

B. This Family Has Been Wrongfully Deprived of Procedural Due Process.

“Parental rights are fundamental, but neither the Texas Family Code nor the Constitution treats them as plenary and unchecked.” *In the Interest of*

H.S., 550 S.W.3d 151, 163 (Tex. 2018). However, due to the nature of the liberty interests at stake, the government cannot interfere with those rights unless there is a compelling state interest and the laws are narrowly tailored to meet that interest. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *In the Interest of J.W.T.*, 872 S.W.2d. 189, 211 (Tex. 1994). “Termination proceedings must be strictly scrutinized.” *In re K.M.L.*, 443 S.W.3d at 112. “Recognizing the significance of the rights at stake in parental termination cases, the State of Texas affords unique protections to parents whose rights are in danger of being terminated.” *Id.*, at 121 (Lehrman, J. concurring).

“The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel*, 57 U. S. at 66. “Where procedural due process must be afforded because of a liberty or property interest is within the Fourteenth Amendment's protection, there must be a determination as to what process is due under particular context.” *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977). In response, the Texas Legislature has codified many of these recognized rights, including, as pertains to this case, the right

to possession of the child and to make medical decisions for the child. Tex. Fam. Code Ann. § 151.001. They have also enacted laws which prescribe the process to be followed to protect these rights, during the investigation, removal of a child, and litigation. Tex. Fam. Code Ann. §§ 261.301; 262.2015; 262.201. However, even well drafted laws fail to pass constitutional scrutiny if they are not followed by the government.

To date, this family has been denied this procedural due process at every stage in the proceedings caused by a failure of CPS and the trial court to accurately follow the legislated procedures.

1. CPS did not follow the law.

CPS caseworkers, employed by the Texas Department of Family and Protective Services (DFPS), a government agency, are not exempt from constitutional restraints. *See, United States v. Place*, 462 U.S. 696, 703, (1983); *Wernecke v. Garcia*, 591 F.3d 386, 393 (5th Cir. 2009); *Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 434 (5th Cir. 2008); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 925 (5th Cir.2000). A valid court order permitting CPS to remove a child functions in the same manner as an arrest warrant in a criminal case. *See, Gates, Id.; Wernecke, Id.* Accordingly, false information, failure to follow procedures, violation of

parents' rights, and other errors in obtaining the order should invalidate the order and taint any resulting evidence in the same manner as it would an arrest warrant.

The report in this case should never have been investigated. CPS is only entitled to investigate reports of behavior which, if proven true, would constitute child abuse or neglect. Tex. Fam. Code Ann. § 261.301. The sole basis of this report was that KDP's mother might obtain a surgery for him from another medical provider. Not only was this report speculative, but it would require a licensed surgeon to accomplish. Imagine indicting someone because they had obtained loans over a period of years, so they might decide to commit robbery by getting a bank manager to give them the code to the safe.

The fact that Dr. Dakil characterized her speculative concerns as "medical abuse," did not relieve CPS from its duty to determine whether, if proven true, these concerns would constitute abuse or neglect. They did not. Tex. Fam. Code Ann. § 261.001. DFPS maintains a website which includes information for the public regarding abuse and neglect that should be reported. It does not mention medical abuse. *Appendix B*. Perhaps this is because the only one that can perform acts that are considered medical are

those with medical training and licenses. Even if KDP's parent had obtained a second opinion, CPS would not be authorized or equipped to determine which doctor was correct. Further, "[A]s long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervised." *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766–67 (Tex. 2003).

To discourage false reporting, a person who acts in bad faith, such as making a report because a parent filed a complaint against medical professional, is subject to civil or criminal liability. Tex. Fam. Code Ann. § 261.106. It is beyond the scope of this review and difficult to determine whether Dr. Dakil's report would rise to the level contemplated by this statute. As previously stated, Dr. Dakil requested a meeting with the parents on June 10th, ten (10) days prior to the removal. Had CPS conveyed that request to KDP's parents, the meeting might have yielded a better understanding on both sides leading to a resolution of the concerns of both Dr. Dakil's and KDP's parents. It would be unfair to fault Dr. Dakil, because Ms. Sims did not appreciate the attitude of the attorney representing KDP's parents and so refused to relay the request for the meeting to the parents. (REC 224-225).

Regardless, CPS was not legally justified in removing the child before a full adversary hearing and the affidavit used to do so was woefully inadequate. Section 262.101 of the Texas Family Code requires sufficient evidence on each of the four elements. Tex. Fam. Code Ann. § 262.101. Neither Dr. Dakil’s concerns nor Ms. Sims conclusions were sufficient to meet the burden of proof.

The caseworker testified that the only reason to remove was based on Dr. Dakil’s concerns related to “medical abuse.” (REC 205). All the events stated by Dr. Dakil to support this theory, took place in and under the supervision of hospitals and doctors’ offices or at their direction. (REC 025 – 031). Dr. Dakil had concerns that some of the diagnoses were incorrect. (REC 024). Other doctors, not parents make diagnoses. It would be nearly impossible to get into a new surgeon’s office, convince that surgeon to perform an unnecessary surgery on a four-year-old child, and have the surgery performed in the fourteen (14) days between June 20th, when the suit was filed and the July 2nd hearing. Further, had that been the mother’s intent and a realistic possibility, KDP could have had the surgery between June 6th when the report was made and June 20th when CPS removed the child; or even before the report was made.

Although Ms. Sims stated in her affidavit that reasonable efforts had been made to avoid the removal, her testimony at trial proved that to be incorrect. (REC 230-231). Ms. Sims also testified she had not attempted to locate family members or relative kin for placement, despite statements to the contrary in her affidavit. (REC 024, 258). The most honest statement in her affidavit was that CPS was basing their request on the parents' lack of cooperation. However, testimony proved that what she considered to be a lack of cooperation, was only the parents following the advice of their legal counsel and expecting CPS to comply with state and federal laws that require CPS to reveal the allegations to the parents. (REC 199-218); 40 Tex. Admin. Code § 700.508; 42 U.S.C.A. § 5106a (b)(2) (B) (xviii).

Nevertheless, even if the facts in the affidavit were all accurate, they do not support a finding that there is an *immediate* danger to the child and the caseworker had several options short of removing the child. Tex. Fam. Code Ann. § 262.101 (REC 199-218). Of course, had the DFPS attorney provided notice to the attorney they knew was already representing the parents, he would have been able to provide affidavits and to advise the judge of these inadequacies and potentially avoid the entire tragedy.

2. The Trial Court Abused Its Discretion in Failing to Properly Apply the Law.

Texas courts play a “critical role ... [a]s gatekeepers for families in crisis” and “have a profound impact on children and families” when “the stakes are exceedingly high.” *In the Interest of J.J.G.*, 540 S.W.3d 44, 64 (Tex. App. – Houston [1st Dist.] 2017), *reh'g denied* (Aug. 15, 2017), *review denied* (Mar. 1, 2019) (quoting Justice (retired) Harriet O'Neill, *Court: Gatekeepers for Families in Crisis*, 70 Tex. B.J. 666, 668 (2007)). The due process clause of the Fourteenth Amendment does not permit a trial court “to infringe on the fundamental right of parents to make child rearing decisions simply because [it] believes a better decision could be made.” *In re Scheller*, 325 S.W.3d 640, 642 (Tex. 2010) (relying on *Troxel v. Granville*, 530 U.S. 57, 72-73). So long as a parent adequately provides for the child, the trial court must presume that parent is acting in the child’s best interest and, therefore, lacks authority to interject itself into the decision-making process. *Troxel*, 530 U. S. at 68.

The Texas Legislature has defined the standards necessary to overcome that presumption and permit the state to act. Before the court can order the removal of a child, CPS to must provide sufficient evidence to prove each part of a four-prong test. Tex. Fam. Code Ann. § 262.101. In

order to retain the case on the docket and the child in state custody, CPS must at the full adversarial hearing prove each part each part of a three-prong test. Tex. Fam. Code Ann. § 262.201 (g). In each instance, CPS failed to meet their burden. Yet the judge ordered the removal of the child. (REC 32-37). Subsequently, the judge failed to return the child at the conclusion of the full adversarial hearing. (*Relators' Petition for Mandamus, Appendix A*). These failures were abuses of discretion that violated the due process rights of KDP and his parents, causing suffering and trauma to the family.

“A trial court has no discretion in determining what the law is or applying the law to the facts.” *In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 840.

Generally, a judge will have no reason to question the veracity of CPS' supporting affidavit and no way to verify the content. As the order was ex parte, there is no way to determine whether he inquired as to whether the parents continued to be represented by the attorney referenced in the affidavit. (REC 024). Nevertheless, the granting of the removal order was an

abuse of discretion. Even if every statement in the affidavit had been true, the content demonstrated only a difference of opinion regarding the parents' medical decisions. The affidavit failed on its face to meet the statutory requirements. Tex. Fam. Code Ann. § 262.101.

More disturbing is the fact that the trial judge refused to return the child. Based on the statutory mandate, Judge Chitty had no legal option other than to dismiss the case and return KDP to his parents. Tex. Fam. Code §262.201(g).

We need not address the lack of sufficient evidence to support findings of the first two prongs. It is undisputed that there is insufficient evidence to support a finding on the third prong. CPS made no efforts, including a less invasive judicial option of obtaining an order for court order services. (REC 230-231). Determinative, however, is that CPS admits that the parents are now, as they testified to at the adversarial hearing, agreeing to comply with all the hospital's recommendations. (*see, Objection to Relators' Emergency Order to Suspend Order Pending Ruling on Petition for Writ of Mandamus*). Even if there had been a risk of danger in the past, it is no longer a continuing danger. Accordingly, CPS failed to meet the statutory burden.

II. PENALIZING A SURVIVOR OF DOMESTIC VIOLENCE IS BAD POLICY AND CONTRADICTS OTHER GERMANE STATUTES.

If the ruling in this case is permitted to stand, it will negatively affect every single parent, who has suffered abuse and their children. Abused parents already have many fears to overcome associated with calling for assistance from law enforcement and taking steps to escape their abusers. They face loss of income, homelessness, and dangerous retribution from their abuser. If a parent feels that will also lose their children, it is highly unlikely that they will make any attempt to leave, especially if the violence is not directed at the children. Parents involved in other types of family law litigation are protected, not punished. Tex. Fam. Code Ann. § 153.004(a). The same should be true in all cases.

KDP's mother was abused by her previous husband. (REC 021-023). On several occasions, CPS investigated and found no reason to provide services or remove the children. (REC 021-023). One investigation, which was administratively closed, revealed that the ex-husband threatened to kill the older two children in order to hurt Ashley Pardo. (REC 023). Although KDP was not even alive at the time of these incidents, the caseworker included this information in her affidavit as a reason that KDP was in danger

and a basis to remove him. (REC 021-022). Clearly, she did not believe that any threat of danger still existed as evidenced by the fact she did not request removal for the two older children, who were previously the subject of the threats. (REC 002 – 024). At trial, she testified that KDP’s mother had the history of neglectful supervision due to the family violence, based solely on this information. (REC 198).

The ex-husband, who was the perpetrator of the violence, is not a party to this suit as it only involves KDP, who is the son of the current husband. There was no evidence that either of KDP’s parents were ever perpetrators of family violence. Yet, the judge made a finding of family violence based on these incidents, the last of which occurred in 2014. (REC 286). He named both parents as temporary possessory conservators and limited their visits with KDP, as if one or both had been the perpetrators of family violence.

Section 153.004 of the Texas Family Code requires the court to consider a history of family violence both in naming a parent as a managing conservator and determining what possession of and access to the child, if any, the perpetrator should be allowed. Tex. Fam. Code Ann. § 153.004(a). Currently, if the Court makes a finding that a parent committed family

violence against the other parent, the Court may not appoint the parents as joint managing conservators. Tex. Fam. Code Ann. § 153.004(b). If, however, the orders in this case are allowed to stand, setting a precedent for that finding to also become a finding of child neglect or abuse, then litigants will not provide that information to the courts or even their lawyers, who would be obligated to report that information to CPS under that scenario. Such a result contradicts the goal of Section 153.004 to protect innocent parents from abusive parents, protect children from dangerous conflict, and encourage parents to seek legal protection for themselves and their children.

III. THE NEED FOR MANDAMUS IS MAGNIFIED IN TERMINATION CASES.

Mandamus is appropriate in this case. Every day this case continues, KDP and his parents suffer due process violations.

A party is entitled to mandamus relief if a trial court violates a legal duty or abuses its discretion, and the party has no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d at 839-40. It is well-settled that appeal is an inadequate remedy when the challenge is to temporary orders involving children, because temporary orders are not subject to appeal. *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993); *See also, Dancy v.*

Daggett, 815 S.W.2d 548 (Tex. 1991). “The burden of litigating a domestic relations proceeding can itself be “so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.” *Troxel*, 530 U. S. at 74, (noting Justice Kennedy’s opinion at 101); see also, *In the Interest of H.S.*, 550 S.W.3d 151, 164 (Tex. 2018) (Guzman, J. dissenting) (“One thing is certain, however: the instability, ill-will, and financial burdens of litigation are detrimental to the child's well-being and harmful to familial relationships.”).

In a termination case, the need for mandamus is magnified. In addition to ongoing separation of the parents of the children, the existence of the temporary orders creates a potential for termination of parental rights even when no abuse or neglect is proven and often burdens other constitutional rights of the parents.

A. Parental Rights Can Be Terminated Without Any Evidence of Abuse and Neglect.

In a termination case separation for a family can become permanent based on any violation of a temporary order. Tex. Fam. Code Ann. § 161.001(O). Such a violation becomes an independent ground for

termination, relieving CPS from proving that any abuse or neglect ever occurred. *Id.* Often, these temporary orders prohibit the exercise of additional constitutional rights, such as the right of association, the right to marry, or, as in this case, the right to free speech. In termination cases, waiting for appeal will result in significantly more harm than merely additional cost and expense. *Walker v. Packer, supra.* It has and will continue to impair Relators' substantive and procedural rights. *See, In re Prudential Ins. Co.,* 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

Obviously trial courts legislating grounds for termination on a case by case basis implies violations of broader constitutional issues related to the separation of powers. Section 161.001 (1) (O) of the Texas Family Code allows each individual judge to design a unique set of actions and prohibitions, on a case-by-case basis, with which that particular parent must comply during the pendency of the litigation, in order to avoid the termination of the parent's relationship with each child. Tex. Fam. Code Ann. § 161.001(O). This provision grants this enormous, legislative power, without specifying parameters, limitations, or instructions for a judge's decisions. *Id.* It also fails to provide notice to parents, prior to a suit, regarding what type of behavior might cause them to lose their child, and

unequal treatment of similarly situated parents, whose fundamental liberty interests are not equally burdened. The larger risk is that a parent could be forced to make unconscionable decisions. They may be forced to choose between divorcing and abandoning a spouse, they know to be innocent of allegations made in the case and permanently losing their child. They may also, as in this case be silenced regarding the atrocities their family is suffering at the hands of the state. In every case, there is the danger that the parents will be unable to complete services that are ordered but not available or, as in this case, which they cannot humanly accomplish and adequately provide for other children in the family; thereby switching the burden of proof to the parents to prove that their rights should not be terminated.

B. The Inclusion of a Gag Order in the Temporary Orders Was Improper.

“Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege...”
Davenport v. Garcia, 834 S.W.2d 4, 7 (Tex. 1992); U.S. Const., amend. 1.
Yet, increasingly courts are using “gag orders” to suppress the truth and prevent public scrutiny of their actions. It an especially dangerous precedent to permit censorship in cases that involve the government’s infringement on the constitutional rights of any litigant. All citizens should have the

opportunity to be advised regarding proceedings that have the potential to undermine or diminish their own constitutional rights. As any parent is subject to investigation of their family and removal of their children from their home based on even an anonymous report, any CPS case potentially affects all parents.

Article I, § 8 of the Texas Constitution guarantees free speech to the citizens of this state. Tex. Const. art. I, § 8. In fact, the rights secured in the Texas Constitution are broader than those protected by the First Amendment of the United States Constitution. *Davenport v. Garcia*, 834 S.W.2d at 8-9. “A prior restraint on expression is presumptively unconstitutional.” *Id.*, at 10. “Gag orders in civil judicial proceedings are valid only when an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and the judicial action represents the least restrictive means to prevent that harm.” *Grigsby v. Coker*, 904 S.W.2d 619, 620 (Tex. 1995) (per curiam) (*citing, Davenport v. Garcia*, at 9).

The injunction included in the temporary orders in this case is a violation of the Pardos’ right to free speech guaranteed by the Texas Constitution for all Texans, including litigants. Tex. Const. art. I, § 8. As with other constitutional rights discussed herein, an infringement by the government on

personal rights protected by the Constitution is subject to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *See, City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985); *Griswold v. Connecticut*, 381 U. S. at 485 (1965); *In re J.W.T.*, 872 S.W.2d 189, 211 (Tex.1994). “A gag order in civil judicial proceedings will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm.” *Davenport v. Garcia*, 834 S.W.2d at 10. Even in family law cases where trial courts have broad discretion, they do not have the authority to “invade constitutional guarantees.” *Grigsby v. Coker*, 904 S.W.2d at 621. “Only an imminent, severe harm can justify prior restraint, and in the context of gag orders, that harm must be to the judicial process.” *Davenport v. Garcia*, at 10.

Clearly this gag order does not pass scrutiny. There was no notice, so no formal hearing on the issue. (REC 001-017). It was an afterthought of the attorney ad litem to protect, again, a speculative potential harm to her client. (REC 285). No emergency existed given the length of time between

the oral rendition and the entry of the written order. (*Relators' Petition for Mandamus, Appendix A*; REC 001-017). The caseworker may have been a little unnerved because videos of her removing KDP from his home had been posted on several sights, but videos of law enforcement activities are posted daily on social media and major television networks, without the slightest censorship. (REC 218). She did not testify to any threats. (REC 219). There was clearly no danger to the judicial process as evidenced by the fact that none of the other parties were similarly enjoined. (*Relators' Petition for Mandamus, Appendix A*). The only finding the judge made to support the order was that it was not appropriate to post about a four-year-old child. (REC 288). Such an opinion might be a surprise to an entire generation or two of parents that communicate solely through social media. Regardless, it is unconstitutional to repress and censor those postings.

To ignore constitutional protections in this scenario would allow the State of Texas to bring an individual into court in order to interfere with one or more of the individual's constitutionally protected rights, under the cover of silence.

“Let it at once be admitted that courts may arrogate the authority of deciding what the individual may say and may not say, what he may write and may not write, and by an injunction writ require him to

adapt the expression of his sentiments to only what some judge may deem fitting and proper, and there may be readily brought about the very condition against which the constitutional guaranty was intended as a permanent protection. *Liberty of speech will end where such control begins.*”

Davenport v. Garcia, at 11 (Tex. 1992) (citing, *Ex Parte Tucker*, 220 S.W. at 76).

Court rooms must remain open and information about legal proceedings must continue to be made available to the public if Texans and Americans in general are to remain informed and engaged. For a little over two decades that information was obtainable in printed format, i.e. newspapers, editorials, and pamphlets. Now that information is disseminated by broader and more varied segments of the population and almost exclusively online. This access to the people and the ability for litigants and observers alike to discuss happenings among themselves and other members of their communities provides a safety net and a check on judges. It provides for more informed and educated voters in judicial elections. By safeguarding the rights of the few inside the courtroom, it safeguards the rights of the many outside. No litigation that affects any constitutional right should take place in secret and darkness. This is especially true in a termination suit.

Having made orders, which are often politically correct, but that at least one party deems to be legally incorrect, courts seek to use temporary orders and the threat of contempt to keep the litigants from alerting the community as to what is happening to their rights at the local courthouse. The threat of jail time and fines is sufficiently intimidating. It pales, however, in comparison to the threat of permanently losing a child. That is the risk faced by KDP's parents if this unconstitutional order remains a part of the temporary orders in this case.

While gag order remains in effect, KDP's parents find themselves in an impossible situation similar to an unarmed homeowner hiding in a closet during a home invasion. The first option is to call 911 and hope that the police arrive before the burglar finds him and shoots him. The second option is to sit quietly and hope that his silence will be rewarded. With the entry of the gag order, the trial court has silenced the ability of KDP's parents to cry for help. They can't even update friends and family in their Facebook posts. This is because of the threat of Section 161.001 (O) of the Texas Family Code. Tex. Fam. Code Ann. § 161.001 (O).

C. The Temporary Orders Are Void for Lack of Jurisdiction.

“Subject matter jurisdiction is essential to the authority of a court to decide a case.” *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). “A judgment is void only when it is apparent that the court rendering judgment “had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act.” *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005). Based on the lack of sufficient evidence to sustain a finding of “a substantial risk of a continuing danger, the trial court had no authority to enter temporary orders. Tex. Fam. Code Ann. § 262.201 (h). Therefore, he lost jurisdiction to enter temporary orders at the conclusion of the hearing. To avoid the pervasive attitude that there is little risk in ignoring statutory requirements and violating parents’ rights in these cases, mandamus must be granted swiftly to correct the erroneous rulings in this case.

CONCLUSION

KDP and his family have suffered because his parents chose to assert their rights to make decisions for their child. The hospital enlisted the assistance of CPS in retaliation for his parents’ audacity to complain about the inadequate treatment of their child and to assert their right to make medical decisions for their child. CPS punished them with removal for

refusing to be intimidated into abandoning their right to legal counsel and ignoring his advice.

The gatekeepers and the child protectors failed KDP and his family. CPS cannot be used as weapon in a dispute between private citizens. Such a trend not only violates the constitutional rights of parents but wastes limited resources to investigate and protect those children in truly abusive or neglectful situations. Trial judges cannot be permitted to allow their own personal opinions regarding the best interest of the child, except their own children, to supersede constitutional protections or specific statutory directions. The damage this has caused to KDP and his family is evident. It is also subject to repetition, which endangers the rights of every parent in this state.

It occurs and is likely to occur with increasing frequency that CPS is enlisted to choose sides between parents and other private citizens; i.e. abortion providers; therapist and doctors insisting on irrevocable gender transition treatment and therapies for young children; religious education or worship that offends certain special interest groups. Some of these conflicts will invariably infringe on other parental rights such as the right to make education decisions or direct the moral and religious training of a child.

Tex. Fam. Code Ann. §151.001. The laws in question have been designed to protect this first and most important relationship in a child's life. If they are not enforced, then they are nothing more than great, but impotent ideas buried in dusty books in a law library.

PRAYER

For the reasons stated herein, Amicus, Texas Home School Coalition respectfully prays this Court grant the relief requested by Relators.

Respectfully submitted,

/s/ Cecilia M. Wood

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CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word 2013 and contains 8,538 words, as determined by the computer software's word count function, excluding the sections of the document listed in Tex. R. App. P. 9.4 (i) (2) (b).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was delivered via E-serve to the parties and/or attorneys as listed below, in accordance with the Texas Rules of Civil Procedure.

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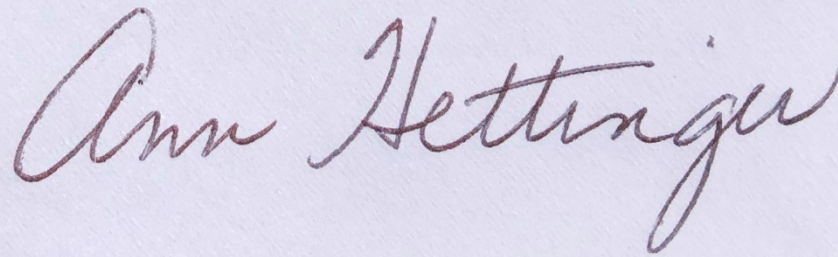
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APPENDIX

APPENDIX A

A handwritten signature in cursive script, reading "Ann Hettinger", written in dark ink on a light-colored, textured paper background.

State Director
Concerned Women for America of Texas

Bob Hall

Senator Bob Hall
Texas Senate
District 2



I wish to be listed on the Amicus brief in support of the Pardo family filed by the Texas Home School Coalition and/or their legal representation as follows:

A handwritten signature in black ink that reads "Dave Welch". The signature is written in a cursive style with a large initial "D" and "W".

Rev. Dave Welch

President, Texas Pastor Council

Donna Campbell

Senator Donna Campbell
Texas Senate
District 25

Donna Campbell

A handwritten signature in black ink, reading "Jeff Leach". The signature is written in a cursive style with a long horizontal stroke at the end.

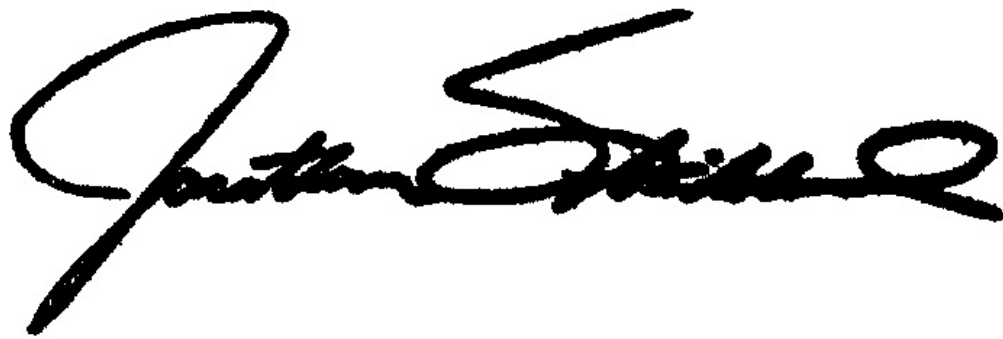
Representative Jeff Leach
Texas House of Representatives
District 67

Jim Graham
President, Texas Right to Life

A handwritten signature in blue ink that reads "Jim Graham". The signature is written in a cursive style with a large, stylized initial "J" and "G".

Jonathan M. Saenz, Esq.
President of Texas Values

A handwritten signature in blue ink, appearing to read "J. Saenz". The signature is stylized with a large initial "J" and a long horizontal stroke extending to the right.

A handwritten signature in black ink, appearing to read "Jonathan Stickland". The signature is written in a cursive style with a large initial "J" and a prominent "S".

Representative Jonathan Stickland
Texas House of Representatives
District 92

M. Schaefer

Representative Matt Schaefer
Texas House of Representatives
District 6

A handwritten signature in black ink, reading "Mayes Middleton". The signature is written in a cursive style with a long horizontal stroke at the end of the last name.

Representative Mayes Middleton
Texas House of Representatives
District 23

A handwritten signature in black ink, appearing to read "Scott Sanford". The signature is written in a cursive style with a large initial "S" and a long, sweeping underline.

Representative Scott Sanford
Texas House of Representatives
District 70

Steve Toth

Steve Toth
State Representative - HD15

Trayce Bradford

President, Texas Eagle Forum

Valoree Swanson

Representative Valoree Swanson
Texas House of Representatives
District 150

APPENDIX B



Texas Department of
Family and Protective Services



Definitions and Laws

Guide to Reporting Suspected Abuse, Neglect or Financial Exploitation of Adults

DFPS Home > Training > APS Reporting > This Page

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Additional Resource: [Online Texas Abuse Hotline - User Guide](#)

The following definitions of abuse, neglect, and financial exploitation apply to in-home investigations:

- [Substantial Impairment](#)
- [Caretaker vs. Paid Caretaker](#)
- [Physical Abuse](#)
- [Emotional or Verbal Abuse](#)
- [Sexual Abuse](#)
- [Neglect](#)
- [Financial Exploitation](#)

For more information, please see the [Texas Administrative Code §705.1001](#) et seq. and the [DFPS In-Home Handbook](#).

Substantial Impairment

For legal definitions of Substantial Impairment, please refer to the [DFPS Handbook](#). Below, you'll find explanation of Substantial Impairment based on definitions found in the TFC.

- The person is consistently or frequently unable to perform basic activities to function well in day-to-day adult life.

- The person has a poor prognosis and is not expected to improve.

Some examples of basic daily activities are:

- Walking.
- Using the bathroom.
- Personal hygiene.
- Eating.
- Cooking.
- Cleaning.
- Shopping.
- Managing money.
- Taking medications.
- Obtaining support services.

A person is not considered substantially impaired if he or she:

- Is capable of protecting themselves from abuse, neglect, or financial exploitation.
- Can consistently manage activities and get any services needed to function well in day-to-day adult life.
- Has a good prognosis and is expected to improve.

Caretaker vs. Paid Caretaker

Caretaker: A guardian, representative payee, or other person who by act, words, or course of conduct has acted so as to cause a reasonable person to conclude that he has accepted the responsibility for protection, food, shelter, or care for an alleged victim. This excludes paid caretakers.

Paid Caretaker: An employee of a home and community support services agency (HCSSA) licensed under [Chapter 142](#), Health and Safety Code, to provide personal care services to an alleged victim, or an individual or family member privately hired and receiving monetary compensation to provide personal care services to an alleged victim. (HCSSA services funded through Medicaid are investigated by APS Provider Investigations.)

Physical Abuse

Please refer to the [Texas Administrative Code §705.1003](#) for the legal definition of Physical Abuse.

Physical abuse is any knowing, reckless, or intentional act or failure to act which caused or may have caused physical injury, emotional harm, or death. Physical abuse may include inappropriate or excessive force, unreasonable confinement, intimidation or corporal punishment.

The following terms are integral to defining physical abuse:

Unreasonable Confinement: An act that results in a forced isolation from the people one would normally associate with, including friends, family, neighbors, and professionals. It is also the act of inappropriate restriction of movement, or the use of any inappropriate restraint.

Physical Injury: Physical pain, harm, illness, or any impairment of physical condition.

Emotional Harm: A highly unpleasant mental reaction with obvious signs of distress, such as anguish, grief, fright, humiliation, or fury.

Intimidation: Behavior by actions or words creating fear of physical injury, death, or abandonment.

Corporal Punishment: Causing physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline.

Inappropriate or Excessive Force: When more force than necessary is used, it is considered inappropriate or excessive.

Emotional or Verbal Abuse

Please refer to the [Texas Administrative Code §705.1007](#) for the legal definition of emotional or verbal abuse.

Emotional or verbal abuse is:

- Any act by a paid caregiver of cursing, vilifying, humiliating, degrading, or threatening that results in emotional harm.
- Any act by a non-paid caregiver of verbal or other communication to threaten violence that makes a reasonable person fearful of physical injury.

The following terms are integral to defining emotional or verbal abuse:

Emotional Harm: A highly unpleasant mental reaction with obvious signs of distress, such as anguish, grief, fright, humiliation, or fury.

Reasonable Person: A person who exercises average care, skill, and judgment in conduct.

Sexual Abuse

Please refer to the [Texas Administrative Code §705.1005](#) for the legal definition of sexual abuse.

Sexual abuse is any non-consensual sexual activity. This may include, but is not limited to, any activity that would be a sexually-oriented offense as found in the Texas Penal Code Chapter 21 (indecent exposure), Chapter 22 (assaultive offenses), or Chapter 43 (public indecency) in which the perpetrator has an ongoing relationship with the victim.

Neglect

Please refer to the [Texas Administrative Code §705.1009](#) for the legal definition of neglect.

Physical Neglect could be self-neglect or caused by a caregiver.

Self neglect: If a person is not able to take care of their physical needs like getting food, shelter, or avoiding emotional harm or physical injury, If someone fails to provide for themselves the protection, food, shelter, or care necessary to avoid emotional harm or physical injury, he or she could be causing physical neglect to themselves.

Neglect by Caregiver: If the act of a caregiver caused emotional harm, physical injury, or death.

Medical Neglect is the lack of medical care or medication to prevent harm or pain. It is considered medical neglect, if the adult is not competent to make the choice for himself or herself to follow through with the needed medical treatment, or if his or her caregiver does not follow through with the needed medical treatment.

Mental Health Neglect is untreated or under-treated mental illness that results in other allegations of abuse, neglect or exploitation. APS **does not** investigate allegations of mental health neglect when no other allegations of abuse, neglect or exploitation are present.

For more information please see the Texas Administrative Code §705.1001 et seq. and the [DFPS In-Home Handbook](#).

Financial Exploitation

Please refer to the [Texas Administrative Code §705.1011](#) for the legal definition of financial exploitation.

Financial exploitation is the illegal or improper use of another person's money or property for personal profit or gain.

Financial exploitation of adults, who are elderly or with disabilities, includes using another person's social security number or other identifying information, for monetary or personal benefit, profit, or gain without the **informed consent** of the adult.

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APPENDIX C

TEXT OF STATUTES

United States Constitutional Provisions

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Texas Constitutional Provisions

Tex. Const. art. I, § 8

Sec. 8. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth

thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Federal Statutes

42 U.S.C.A. § 5106a (xviii)

(xviii) provisions and procedures to require that a representative of the child protective services agency shall, at the initial time of contact with the individual subject to a child abuse or neglect investigation, advise the individual of the complaints or allegations made against the individual, in a manner that is consistent with laws protecting the rights of the informant;

State Statutes

Tex. Fam. Code Ann. § 151.001

(a) A parent of a child has the following rights and duties:

- (1) the right to have physical possession, to direct the moral and religious training, and to designate the residence of the child;
- (2) the duty of care, control, protection, and reasonable discipline of the child;
- (3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;
- (4) the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
- (5) except as provided by Section 264.0111, the right to the services and earnings of the child;
- (6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment;
- (7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- (8) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
- (9) the right to inherit from and through the child;
- (10) the right to make decisions concerning the child's education; and
- (11) any other right or duty existing between a parent and child by virtue of law.

Tex. Fam. Code Ann. § 153.004

In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.

(b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault in violation of Section 22.011 or 22.021, Penal Code, that results in the other parent becoming pregnant with the child. A history of sexual abuse includes a sexual assault that results in the other parent becoming pregnant with the child, regardless of the prior relationship of the parents. It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

(c) The court shall consider the commission of family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.

(d) The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that:

(1) there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit; or

(2) the parent engaged in conduct that constitutes an offense under Section 21.02, 22.011, 22.021, or 25.02, Penal Code, and that as a direct result of the conduct, the victim of the conduct became pregnant with the parent's child.

(d-1) Notwithstanding Subsection (d), the court may allow a parent to have access to a child if the court:

(1) finds that awarding the parent access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child; and

(2) renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent and that may include a requirement that:

- (A) the periods of access be continuously supervised by an entity or person chosen by the court;
- (B) the exchange of possession of the child occur in a protective setting;
- (C) the parent abstain from the consumption of alcohol or a controlled substance, as defined by Chapter 481, Health and Safety Code, within 12 hours prior to or during the period of access to the child; or
- (D) the parent attend and complete a battering intervention and prevention program as provided by Article 42.141, Code of Criminal Procedure, or, if such a program is not available, complete a course of treatment under Section 153.010.
- (e) It is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or abuse or family violence by:
 - (1) that parent; or
 - (2) any person who resides in that parent's household or who is permitted by that parent to have unsupervised access to the child during that parent's periods of possession of or access to the child.
- (f) In determining under this section whether there is credible evidence of a history or pattern of past or present child neglect or abuse or family violence by a parent or other person, as applicable, the court shall consider whether a protective order was rendered under Chapter 85, Title 4,¹ against the parent or other person during the two-year period preceding the filing of the suit or during the pendency of the suit.
- (g) In this section:
 - (1) "Abuse" and "neglect" have the meanings assigned by Section 261.001.
 - (2) "Family violence" has the meaning assigned by Section 71.004.

Tex. Fam. Code Ann. § 261.001

- (1) "Abuse" includes the following acts or omissions by a person:
 - (A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;
 - (B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;
 - (C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or

reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;

(D) failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;

(E) sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of young child or children under Section 21.02, Penal Code, indecency with a child under Section 21.11, Penal Code, sexual assault under Section 22.011, Penal Code, or aggravated sexual assault under Section 22.021, Penal Code;

(F) failure to make a reasonable effort to prevent sexual conduct harmful to a child;

(G) compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code, including compelling or encouraging the child in a manner that constitutes an offense of trafficking of persons under Section 20A.02(a)(7) or (8), Penal Code, prostitution under Section 43.02(b), Penal Code, or compelling prostitution under Section 43.05(a)(2), Penal Code;

(H) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by Section 43.21, Penal Code, or pornographic;

(I) the current use by a person of a controlled substance as defined by Chapter 481, Health and Safety Code, in a manner or to the extent that the use results in physical, mental, or emotional injury to a child;

(J) causing, expressly permitting, or encouraging a child to use a controlled substance as defined by Chapter 481, Health and Safety Code;

(K) causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by Section 43.25, Penal Code;

(L) knowingly causing, permitting, encouraging, engaging in, or allowing a child to be trafficked in a manner punishable as an offense under Section 20A.02(a)(5), (6), (7), or (8), Penal Code, or the failure to make a reasonable effort to prevent a child from being trafficked in a manner punishable as an offense under any of those sections; or

(M) forcing or coercing a child to enter into a marriage.

(2) “Department” means the Department of Family and Protective Services.

(3) “Exploitation” means the illegal or improper use of a child or of the resources of a child for monetary or personal benefit, profit, or gain by an employee, volunteer, or other individual working under the auspices of a facility or program as further described by rule or policy.

(4) “Neglect”:

(A) includes:

(i) the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child;

(ii) the following acts or omissions by a person:

(a) placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;

(b) failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child;

(c) the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused;

(d) placing a child in or failing to remove the child from a situation in which the child would be exposed to a substantial risk of sexual conduct harmful to the child;
or

(e) placing a child in or failing to remove the child from a situation in which the child would be exposed to acts or omissions that constitute abuse under Subdivision (1)(E), (F), (G), (H), or (K) committed against another child;

Tex. Fam. Code Ann. § 261.106

A person who reports the person's own abuse or neglect of a child or who acts in bad faith or with malicious purpose in reporting alleged child abuse or neglect is not immune from civil or criminal liability.

Tex. Fam. Code Ann. § 262.101

“ An original suit filed by a governmental entity that requests permission to take possession of a child without prior notice and a hearing must be supported by an affidavit sworn to by a person with personal knowledge and stating facts sufficient to satisfy a person of ordinary prudence and caution that:

- (1) there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse;
- (2) continuation in the home would be contrary to the child's welfare;
- (3) there is no time, consistent with the physical health or safety of the child, for a full adversary hearing under Subchapter C; and
- (4) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child.”

Tex. Fam. Code § 262.201(g)

“(g) At the conclusion of the full adversary hearing, the court shall order the return of the child to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that:

- (1) there was a danger to the physical health or safety of the child which was caused by an act of 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.

Tex. Fam. Code Ann. § 262.201

(h) In a suit filed under Section 262.101 or 262.105, 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.

40 Tex. Admin. Code § 700.508

(a) Any visit to interview the parents or an alleged perpetrator may be announced or unannounced. The worker decides whether to announce the visit on the basis of the nature of the allegations and the need to protect the child.

(b) At the first contact with the parents or with the alleged perpetrators, the worker must:

(1) identify himself and have the Texas Department of Protective and Regulatory Services (TDPRS) identification available for inspection;

(2) explain the nature of the complaint or the reason for the contact;

(3) explain TDPRS's role and legal responsibilities in the investigation;

(4) discuss each allegation in the report; and

(5) ask for a response to the allegations or an explanation of the alleged victim's situation in light of the report.

(c) If at any point in the investigation it is learned that a parent may be a victim of domestic violence, information concerning community services available to domestic violence victims must be given to the parent.