No. 08-0391

IN THE SUPREME COURT OF TEXAS

IN RE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

Relator

Original Proceeding from Cause No. 03-08-00235-CV
in the Third Court of Appeals
Austin, Texas

RESPONSE TO MOTION FOR EMERGENCY RELIEF

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TO THE HONORABLE SUPREME COURT OF TEXAS:

This Court should deny the Department's Motion for Emergency Relief. No grounds exist for a stay because allowing the order to go into effect will not moot the controversy nor otherwise threaten this Court's jurisdiction. (Section A) Moreover, even if the Court's constitutional equity jurisdiction were broad enough to encompass this request, the Department has no evidence of irreparable harm if the order takes effect. The Department asserts a red herring when it claims that it does not know the correct identities of the mothers to whom the children are to be returned. By contrast, these children are being subjected to continuing, irreparable harm every day that they are separated from their parents. (Section B) Accordingly, the Court should deny the Department's request for a temporary stay.

The court of appeals read the plain language of the statute enacted by the Legislature, carefully reviewed the record, found that the Department had introduced no evidence satisfying the statutory requirements, and conditionally granted mandamus relief, instructing the trial court to vacate its order granting custody of the children to the Department. The practical effect of this order is to allow the children to go home while the Department continues its investigation. The Department's suit regarding the children remains pending in the trial court, which could issue any appropriate orders to protect the children's safety and ensure their continued presence in the state. *See, e.g.,* Tex. Fam. Code §262.1015 (authorizing the trial court, upon proper proof, to issue temporary restraining order removing alleged perpetrator of child abuse from child's home); *id*.

§105.001 (authorizing trial court to make a temporary order for the safety and welfare of a child, including prohibiting a person from removing the child beyond a geographical area identified by the court). As demonstrated below, there is no sound basis for this Court to grant the temporary stay the Department seeks.

A. Allowing the court of appeals' mandamus decision to go into effect will not moot the controversy nor otherwise threaten this Court's jurisdiction.

The appellate rules provide that the Court may grant temporary relief pending review of a mandamus petition. *See* TEX. R. APP. P. 52.10 (b) ("The court—on motion of any party or on its own initiative—may without notice grant any just relief pending the court's action on the petition."). The rules do not state under what circumstances temporary relief would be justified. The Texas Constitution, however, makes clear that temporary relief is justified only when necessary to protect the Court's jurisdiction to resolve the mandamus dispute. *See* Tex. Const. Art. 5 § 3 (a) ("The Supreme Court and the Justices thereof . . . may issue the writs of mandamus, procedendo, certiorari and such other writs . . . *as may be necessary to enforce its jurisdiction*.") (emphasis added). The Department appears to acknowledge this standard in its request for an emergency stay. *See* Motion for Emergency Relief at 5 ("This emergency stay is necessary to maintain the status quo of the parties and *to preserve the Court's jurisdiction to consider the merits of the original proceeding. In re Reed*, 901 S.W.2d 604, 609 (Tex. App.—San Antonio 1995, orig. proceeding).") (emphasis added).

This Court's jurisdiction is not threatened by allowing the court of appeals' decision to take effect. There are many types of cases in which the grant of a temporary stay *is* necessary to protect the Court's jurisdiction to review the issues in the mandamus proceeding. Familiar examples can be drawn from this Court's mandamus jurisprudence regarding whether the relator has an adequate remedy by appeal:

- If the trial court issues an order compelling discovery of privileged documents, a temporary stay is necessary because once the documents are produced any issue as to their privilege becomes moot. *See, e.g.*, *In re University of Texas Health Ctr.*, 33 S.W.3d 822, 827 (Tex. 2000); *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12, 21 (Tex. 1996); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 649 (Tex. 1995).

- If the trial court issues an order compelling discovery of trade secrets without adequate protections to maintain the confidentiality of the information, temporary relief is necessary lest the trade secrets be lost pending resolution of the mandamus dispute. *See, e.g.*, *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 734 (Tex. 2003); *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998).

- If a trial court order compels discovery that allegedly violates First Amendment rights, absent a stay the constitutional harm will be complete before mandamus relief issues. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375 (Tex. 2000).

- If a trial court orders overly broad or burdensome discovery, a stay is necessary because once the production is made the harm is done and the mandamus proceeding

becomes moot. *See, e.g., In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003); *In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998); *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 942-43 (Tex. 1998).

- If a trial court compels a party to arbitrate without its having agreed to do so, and no stay issues pending resolution of the mandamus dispute, the party "will have lost its right to have dispute resolved by litigation." *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994).

- If the trial court denies a motion for a continuance where special circumstances render such a denial an abuse of discretion, absent a stay the requested relief becomes moot. *See In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005); *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997).

The circumstances of this case are fundamentally different from the examples cited above. Here, unlike in those cases, the controversy will *not* become moot if the Court denies the State's request for a stay. Mootness arises only when a controversy ceases to exist. *See Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2000) ("If a controversy ceases to exist—'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome'—the case becomes moot.") (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)); *see also Bd. of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002) (applying *Williams* standard, and concluding that controversy in question was not moot). Here, the controversy is whether the Department satisfied the statutory requirements necessary to remove the Real Parties in Interest's children from

their homes. That controversy will not be affected by where the children are housed pending resolution of the mandamus dispute.

This Court's recent decision in *In re McAllen Medical Center* does not support a different result. *See In re McAllen Medical Center*, No. 05-0892, 2008 WL 2069837 (Tex. May 16, 2008). To the extent that the *In re McAllen* cost/benefit analysis can be applied in the temporary-stay context, *see id.* at *3, the "costs" of issuing the temporary stay here far outweigh any perceptible "benefits." Even if this Court were to decide the merits of this proceeding against the Real Parties in Interest, the children could be returned to Department custody, albeit at some expense and inconvenience. However, the speculative outcome of a ruling in favor of the Department, and any inconvenience or expense that might entail, does not justify the continuing harm to the children from forced separation from their parents—a harm that is certain and irreparable. Moreover, if the trial court releases the children, and if the Department presents evidence that a particular child (or children) is in immediate physical danger, under the governing statutes, then the Department can initiate a new removal proceeding. Thus, any potential concerns about the children's physical safety can be addressed within the context of the pending trial-court proceedings and governing statutes.

Because neither this Court's jurisdiction nor the subject matter of the proceeding is threatened by allowing the court of appeals' mandamus decision to take effect, the Court should deny the Department's request for a stay.

B. The Department's contention that it does not know the correct identities of the mothers to whom the children are to be returned is a red herring.

As demonstrated above, there is no jurisdictional basis for granting the Department's request for a stay. That is dispositive. Absent statutory or constitutional authority supporting the stay it seeks—which does not exist under the circumstances here—the State cannot invoke this Court's equity jurisdiction to obtain its requested stay:

> Equity jurisdiction does not flow merely from the alleged inadequacy of a remedy at law, nor can it originate solely from a court's good intentions to do what seems "just" or "right;" the jurisdiction of Texas courts—the very authority to decide cases—is conferred solely by the constitution and the statutes of the state.

State v. Morales, 869 S.W.2d 941, 942 (Tex. 1994).

And even if the Court's constitutional jurisdiction were broad enough to consider a stay under general equitable principles, the Department cannot meet that less demanding burden. Right now these children are experiencing the irreparable harm, pain, and distress of enforced separation from their parents (and, in many cases, siblings). That clear, continuing harm outweighs any other potential countervailing interest, including any concerns about cost or other administrative difficulties. By denying the stay and allowing the court of appeals' order to take effect, this Court would halt the only harm that everyone is certain is occurring. As the court of appeals correctly determined, there is no evidence of any equivalent harm—including abuse—that could justify the stay.

The Department removed these children from their homes, but now contends that it cannot return the children to their mothers, as the court of appeals' decision requires,

because it does not know with certainty which child belongs with which mother. This argument is belied by both the evidence in the record and the Department's own actions.

The Department first complains that Appendix 1 to the mothers' reply brief in the court of appeals was not before the trial court and therefore could not be considered by the court of appeals. This is beside the point. Appendix 1 is not evidence, and was never intended as evidence. It is part of the mothers' briefing and was prepared *from* the record in response to the Department's argument that the mothers had never identified their children. It points the Court to specific places in the reporter's record and the clerk's record in which mothers identified themselves and their children. *See* App. 1 to mothers' reply brief (submitted to Supreme Court's Clerk by separate e-mail—motion to seal to be filed). The mothers do not rely on a "bare assertion set forth in a spreadsheet," Motion for Emergency Relief at 3, but on the record itself, which the Department ignores.

The Department's profession of ignorance regarding the children's parentage is refuted by its own conduct after the hearing. It is undisputed that the Department has allowed these mothers to visit their children. It has participated in status hearings with the parents in which the Department presents the parents with a "service plan," *i.e.*, the requirements the parents must fulfill over the next year in order to be reunited with their children. In those service plans, prepared by the Department, both children and parents are named. *See* App. 1, 2, attached. In other words, the matching of children with parents did not become a problem for the Department until a court decided that it had to give the children back. The Department's claim of ignorance strains credulity.

Moreover, even if the Department's professed confusion has any credence at all, it certainly cannot justify failure to return *all* the children. If there are particular concerns about any particular child (of which there is no indication in the record), that would be a matter for the trial court to address as part of its continuing jurisdiction over the cases and parties.

The State should not be able to bootstrap conduct that the Third Court determined to be wholly unsupported by the Legislature's statutory scheme into a new "status quo" that should not be disturbed. The last peaceable status quo was the children being in their parents' care and custody. For the foregoing reasons, Real Parties in Interest respectfully request that this Court deny the Department's Motion for Emergency Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Motion for Emergency Relief was served upon the following counsel of record via the method indicated below, on this the 23rd day of May, 2008.

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