

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 PETITION FOR WRIT OF MANDAMUS

Amy Warr
State Bar No. 00795708
Douglas W. Alexander
State Bar No. 00992350
ALEXANDER DUBOSE
JONES & TOWNSEND LLP
Bank of America Center
515 Congress Avenue, Suite 2350
Austin, Texas 78701
Telephone: (512) 482-9300
Telecopier: (512) 482-9303

Robert W. Doggett
State Bar No. 05945650
Julie M. Balovich
State Bar No. 24036182
Amanda J. Chisholm
State Bar No. 24040484
Texas Rio Grande Legal Aid
4920 N. IH-35
Austin, Texas 78751
Telephone: (512) 374-2725
Telecopier: (512) 447-3940

COUNSEL FOR REAL PARTIES IN INTEREST

TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES iii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. To protect the interests of the children, the governing statute must be strictly applied as written 2

II. Because the Department failed to carry its burden, the governing statute requires that the children be returned to their homes 5

 A. The trial court abused its discretion in determining that over 400 children were in physical danger based solely on evidence that five minor girls were either pregnant or had children and that there was a belief system that getting married and having children at a young age was a blessing (First Degree) 7

PRAYER 15

CERTIFICATE OF SERVICE 17

INDEX OF AUTHORITIES

Cases

<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	5
<i>City of Rockwall v. Hughes</i> , 246 S.W.3d 621 (Tex. 2008)	4
<i>Healy v. James</i> , 408 U.S. 169 (1972)	5
<i>In re Derzapf</i> , 219 S.W.3d 327 (Tex. 2007)	4, 5
<i>Johnson v Fourth Ct. of Appeals</i> , 700 S.W.2d 916 (Tex. 1985)	7
<i>Lee v. City of Houston</i> , 807 S.W.2d 290 (Tex.1991)	4
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102 (1996)	5
<i>NAACP. v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	5
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1971)	7
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000)	3
<i>Wiley v. Spratlan</i> , 543 S.W.2d 349 (Tex. 1976)	3
Statutes	
TEX. FAM. CODE § 151.003	3

TEX. FAM. CODE § 262.1015 9, 10

TEX. FAM. CODE § 263.001 11

TEX. FAM. CODE § 71.005 11

TEX. FAM. CODE §105.001 13

TEX. FAM. CODE §262.201 2, 3, 9, 11, 14

Other Authorities

Theo Liebman,
*What’s Missing from Foster Care Reform? The Need for Comprehensive, Realistic
and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL’Y 141, 161-
62 (2006) 3

TO THE HONORABLE SUPREME COURT OF TEXAS:

Real Parties in Interest respectfully file this response to the Department's petition for writ of mandamus.

SUMMARY OF THE ARGUMENT

To protect the parent-child relationship from the most extreme interference by the State—removal of a child from her parent—the Legislature adopted a statutory scheme with strict criteria. Under § 262.201 of the Family Code, the Department must satisfy a three-pronged test, or the child “shall” be returned. Here, the Department failed to present evidence sufficient to satisfy *any* of the three prongs of the test, much less *all* of them as required. Accordingly, the court of appeals correctly held that the trial court abused its discretion in authorizing the Department's continued possession of the children. Under the Legislature's mandatory scheme, it is time for the children to be returned home.

Rather than meaningfully address the three statutory criteria, the Department offers diversionary reasons as to why it would be impractical or “wrong” to return the children to

ARGUMENT

The Department properly points out “the need for the Department to take action under difficult, time-sensitive and unprecedented circumstances to protect children on an emergency basis.” Pet. at 1. In an emergency, no one can make a correct decision 100 percent of the time. That is why the Legislature put into place a statutory safety valve by which parents can be reunited with their children if the Department makes a mistake. This is one of those times. When there is no longer an emergency, the Department cannot justify continued custody by suggesting that it must retain the discretion to make snap judgments. The issue here is not whether the Department acted in good faith at the time of the removal, but whether—14 days later—it had satisfied the Legislature’s mandatory criteria for continuing custody of the children.

I. To protect the interests of the children, the governing statute must be strictly applied as written.

The Legislature has determined that the parent-child relationship is a special relationship that deserves extraordinary protection from interference by the State. Accordingly, the Legislature established a statutory scheme under which erroneous State decisions to remove children from their parents can be quickly corrected. *See* TEX. FAM. CODE §262.201(a). At the conclusion of the hearing, the child must be returned home unless the Department “introduced 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 or failure to act of the person entitled to possession

and for the child to remain in the home is contrary to the welfare of the child;

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

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

Id. § 262.201(b) (emphasis added). Risk of flight from the jurisdiction is not included as a reason to authorize continued custody, and, as demonstrated in Part III.A., is not a legitimate concern here in any event.

This statutory scheme balances the State's interest in protecting children from danger to their physical health or safety with parents' fundamental right to make decisions concerning the care, custody, and control of their children. *Id.* § 262.201(b); *see Troxel v. Granville*, 530 U.S. 57, 67 (2000); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). The scheme is consistent with the Legislature's admonition that a state agency may not interfere with a parent's upbringing of a child. *See* TEX. FAM. CODE § 151.003 ("A state agency may not adopt rules or policies or take any other action that violates the fundamental right and duty of a parent to direct the upbringing of the parent's child."). And the scheme recognizes the "well documented [fact] . . . that separation from parents for even a relatively short time can have a devastating impact on a child emotionally and physically." Theo Liebman, *What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic and Compassionate Removal Standards*, 28 *HAMLIN J. PUB. L. & POL'Y* 141, 161-62 (2006).

This is a sound statutory scheme that strikes an appropriate balance. But even if this or any other court were to question the wisdom of this statutory scheme enacted by the Legislature, under the separation of powers doctrine, the courts' role is simply to apply the statute as written. As this Court recently reaffirmed: "Our function is not to question the wisdom of the statute; rather, we must apply it as written." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 629 (Tex. 2008) (quoting *Lee v. City of Houston*, 807 S.W.2d 290, 293 (Tex.1991)).

This is a statutory-application case—not a statutory-interpretation case. The statutory scheme applicable here is unambiguous; we do not have to guess at its meaning. The court of appeals faithfully applied the statute as written. The trial court did not. And the Department treats the statutory scheme as an afterthought, not mentioning it until page 9 of its petition. This Court should not disturb the court of appeals' correct application of the governing statute which the Legislature adopted to protect the interests of the children of this state.

The Department argues, citing no authority, that in a mandamus proceeding a court cannot conduct legal sufficiency review. Pet. at 10. That argument is wrong. This Court recently granted mandamus relief because no evidence supported the trial court's determination that grandparents met the statutory grounds for access to or possession of their grandchildren. *In re Derzapf*, 219 S.W.3d 327, 334-35 (Tex. 2007) (per curiam). As demonstrated below, the evidence presented by the Department at the statutorily required

hearing was legally insufficient to keep the children of the Real Parties in Interest from being returned to their homes. Therefore, the court of appeals correctly issued mandamus. *See id.*

II. Because the Department failed to carry its burden, the governing statute requires that the children be returned to their homes.

Even now, the Department is unable to identify evidence in the record that satisfies any of the three prongs of the statute. Instead, the Department puts forth a jumble of assertions about beliefs, combined with its only potential evidence of physical abuse—five minor girls who were pregnant or had children—and summarily argues that this evidence satisfies all three requirements under the Family Code for all of the hundreds of children involved. But the evidence as to the five pubescent-age girls is flawed, and, in any event, is no evidence as to boys or pre-pubescent girls.

And beliefs alone—or association with an unpopular organization—do not satisfy the Department’s burden because they are no evidence of the *physical* harm required by the statute. Moreover, punishment for such beliefs and associations would run afoul of the Constitution. *NAACP. v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982); *Healy v. James*, 408 U.S. 169 (1972); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)). Instead of focusing on whether each parent engaged in or tolerated the sexual abuse of their children, the Department put their entire religion on trial:

* The Department criticized the community as being led by a “central leader.” 5 RR 62:9

* “Free choice is not really possible,” the Department warned, “where it is a blessing to have children and to be compliant to your father and the prophet.” 5 RR 76: 17-23.

- * The leader controls how the community dresses, eats, sleeps, works. 5 RR 62:12.
- * The Department is concerned about “their belief that they hold about the community and God and so forth” 5 RR 131:4-5.
- * The Department desires the children be separated from each other and their parents so “they can begin to have an opportunity to create free choice about a variety of things.” 5 RR 143:22-24.
- * The Department characterizes the community as having “destructive belief systems.” 5 RR 143:23.

The Department states that the children should be held in their custody because of the alleged beliefs of the parents. 4 RR 260:5-10. The Department is not merely alleging sex abuse or toleration of it; it is alleging that the religious beliefs of the parents themselves are improper and candidly presented this testimony to the trial court, the court of appeals and this Court in an attempt to support the continued custody of the children. As the court of appeals correctly observed: “The existence of the FLDS belief system as described by the Department’s witnesses, by itself, does not put children of the FLDS parents in physical danger. It is the imposition of certain alleged tenets of that system on specific individuals that may put them in physical danger.” Op. at 7. Moreover, the Department’s reliance on practices that do not involve sex abuse constitutes direct evidence of intentional religious discrimination prohibited by the Due Process, and Equal Protection clauses of the Fourteenth Amendment, and the Free Exercise clause of the First Amendment. While religious discrimination may not be the sole factor that has triggered the Department’s activities, it clearly was a factor by their own admissions.

Furthermore, due process requires that Real Parties receive an individualized determination of whether their actions or failures to act authorize the state to continue custody of their children. *See Stanley v. Illinois*, 405 U.S. 645, 654 (1971) (unwed fathers entitled to individualized determination of whether they would have custody of their children). In this case, the Department attempts to make global accusations as to all persons living at the ranch without consideration of each child's situation. With no individualized proof as to each child cited by the Department, the court of appeals still did what it was required to do, and reviewed the record to see if there was any basis for the trial court's order. *See Johnson v Fourth Ct. of Appeals*, 700 S.W.2d 916, 917-18 (Tex. 1985). Finding no evidence to support any of the statutory prongs of § 262.201, the court correctly held that the trial court abused its discretion in authorizing the Department to retain custody of the children.

A. The trial court abused its discretion in determining that over 400 children were in physical danger based solely on evidence that five minor girls were either pregnant or had children and that there was a belief system that getting married and having children at a young age was a blessing. (First Prong)

The Department does not dispute that it was required to present evidence that there was a danger to the physical health or safety of each child. However, even now, the Department is unable to point to any evidence other than Angie Voss's testimony that five girls—who the Department was able to identify by name—had become pregnant at the age of 15 or 16. 7 RR Pet's Exh. 26; 4 RR 252: 19-25; 253: 1-22. Contrary to the Department's assertion, the court of appeals did not question the credibility of this evidence, or misstate

or reweigh the testimony. Indeed, the court of appeals gave this evidence full credit when it stated: “With the exception of the five female children identified as having become pregnant between the ages of fifteen and seventeen, there was no evidence of any physical abuse or harm as to any other child.”¹ Op. at 6.

The record contains no evidence of risk of physical harm to boys or pre-pubescent girls. In fact, Voss, the Department’s sole fact witness, repeatedly testified that there was no proof that boys or babies had been abused. 4 RR 262: 5-10.² The Department’s counsel then asked Voss why boys and girls who were not of adolescent (pubescent) age had to be removed. Her response conclusively established the Department’s position that danger to physical health or safety was not the grounds for removal:

. . . My concern is that the—the men and women who are the parents of the children, the boy—the little boys, the babies, the girls, what I have found is that they’re living under an umbrella of belief that having children at a young age is a blessing and therefore any child in that environment would not be safe.

4 RR 262: 16-23. And the Department’s expert witness, Dr. Bruce Perry, concurred that the only danger of physical harm was the danger of growing up under a belief system which, he posited, could affect their psychological, emotional, or social—but not physical—health. 5

¹ The Department misrepresents in its brief that the Bishop’s Records reveal that one child was 13 when she conceived a child. The citation is not to the Bishop’s Records, but to Voss’s testimony in which she is explaining her own summary of testimony that was introduced as Petitioner’s Exhibit 26. In that testimony, she refers to a 22-year-old woman, who she states has an 8 year old child, and therefore must have conceived at the age of 13 or 14. *See* 6 RR Pet’s Exh. 26; 4 RR 254: 2-6. Because her pregnancy occurred eight years ago, it is no evidence of current conditions at the ranch.

² For example, when questioned by an attorney ad litem, Voss testified: “As to the—the Dockstader boys, is there any issue of any abuse, physical, other than this perception of grooming? A: Not that I’m aware of.” 4 RR 279: 4-6.

RR 133:4-6. The court of appeals correctly held that the trial court could not stray from the plain language of the statute and rely upon such evidence to justify its decision to permit the Department's continuing to have custody of the children under § 262.201(b)(1). Op. at 6.

B. The Department presented no evidence of an urgent need for protection requiring immediate removal of the children, nor evidence of reasonable efforts, consistent with the circumstances and providing for the safety of the children, made to eliminate or prevent the children's removal. (Second Prong)

The court of appeals reviewed the record and correctly determined there was no evidence satisfying the second prong of § 262.201(b). Op. at 7. With respect to the boys and girls who were younger than adolescent age, the Department's perceived risk of danger was not an urgent or immediate one. The only evidence regarding these categories of children is that they will grow up among their parents' beliefs. 4 RR 283: 10-19. If a belief system, standing alone, is ever any evidence of a need for protection, it is certainly not an *urgent* one in this case, because the only conceivable harm is far in the future, as the court of appeals correctly held. Op. at 7-8. Thus, there is no evidence that the Department satisfied its burden on the second prong as to these categories of children.

The same is also true as to pubescent-age girls. Even assuming that there was an urgent need for protection of these girls, there is no evidence that the Department considered any reasonable efforts, consistent with the circumstances and providing for the safety of the children, to eliminate or prevent their removal. *See* TEX. FAM. CODE § 262.201(b)(2).

There were reasonable alternatives to removal statutorily available to the Department, the most obvious of which was to remove the alleged perpetrators of the abuse. *See* TEX.

FAM. CODE § 262.1015(a) (“If the department determines after an investigation that child abuse has occurred and that the child would be protected in the child’s home by the removal of the alleged perpetrator of the abuse, the department shall file a petition for the removal of the alleged perpetrator from the residence of the child rather than attempt to remove the child from the residence.”). The statute specifically provides authority for the court to issue a temporary restraining order in this circumstance if the danger is “immediate.” *Id.* § 262.1015(b). Even if the Department did not know who the alleged perpetrators were, the Department could have required all men to leave each household. The Department’s own testimony established that the men at the ranch were cooperative and unarmed. 4 RR 162: 6-8; 284: 13-16.

The Department’s only attempt at explaining why it elected to remove over 400 children from the ranch—and from the care of their parents—instead of removing approximately 65 men from the ranch is Voss’s conclusory testimony that she knew of no way to “secure” the ranch. 5 RR 13: 6-14; 4 RR 14: 6-20. Such testimony amounts to no evidence that removal of the men was not a reasonable alternative. Moreover, the Department did not produce any evidence that it would have been unable to secure particular dwellings. 4 RR 162: 11-12 (ranch contained 19 individual buildings).

Finally, the Department’s own witness, child-psychiatrist Dr. Bruce Perry, testified that it was more detrimental to the children under age five to be removed from their parents than to be exposed to their parents’ lifestyle. 5 RR 156: 10-20. The trauma of removal would be magnified for children with developmental disabilities. 5 RR 163: 6-20. But

instead of considering reasonable alternatives, the Department chose to do what the Legislature intended to avoid, scattering hundreds of children—including infants and toddlers—throughout the state of Texas, splitting up siblings in the process.

C. The trial court abused its discretion in determining that the Department made reasonable efforts to return the children, but that there was a continuing danger in the home. (Third Prong)

The record contains no evidence supporting the third prong of the statute. TEX. FAM. CODE § 262.201(b)(3). This prong, like the other two, is mandatory. The Department has not made any reasonable effort to enable the children to return home, nor does it point to evidence of any efforts in its petition. When asked what steps the Department has taken to determine the safety of the ranch, Voss testified, “I don’t believe CPS has been back to the ranch after the removal of the children.” 4 RR 279: 13-17.

In addition, the Department has not shown that there is any continuing danger in the home. In determining whether there is a “substantial risk of a continuing danger,” the court may consider whether anyone in the household has abused a child. TEX. FAM. CODE § 262.201(b)(3), (c). The court of appeals correctly determined that there was no evidence that the ranch on which the children and their parents lived constitutes one “household.” Op. at 7-8 n.10. The term “household” is not defined in Chapter 262 of the Family Code; however, when the Legislature has defined it, it is defined as “a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.” TEX. FAM. CODE §§ 71.005, 263.001(a)(3). The Department argues that the ranch is one household because the children and adults “explained they are one big family, one

large community, and they had the same belief system.” Pet. at 13; 4 RR 258. Defining “household” so broadly belies the plain language of the term and common sense. The Department mischaracterizes this as the only evidence pertaining to the question of whether the entire ranch was one household. As the court of appeals notes, the Department’s own witnesses recognized that the ranch was comprised of 19 three-story structures and more than one home. 4 RR 270: 10-12; Op. at 7-8 n.10. The court of appeals did not discredit any testimony or engage in independent fact-finding when it concluded that the entire ranch is not one household; it only rejected the legal definition of “household” adopted by the Department’s own witness.

In sum, the Department did not present evidence that was legally sufficient to support *any* of the three prongs under the governing statute. Yet, to justify its continuing to retain possession of the children the Department was statutorily required to present evidence to support *all* three prongs. The court of appeals correctly held that the Department failed to do so, and this Court should decline to disturb that decision.

III. If the trial court’s orders are vacated, it can ensure their continued presence in the state while the case proceeds and the Department continues its investigation, and can ensure that the right children are returned to the right parents.

A. The trial court can address any flight-risk allegations as to individual families.

The Department argues that, if the children return to their parents, they will be likely to flee the state. There is no basis in the record for these allegations, and the Family Code provides the trial court with tools to address them. Moreover, the Department’s agreement

(discussed in the sur-reply in opposition to stay motion) to return home 12 of the Real Parties' children, subject to geographical and other restrictions, undermines their argument that *no* child can be returned safely because *all* families will flee the jurisdiction.

The practical effect of denying the Department's mandamus petition would be to allow the children to go home while the Department's lawsuits seeking managing conservatorship of the children remain pending, and while the Department continues its investigation under Chapter 261 of the Family Code. Because the Department's suit would remain pending in the trial court, it could issue any appropriate orders to protect the children's safety. TEX. FAM. CODE §105.001.

The Department's allegation that the parents, once reunited with their children, might flee the state is similarly addressed by the trial court's authority under the Family Code to enjoin the parents from removing their children from a specific geographical boundary. *See id.* §105.001(4). Moreover, there is no evidence that any of the specific families are flight risks. Once again, the Department paints with a broad brush, assuming that, because the parents share a religion and a way of life, each of them shares the same desire to flee the jurisdiction at the first opportunity. The Department makes this broad assertion while taking the conflicting action of agreeing to send 12 children home, with a geographical restriction as the Real Parties have suggested. As the Department's agreement demonstrates, each family deserves an individualized determination of whether it is a flight risk, and the trial court is equipped to do just that.

The Department makes much of the fact that FLDS communities exist in Arizona and Utah, to which the families could flee. If that were sufficient evidence of a risk of flight, then any family with relatives or friends out of state would be labeled a flight risk. Most importantly, “flight risk” is not a ground for maintaining the temporary removal of a child under §262.201. The Legislature evidently determined that continued forced separation of a child from his or her family was too blunt an instrument to address that specific risk, and put other statutory safeguards, detailed above, in place. Therefore, this allegation provides no basis for the continued removal of all of the children. Any concerns about particular families can be addressed by the trial court.

B. The parentage issue is without merit.

The Department argues that the trial court was presented no reliable evidence as to the names of children, the identity of persons in their homes, or the identity of children's biological parents. Petition at 12, 13. But the Department never raised doubts in the trial court about parentage as a ground for continuing custody of the children. The Department began using parentage as a justification for continuing custody only when a court decided that the children should be returned. And, in any event, proving parentage is not the parents' burden under the statute.

Under § 262.201, the Department must justify its continued possession of a child by satisfying the statutory requirements described above; a parent has no burden to prove why the child should be returned, or to whom he should be returned. TEX. FAM. CODE § 262.201(b). Failure to present evidence as to parentage neither relieves the Department of

its burden under § 262.201(b) nor prevents the return of a child to his home if that burden is not met.

The Department also argues that it cannot return the children, and that the court of appeals was wrong in ordering it to do so because it has “no one to return the vast majority of these children to.” Relator’s Petition for Writ of Mandamus at 13. The Department does not need proof of parentage to return children. It knows who the parents are. The Department has been treating specific parents and children as family units from day one—requiring visitation, and informing parents what specific actions were required of them to be reunited with their children. The Department even agreed to return 12 children to their parents, without DNA results.

Moreover, even if the Department’s professed confusion has any credence at all, it cannot justify failure to return all of the children. If there are particular concerns about any specific child, that would be a matter for the trial court to address as part of its continuing jurisdiction over the cases and parties. Simply put, the Department should not be allowed to go into a home, take children from that home, and then claim that they cannot return the children because they do not know to whom to return them.

PRAYER

This Court should deny the petition for writ of mandamus.

Respectfully submitted,

Amy Warr
State Bar No. 00795708
Douglas W. Alexander
State Bar No. 00992350
ALEXANDER DUBOSE
JONES & TOWNSEND LLP
515 Congress Ave., Suite 1720
Austin, Texas 78701
Telephone: (512) 482-9300
Telecopier: (512) 482-9303

Robert W. Doggett
State Bar No. 05945650
Julie M. Balovich
State Bar No. 24036182
Amanda J. Chisholm
State Bar No. 24040484
Texas RioGrande Legal Aid
4920 N. IH-35
Austin, Texas 78751
Telephone: (512) 374-2725
Telecopier: (512) 447-3940

COUNSEL FOR REAL PARTIES IN
INTEREST

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition for Writ of Mandamus was served upon the following counsel of record via the method indicated below, on this the 29th day of May, 2008.

Duke Hooten
P.O. Box 149030
MC: Y-934
Austin, Texas 78714

Via U.S. Mail and Facsimile

Michael Shulman
P.O. Box 149030
MC: Y-934
Austin, Texas 78714

Via U.S. Mail and Facsimile

*Counsel for Relator Texas Department
of Family and Protective Services*

Honorable Barbara Walther
51st Judicial District Court
County Courthouse
112 West Beauregard
San Angelo, Texas 76903

Via U.S. Mail and Facsimile

Respondent in Court of Appeals

Third Court of Appeals
P.O. Box 12547
Austin, Texas 78711

Via U.S. Mail

Respondent in Supreme Court

Amy Warr