

No. 08-0391

IN THE SUPREME COURT OF TEXAS

**IN RE TEXAS DEPARTMENT OF
FAMILY AND PROTECTIVE SERVICES, RELATOR**

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

BRIEF OF AMICUS CURIAE

To The Honorable Justices of the Supreme Court:

Barbara J. Elias-Perciful files this Brief of Amicus Curiae in letter format in support of the Petition for Mandamus filed by the Texas Department of Family and Protective Services (the “Department”) and in support would show the following:

I. INTEREST OF AMICUS CURIAE

Amicus has been an attorney for twenty-four years, specializing in child abuse law and representing abused children as their guardian/attorney ad litem in child protection cases for the last sixteen years. Amicus is the incoming Chair of the Texas State Bar Committee on Child Abuse and Neglect and has served on that Committee for thirteen years. Amicus is the Director of Texas Lawyers for Children, which identifies best practices for handling child abuse and neglect cases and disseminates this information to judges and attorneys statewide, and which provides training and legal materials to those judges and attorneys. Amicus is also the co-founder and president of Texas Loves Children, Inc., a non-profit organization with the mission of improving case outcomes for

abused and neglected children. This brief is submitted by Amicus in her individual capacity and not on behalf of the organizations she leads.

Amicus is motivated to write this brief by a desire to see that the law is properly applied to protect the children in this case. Moreover, the law in this field is important to the future well-being of Amicus' child clients as well. The Third Court of Appeals, however, has so seriously departed from the legal standards for mandamus proceedings and those in the Texas Family Code that other children will be left unprotected in light of the appellate court's shocking precedent to completely substitute its judgment for the trial court's judgment.

II. INTRODUCTION

This case involves the systematic rape¹ of minor children – conduct that is institutionalized and euphemistically called “spiritual marriage.” That label, however, cannot change the fact that the conduct exposed by the testimony in the 14-day hearing in the lower court is child sexual abuse as a matter of law. Texas Family Code § 261.001 defines “abuse” as:

- (E) sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of a young child or children under Section 21.02, Penal Code, indecency with a child under Section 22.11, 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.

Tex. Fam. Code § 261.001 (E), (F). It is particularly troubling that the Third Court of Appeals cites and then chooses to ignore “evidence that twenty females had become pregnant between the ages of thirteen and seventeen . . .” and evidence “that the five [female children] identified as having become pregnant between the ages of fifteen and

¹ The statutory term in Penal Code § 22.011 is “sexual assault,” but this offense is more commonly known as “statutory rape.”

seventeen were victims or potential victims of sexual or other physical abuse” Memorandum Opinion of the Texas Court of Appeals, Third District, at Austin, Case No. 03-08-00235-CV, filed May 22, 2008 (the “Memorandum Opinion”) at page 5. Adult men impregnating minor children is sexual abuse per se, and mothers “who fail to make a reasonable effort to prevent sexual conduct harmful to a child” are equally culpable under the law despite innocent looks and prairie dresses. 261.001 (F).

III. THE THIRD COURT OF APPEALS HAS ERRED IN GRANTING MANDAMUS IN THIS CASE BECAUSE IT HAS APPLIED INCORRECT LEGAL STANDARDS

The Department’s Petition for Writ of Mandamus before this Court does a very thorough job of recounting the numerous legal errors (which do not need repeating in full) made by the Third Court of Appeals. These include, among others, applying the legal standard for a direct appeal rather than a mandamus proceeding and using the wrong burden of proof for a removal hearing under Family Code § 262.201. Consequently, the appellate court time and again continuously reviews the evidence, weighs it anew, and substitutes its judgment for the trial court’s in flagrant violation of the standard for determining a mandamus proceeding.

For example, the appellate court completely substitutes its judgment for the trial court’s judgment concerning the undisputed testimony that the children and adults at the Yearning for Zion Ranch “explained that they are one big family, one large community, and they have the same belief system.” 4 RR 258. By ignoring that evidence, the appellate court then discounts Family Code § 262.201(D), which provides:

In determining whether there is a continuing danger to the physical health or safety of the child, the court may consider whether the household, to which the child would be returned, includes a person who: . . . (2) has sexually abused another child.

Despite extensive evidence of sexual abuse of certain children by adult males in the “household,” the appellate court erroneously concludes that there was no danger to the other children. The purpose of this provision in the Family Code, however, is to protect other children in the household from possible sexual abuse once a child there has been sexually abused. In its wisdom, the Legislature recognized that sexual abuse of one child constitutes danger to other children in the household. Analogous case law pertaining to termination of parental rights on grounds of endangerment is instructive. For over twenty years, the law has been well established that for endangerment of a child to be sufficient to terminate a parents’ rights, “it is not necessary that the conduct be directed at the child or that the child actually suffers injury.” *Tex. Dept. of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Nonetheless, the appellate court erroneously concludes there was no evidence of danger to the children.

IV. RETURNING THE CHILDREN HOME AT THIS TIME WOULD ELIMINATE THE DEPARTMENT’S ABILITY TO PROTECT THEM

The media has provided extensive coverage of the pain to all involved and the trauma children suffer when they are removed from their home. Removal, however, is the lesser of two evils when the alternative is a continuing danger of sexual abuse. Typically, there is no media coverage of the horrific acts sexual predators commit against children. Amicus dares to say that if the media showed the actual events of adult males demanding sex with eleven year old girls, there would be no one questioning the graphic danger of returning these children to their home at this time.

The Department needs time to complete the process of identifying which children belong to which parents through DNA testing. Only then can the Department work individually with each family to determine who is willing and able to provide their

children with a safe environment, free from sexual abuse. Otherwise, the Court may be sending the children to live with sexual predators. To return the children now will send a message that sexual abuse of young girls is not a serious matter. It will also eliminate the parents' incentive to make the difficult changes necessary to ensure the safety of their children. For many, this will mean having to make a choice to leave behind a lifestyle that included sexual abuse of young girls, training girls to accept abuse, and training boys to be perpetrators. More importantly, as the Department has effectively established, the evidence shows a serious flight risk for these children.

As a child protection case, this case is very different from a custody matter in a divorce case. As the Department has explained, if the trial court's order is vacated, the Department will no longer be temporary managing conservator and will have no legal power to act. Similarly, returning the children home, even if the Department were to retain temporary managing conservatorship, would essentially end the case. The Department would lose all practical ability to oversee what is happening between the parents and the children and would in all likelihood nonsuit the case. The Department generally only gets once chance to protect children. It is important that the Court err on the side of caution and allow the Department to take the steps necessary to protect these children.

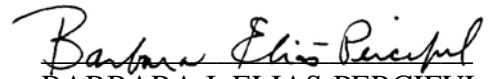
V. CONCLUSION

There are no easy answers in child protection cases – only hard choices that require all to seek the best interest of the children. Although, removal is traumatic, the Legislature has determined that child abuse is worse, so there are times that children must be removed from their parents until the Department has had a chance to guide the parents

in trying to remedy the problems that led to the abuse and danger. That is what needs to happen in this case, as painful as it may be. Removal is the first step down the path to a safer life for the children, where, hopefully, their parents resolve the issues that led to the abuse or danger and allow the family to be reunified at an appropriate time.

Removal is like the painful surgery that is necessary before healing can take place. It can be the best and only chance to protect the child and is the best chance to reunify the family in a healthy way. Amicus urges the Court to grant the Department's Petition for Mandamus and Motion for Emergency Relief.

Respectfully submitted,


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AMICUS CURIAE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument, via facsimile, was served upon the following counsel of record on this the 29th day of May, 2008.

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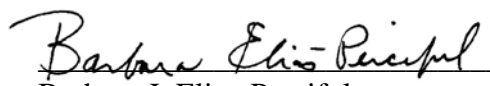
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