

No. 08-0403

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IN THE  
SUPREME COURT OF TEXAS

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IN RE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE  
SERVICES

RELATOR

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RESPONSE TO MOTION FOR EMERGENCY RELIEF

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Original Proceeding From Cause No. 03-08-00298-CV  
in the Third Court of Appeals, Austin, Texas

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To the Honorable Supreme Court of Texas:

This motion, brought before the Court by the Texas Department of Family and Protective Services (“Department”), arises out of the same underlying proceeding as the Department’s previous motion for emergency relief filed in *In Re Steed*, No. 08-0391. The Real Parties In Interest in that case have already filed a Response, in opposition to the Department’s motion. The Real Parties in Interest in this case would add that it is now apparent from review of the Department’s motions that neither the emergency relief nor mandamus is merited as the Department’s Motion and Petition rest precariously on (1) an incorrect and outdated recitation of the modern mandamus standard,<sup>1</sup> (2) an assumption that evidence of a general belief system may be offered by the Department in lieu of the particularized evidence of physical harm that the law demands where the Department lacks the proof demanded by law after 14 days of state custody,<sup>2</sup> and, relatedly, (3) an assumption that the burden may be shifted to parents to disprove their own unfitness where the Department’s investigation has not advanced beyond the stage of generalized allegations that existed at the outset.<sup>3</sup> Any of these three bases justify denial of the Department’s Motion and its Petition for Mandamus.

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<sup>1</sup> Mandamus will clearly issue to correct an error in child custody matters where appeal is not expressly authorized. *In re Texas Dep’t of Family Protective Services*, 210 S.W.3d 609 (Tex. 2006); *In re Mata*, 212 S.W.3d 597, 603-04 (Tex. App. – Austin 2006) (no pet.). Likewise, mandamus is available not only to redress an abuse of discretion, but to correct an error of law as the trial court has no “discretion in determining what the law is or applying the law to the facts.” *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *see also In re Prudential*, 148 S.W.3d 124, 136 (Tex. 2004).

<sup>2</sup> TEXAS FAM. CODE § 262.201.

<sup>3</sup> “[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).

The Department also claims that no court will have the power to issue orders to protect the children if the lower court's opinion stands, implying that its investigation will suddenly cease and the children would be left unprotected if the Department later discovers actual, competent evidence of tangible harm. *See* Motion for Emergency Relief at ¶15. To the contrary, the Texas Family Code provides various means by which the Department can, and indeed *should*, protect children after a 14-day hearing.<sup>4</sup> If the court of appeal's decision is upheld, the Department will no doubt continue its investigation with the full force of court orders readily available.

Given the late stage of the filings in this matter and in view of the fact that the Department's proffered reasons in support of its requested stay are essentially the same in both cases, the Real Parties in Interest will simply agree with, and incorporate by reference, the arguments in opposition offered by the real parties in interest in the *Steed* case rather than delay disposition further.

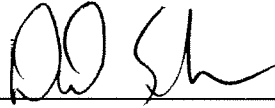
Respectfully submitted,

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<sup>4</sup> The Department routinely investigates suspected child abuse without removing the child from the home as the Family Code empowers it to do. *See* TEX. FAM. CODE §§ 261.301-.316. If anyone interferes with the investigation by not allowing access to the child, the Department may obtain a court order to allow for interviews or examinations of the child. TEX. FAM. CODE § 261.303(b), (c). Moreover, if a parent fails to cooperate with the investigation, the Department may seek assistance from law enforcement and have a summons issued to locate any missing person. TEX. FAM. CODE § 261.3031.

If a parent or other caregiver relocates a child, temporarily or permanently, without notifying the Department or conceals the child, that caregiver commits an offense. TEX. FAM. CODE § 261.3032. Finally, if the Department fears that the caregivers will remove a child that is subject to an investigation from the state it may seek a temporary restraining order from a district court without out regard to the normal venue rules of continuing jurisdiction over the child in Chapter 155. *Tex. Fam. Code* § 261.306.

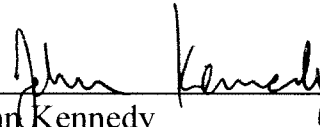
If, during that investigation, the Department believes removal is necessary, it may file a petition to do so under Chapter 262. *Tex. Fam. Code* § 261.302(d).



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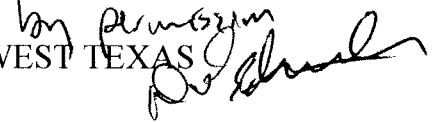
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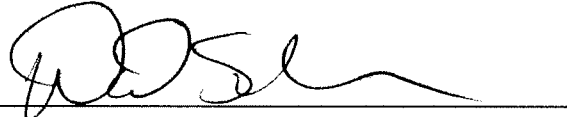
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ATTORNEYS FOR REAL PARTIES IN  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on counsel for the Texas Department of Family and Protective Services via United States Certified Mail, Return Receipt Requested, on May 29, 2008, by mail and electronic mail.

A handwritten signature in black ink, appearing to read 'D. Schenck', written over a horizontal line.

David J. Schenck