No. _____

IN THE COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

In re Ashley Pardo and Daniel Pardo, individually and
as next friends for KDP, a minor,

Relators

PETITION FOR WRIT OF MANDAMUS

EMERGENCY HEARING REQUESTED

From Kaufman County District Court
Kaufman County, Texas
Hon. Mike Chitty, 422nd District Judge
Cause No. 102717-CC

Respectfully Submitted:

Scheef & Stone, LLP
James A. Pikl
State Bar No. 16008850
jim.pikl@solidcounsel.com
2601 Network Blvd., Suite 102
Frisco, Texas 75034
(214) 472-2100
Fax (214) 472-2150

ATTORNEYS FOR RELATORS

ORAL ARGUMENT REQUESTED

No. _____

IN THE COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

In re Ashley Pardo and Daniel Pardo, individually and
as next friends for KDP, a minor,

Relators

IDENTITY OF PARTIES AND COUNSEL

Relators certify that the following is a complete list of the parties, their attorneys, and any other person who has any interest in the outcome of this case:

RELATORS:

Ashley Pardo
Daniel Pardo
KDP, a minor child

Counsel for Relators:

Scheef & Stone, LLP
James A. Pikl
Texas Bar No. 16008850
2601 Network Blvd., Suite 102
Frisco, Texas 75034
(214) 472-2100
Fax (214) 472-2150
jim.pikl@solidcounsel.com

Counsel in the trial court:

The Chris Branson Law Firm, PLLC
Chris Branson
Texas Bar No. 24009914
5380 West 34th Street, Suite 221
Houston, Texas 77092
(832) 794-3338
Fax (713) 290-1717
chris@bransonlegal.com

Julie Jacobson
State Bar No. 24064203
P.O. Box 992
Kennedale, Texas 76060
(817) 714-1545

Attorney Ad Litem for KDP:

Courtney Wortham
Texas Bar No. 24075677
114 North Adelaide Street
Terrell, Texas 75160
(972) 740-9571

RESPONDENT:

Hon. Mike Chitty
Judge, 422nd Judicial District Court
100 W. Mulberry St.
Kaufman, Texas 75142
(469) 376-4640

Counsel for Respondent:

None known to Relators

REAL PARTY IN INTEREST:

Texas Department of Family and Protective Services

Counsel for Real Party in Interest:

Clay Watkins
State Bar No. 24103982
Department of Family and Protective Services
100 W. Mulberry St.
2525 E. Highway 175, Suite E
Kaufman, Texas 75142
(972) 932-9100

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

U.S. Constitution

Texas Constitution

Statutes

Rules

STATEMENT OF THE CASE

1. **Nature of Proceeding**. The underlying proceeding is a Suit Affecting the Parent-Child Relationship (SAPCR) initiated by the Texas Department of Family & Protective Services (TDFPS) on June 20, 2019 seeking to obtain possession, care, custody, and control of a minor child, KDP, and terminating or severely limiting the parental rights of Relators.

2. **Judge, Court, and County.** Hon. Mike Chitty, 422nd Judicial District Court, Kaufman County, Texas.

3. **Respondent's Action.** Respondent entered a temporary order on July 24, 2019 removing KDP, a minor child, from the care, custody, and control of his parents and placed him in the custody of TDFPS.

4. **Habeas Corpus.** N/A

5. **Supreme Court.** N/A

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this mandamus proceeding. Texas Constitution, art. V, §6; Texas Government Code §22.221. There is no appeal available from the ruling under review relating to the possession order. *In re Justin M.*, 549 S.W.3d 330 (Tex.App.–Texarkana 2018, orig. proceeding)(mandamus is appropriate remedy to challenge temporary removal order). *Accord*: Texas Civil Practice & Remedies Code §51.014(a) (describing trial court orders subject to interlocutory appeal; rulings in this case not among those listed).

ISSUE PRESENTED

> Did the trial court abuse its discretion by not returning KDP to his parents and by entering the July 24, 2019 *Temporary Order Following Adversary Hearing* when no evidence before the court indicated the minor child was in danger, was at any risk of harm, had been abused or was being abused in any way, or that remaining with his parents would pose any threat of future harm, danger, or injury to the minor child's mental or physical well-being?

ABBREVIATIONS

KDP	The minor child of concern in the case
CPS	Child Protective Services, a division of Texas Department of Family and Protective Services
TDFPS	Texas Department of Family and Protective Services
REC__	Record (page number)
Order	*Temporary Order Following Adversary Hearing* entered July 24, 2019; APPENDIX, section A

RULINGS RELEVANT TO THIS PETITION

The following rulings found in the Order are improper and should be corrected by this Court via emergency mandamus because they violate the statutory parental rights of the Pardos and infringe on the general Constitutional rights of parents according to the United States and Texas Supreme Courts. Most of the "findings" appear to be nothing more than boilerplate recitation of statutory language, wholly untethered to the facts and evidence in this case.[1]

Order ¶	**Improper Rulings**
4.1	that there was unexplained "danger" to the physical health or safety of KDP caused by an act or failure to act by the Pardo parents
	that for KDP to remain in his home is contrary to KDP's welfare
	that there is an urgent need for protection of KDP by the state
	that efforts were made to eliminate or prevent removal of KDP from his home
	that efforts have been made to enable KDP to return home
	that there is any substantial risk of a continuing danger to KDP if he is returned home
	that either Ashley or Daniel Pardo has ever been involved in family violence, other than Ashley being a ***victim*** of such violence[2]

[1] The subject Order was submitted to the court by TDFPS after Pardo's counsel objected to various provisions (including the gag order) and without a hearing so those objections could be considered by the trial court before entry.

[2] REC 023, 198. All family violence was perpetrated by Chad Patrick Gannon, not Ashley.

6.1 and 6.2	that standard possession guidelines under Texas state law and the U.S. Constitution are somehow not in KDP's best interest
9.1	that the Pardos submit to mandatory, non-confidential psychological or psychiatric evaluation as a "condition" to return of their child[3]
10.2.1 and 10.2.5	ordering the Pardos to simply accept and follow, without the ability to obtain second or further medical opinions, and allowing KDP to be subjected to the advice or treatment plans proposed by the very doctors who have a conflict of interest in that they were responsible for helping secure KDP's removal from his home by CPS, and potentially by CMC doctor Anderson, whom the Pardos fired for his neglect of KDP[4]
10.2.2	ordering the Pardos to provide confidential social history "and any other information the Department requires" because such commands are open-ended and unrestricted in any way
11.1	ordering the Pardos to not engage in their First Amendment rights to speak about KDP or the case; this constitutes illegal prior restraint[5]

The Order also contains no restrictions on TDFPS as to their care or treatment of KDP, including any restrictions on clothing, education, religious matters, diet, or where they can house KDP, what medical or other treatment may be administered based on their

---

[3] The non-confidential nature of this required evaluation is particularly concerning in that the trial court is essentially "waiving" what is otherwise a privileged paradigm protected by the physician-patient privilege under Texas Rules of Evidence 509 and 510. The only possible "exception," found at TRE 510(d)(4), does not apply because the court did not impose appropriate safeguards against unauthorized disclosure.

[4] At the time the Pardos fired Dr. Anderson, they had full legal authority to determine KDP's medical treatment including selecting his doctors. There has never been a hearing on Dr. Anderson's competency, so the Pardos' decision to fire him must be given legal force and effect unless and until the decision to fire Anderson has been adjudicated, which it has not. By putting Anderson back in charge of KDP's medical care, the trial court essentially overturned the Pardos' legal authority regarding KDP's care without any evidence that their decision was improper.

[5] This part of the Order is much different from the trial court's verbal rulings made on July 2, 2019, which only sought to prevent "media postings about a four year old child...regarding her client, your child." REC 289-290

approval to do so, or whether the Pardos have any remaining rights to question or weigh in on any further care or treatment decisions for KDP.

STATEMENT OF FACTS

Procedural History

1. On June 20, 2019, in what is best described as a "boilerplate" petition asserting virtually every possible ground for removal known to Texas law (in the "alternative" of course), TDFPS petitioned the trial court for custody of KDP.[6] That same day, without a hearing and ex parte, the trial court entered its *Order for Protection of a Child in an Emergency and Notice of Hearing* (hereafter the June 20 Order), which allowed TDFPS to take immediate custody of KDP.[7]

2. KDP was taken from his parents by TDFPS on June 20, 2019, without their consent.

3. The June 20 Order also set an adversary hearing 12 days later, on July 2, 2019, at which time the parties were notified to attend and present their evidence to determine if the temporary removal of KDP should continue.

4. At the July 2 adversary hearing, the following facts were established by sworn testimony and admissible evidence submitted by Tabitha Sims (CPS investigator); Dr.

---

[6] REC 001-017. CPS even refers to such a pleading as a "global pleading seeking alternatives," meaning when they file it, they know it does not reflect the actual case facts and does not contain only the relief being requested, but instead recites facts and seeks relief (including permanent custody) that CPS knows are incorrect. REC 250-251. This pleading tactic, apparently common with TDFPS, presents serious due-process concerns in every case.

[7] The June 20, 2019 *Order for Protection of a Child in an Emergency and Notice of Hearing* was signed by Hon. Tracy Gray, Judge, Kaufman County Court at Law. See REC 32-37

Suzanne Dakil (reporter); Chris Hoffmeyer (CASA volunteer); Erica Larry (CPS investigation supervisor); and Daniel Pardo and Ashley Pardo (parents of KDP).

KDP-Related Facts

5. Relators are the natural parents of KDP, a minor child. From birth until June 20, 2019, KDP had been in the care and custody of his parents.

6. KDP's developmental issues surfaced early in his life, and his parents engaged physicians to determine why this was so.[8] Dr. Dakil testified testified that KDP is only "behind" in development related to his speech.[9]

7. KDP is developing more slowly than typical milestones in pediatric development, but his delayed development has been diagnosed by physicians, not KDP's parents.[10]

8. KDP was diagnosed with autism by two physicians, Dr. Naz (developmental pediatrician) and Dr. Evans, and not any "self-diagnosis" by KDP's parents.[11]

9. KDP's parents have never had any concerns with advice they have received from physicians, and the only time they questioned such advice was when they were advised that KDP should have a 12-week, on-site feeding study which they could not do logistically and could not financially afford.[12] KDP's parents are, and have always been, open to any suggested alternatives to the feeding study that can be made to work

---

[8] REC 109-110

[9] REC 169-170

[10] REC 108-109

[11] REC 112-113

[12] REC 61-62

for their family situation.[13]

10. KDP had installed a NG feeding tube on the advice of his physician. This tube snakes down a patient's throat through their nose; it is not surgically implanted.

11. The "G" feeding tube that seems of so much concern to CPS, but has never been implanted, was recommended by a dietician,[14] KDP's primary care physician (pediatrician Jacobs), a neurologist (Brunstrom-Hernandez), two gastrointestinal physicians (Channa and Anderson), and a pediatric surgeon (Diesen).[15] The G tube was therefore not the idea of KDP's parents who, since KDP was three years old, have been trying to get him to eat solid foods in a regular manner.[16]

12. The only time KDP's parents terminated the care of any physician seeking KDP was when Dr. Anderson failed or refused to visit with KDP for several days while KDP was inpatient at Children's Hospital, and gave as his explanation for why no such visits were undertaken: because KDP was "sick" (i.e., neglect of patient).[17] Anderson was replaced with another doctor in Anderson's same practice clinic.[18]

---

[13] REC 62

[14] REC 59 (Mr. Pardo could not recall the dietician's name)

[15] REC 92, 96, 107

[16] REC 90-92, 121-122

[17] REC 74-75. The correct legal response for a parent's failure to cooperate is found in Texas Family Code §§261.303 and .304.

Even Dr. Dakil admitted not seeing a patient for three days while the patient is in the hospital is potentially grounds to terminate a physician's employment. REC 159.

[18] REC 95

13. KDP has no problem with mobility in the Pardo home, and the CPS affidavit saying KDP is constantly pushed around his home in a wheelchair is false testimony.[19]

14. The wheelchair used by KDP was prescribed by two separate physicians, Dr. Evans and Dr. Brunstrom-Hernandez, and was only used on days when KDP experienced long hours walking that tired him out.[20]

15. The Pardos have not profited financially in any way from KDP's various medical issues.[21]

16. When the judge asked Ms. Pardo if she would allow the doctors at Children's Hospital to guide and direct KDP's medical needs, she readily agreed she would, and would follow medical advice as she had always done in the past.[22]

Dr. Dakil

17. The physician, Dr. Dakil, who swore out the affidavit that CPS interpreted as alleging child neglect, had no first-hand knowledge of the circumstances she swore were true, but relied solely on medical records she had allegedly reviewed[23] and admittedly-

---

[19] REC 92

[20] REC 78, 89-90

[21] REC 99-100

[22] REC 194-195. This was a wholly-inappropriate request at that time since no evidence had been adduced at the hearing suggesting that Ms. Pardo could not decide for herself when, where, or how to have her children medically treated. It is referenced here to prove Ms. Pardo has concern only for the welfare of her children, even to the exclusion of her own rights.

[23] REC 131-132

unfounded speculation of what the Pardos might do in the future.[24]

18. Dr. Dakil expressed concerns only about communications with the Pardos, not about KDP's past or present medical care.[25] This is important because Dr. Dakil's report was the sole basis for CPS taking custody of KDP.[26]

19. Dr. Dakil testified that the only reason she referred KDP to CPS was because she erroneously thought it was "possible" that his parents might somehow trick another facility into giving Drake a G feeding tube and she wanted to prevent this.[27] However, Dr. Dakil admitted there was no history of KDP's parents doing such things.[28]

20. Dr. Dakil testified several times in court that there was no "emergency" situation involving KDP that suggested he be taken from his parents' custody, and admitted her concerns were purely speculative.[29] Indeed, Dr. Dakil never recommended that KDP

---

[24] REC 188, 190, 192-193

[25] REC 187-188

[26] REC 201-203. CPS never even spoke to the Pardos before seeking court intervention. REC 202. Interestingly, CPS "interpreted" several concerns into Dr. Dakil's report that Dr. Dakil herself testified she does not have.

[27] REC 177-178

[28] REC 178.
There are two types of feeding tubes at issue here: the NG (or nasogastric) and the G (gastric). The NG tube is inserted through the nose into the duodenum or stomach, is only mildly intrusive, and requires no surgery. The G tube is inserted through the abdominal wall directly into the stomach and requires surgery; it is much more intrusive. KDP has only ever had the NG tube (installed in May 2019; REC 134-135), but never a G tube.

[29] REC 177-178. *Accord*: REC 84-85: CPS never told KDP's parents of any "emergency" and Dr. Dakil admits, REC 178, that her "concerns" about possible future medical care lack any supporting evidence. In this country, we don't take children from
(continued...)

be removed from his parents' custody, nor is there any evidence that any other physician or health care professional ever recommended that such action be taken.

21. Dr. Dakil's concerns that KDP's physicians were getting their information about KDP from KDP's parents is the form in which such information is "[a]lmost exclusively" obtained about 1-3 year old children, per Dr. Dakil. How this form/source of information gathering could be concerning is therefore difficult to understand.[30]

22. During cross-examination, Dr. Dakil admitted her diagnosis of "medical child abuse" was completely unfounded because one-half of the information she claims is required for such a diagnosis (input from the parents) is not within her knowledge.[31]

23. Dr. Dakil admitted she only reviewed part of KDP's medical records, and didn't even see Dr. Evan's letter of autism diagnosis.[32] Dr. Dakil also admitted that the records she reviewed had no requests for second opinions being requested by KDP's parents regarding KDP's eating issues; she admitted that seeking numerous second, third, etc.

---

[29](...continued)
their parents based on unsubstantiated gut feelings, even those of well-meaning but uninformed physicians.

[30] REC 136. Dr. Dakil also described this "almost exclusive" method of doctors getting information about toddlers from their parents as "unfortunate" without saying why it would be unfortunate. REC 162.

[31] REC 153 (she then caught herself and changed her diagnosis (REC 152: "I made a diagnosis of medical child abuse") to something else called a "functioning diagnosis" for which additional information – information she does not have – is ***required***). See REC 144.

[32] REC 160-161

opinions can be a hallmark of someone trying to portray their child as "sick."[33]

24. Dr. Dakil also admitted that KDP's parents only got second opinions from four physicians before they allowed KDP to have brain surgery.[34]

25. Dr. Dakil was not part of the decision by CPS to remove KDP from his parents.

26. Dr. Dakil did not know of any "emergency" that supposedly required that removal other than a purely-speculative, unfounded "risk" that KDP's parents might seek medical care for KDP that Dr. Dakil believes he may not need.[35]

27. Ultimately, Dr. Dakil testified that her only immediate concern for KDP was her unfounded speculation that his parents might take him to another doctor and have a G tube surgically implanted that Dr. Dakil – who is not a gastroenterologist or internist – believes may not be appropriate.[36] In other words, the sole medical "concern" in this case is by a physician who is not qualified to opine on a G tube, speculating that KDP's parents might run to another doctor and get the procedure done, even though she has absolutely no evidence to support such a "concern" and wouldn't know if such a procedure was appropriate or not.[37]

28. Dakil testified that she did not speak to KDP's parents before calling CPS to confirm

---

[33] REC 166

[34] REC 146-147

[35] REC 176-179

[36] REC 188
Dr. Dakil is a child abuse pediatrician. REC 129. Why she feels herself qualified to second-guess what *qualified* professionals might advise is unexplained in the record.

[37] REC190, 192-193

facts, but admits she should have done so.[38]

29. Dr. Dakil's original request to CPS was for the agency to set up a meeting with KDP's parents on June 10, 2019 to discuss the situation. However, no one ever informed KDP's parents that any such meeting was scheduled, so naturally they did not show up for it.[39]

30. Dr. Dakil testified that not only was she surprised by KDP being removed from his parents, but that her concerns would be best addressed by the parents attending KDP's medical appointments to discuss his care, and she does not believe that course of action is possible with KDP in CPS custody. Thus, CPS taking custody of KDP was not done pursuant to, but was directly ***contrary*** to, Dr. Dakil's medical advice.

CPS

31. CPS testified that the failure to attend the June 10, 2019 meeting, which KDP's parents were never informed about, was the sole reason CPS deemed the situation was an "emergency" necessitating immediate action.[40]

32. CPS testified they never informed KDP's parents about any June 10, 2019 meeting, and in fact canceled that June 10 meeting supposedly because a family advocate was unavailable.[41] The June 10 meeting was then rescheduled for June 18, but that meeting

---

[38] REC 142

[39] REC 224; 238-239

[40] REC 220-229

[41] REC 64

also did not occur because the Pardos' attorney asked what allegations were being made against them before any such meetings were scheduled, and CPS refused to provide them.[42]

33. CPS admitted they had several less-intrusive options available to them to deal with KDP's situation short of removing him from his parents' custody.[43] Indeed, CPS never testified to any reason why they sought to remove KDP from his parents other than alleged failure to cooperate with CPS.[44]Tabitha Sim, investigator for CPS, testified that family reunification is the primary goal for CPS in situations like this one.[45]

34. Ms. Sims also testified that her recommendation to remove KDP from his parents' custody was based solely on Dr. Dakil's admittedly-unfounded "concerns" about future medical treatments that his parents might have him undergo.[46]

35. Ms. Sims likewise testified that she did not give any information to the Pardos about maybe having a family member obtain temporary custody of KDP while further

---

[42] REC 64-65. This request for information was made by the attorney identified as the Pardo's counsel, in accordance with the federal Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §5106a (b)(2)(B)(xviii), which requires the State to have in place provisions or procedures to advise individuals subject to a child abuse or neglect investigation of the complaints or allegations made against him or her ***at the time of the initial contact***. No such allegations were given to the Pardos at the time of initial contact. Also, according to the Office of the Administration of Children and Families, requiring a person under investigation to have a "face to face" meeting to discuss the allegations being made after the initial contact is a violation of CAPTA.

[43] REC 258

[44] REC 203, 212-213

[45] REC 201

[46] REC 205

investigations occurred, even though this is required under Texas State law.[47]

36. Ms. Sims did a good job of answering leading, boilerplate questions in her direct examination about the reasons for the actions CPS has taken, but she was short on any details as to ***why*** KDP was actually taken from his parents other than the Pardos' "failure to cooperate" with CPS.[48]

37. Ms. Sims did not consider there to be any "emergency" situation requiring court intervention when the report first came in on June 6,[49] nor when she could not speak to the Pardos because they were not home on June 7,[50] nor when the Pardos failed to show up for the meeting on June 10,[51] nor when the Pardos failed to show up for the meeting on June 18.[52] It was only when Dr. Dakil provided her affidavit listing her admittedly-unfounded concerns that Sims thought an "emergency" situation was at hand on June 19 and filed this SAPCR on June 20.[53]

38. Even when Ms. Sims went to the Pardo home to take KDP, she knew that at least

---

[47] REC 201-202. *See* Texas Family Code §262.201(e)(requires the court to place with relatives, if possible, a possibility prevented by the improper actions of CPS and Sims).

[48] REC 199-228, esp. 213 and 228 ("The emergency consisted of the family not cooperating").

[49] REC 220

[50] REC 220-221

[51] REC221

[52] Id.

[53] REC 228, 231

some of the allegations in Dr. Dakil's affidavit were untrue, but that did not cause her to pause in her actions.[54]

39. Ms. Sims also testified that there were other less-intrusive options available to her in this situation short of removing KDP from his home, but she did not pursue any of those avenues even though Texas law expressly requires such lesser actions unless removal is founded on "immediate damger to the physical health or safety of the child."[55]

40. CPS supervisor Erica Larry – one of the supposed "checks" on CPS investigators going off the rails – also testified that the alleged "continuing danger" to KDP was "an indication that them feeling that [KDP] needed medical treatment that was not, you know, necessary or in the best interest at that time."[56] In other words, the non-physicians at CPS were taking the word of Dr. Dakil, who herself is not a gastroenterologist or internal medicine specialist, that certain medical/gastroenterology-related procedures involving internal medicine that is outside their areas of expertise, not ***were*** going to take place, but only ***might be contemplated*** by KDP's parents that these non-experts determined, somehow, were "not necessary." In fairness to Dr. Dakil, she never recommended that KDP be removed from his parents' custody, nor did she indicate in her affidavit that an

---

[54] REC 230 (KDP was not in leg braces or a wheelchair as alleged by Dr. Dakil in her affidavit).

[55] REC 231. Texas Family Code §262.102(a)(1), (2), and (3).

[56] REC 253

"emergency" situation existed; those conclusions were all made by CPS.[57]

41. When Ms. Larry, the CPS supervisor, was asked why removal of KDP from the Pardo's home was approved, this exchange occurred:[58]

> Q: So did it state anywhere in that [Dr. Dakil] affidavit or in your conversations with her that she wanted the child removed and put into state custody?
>
> A. Not that I recall.
>
> Q: So if, if she wasn't stating there was an emergency in the affidavit, and she wasn't asking for removal, how did that affidavit provide a reason for you to remove the child as an emergency?
>
> A: Because the affidavit referenced (sic) to the staff at Children's [Hospital] had prior discussions with mom and dad about seeking some additional observations of [KDP] in regards to the concerns they expressed, and mom and dad did not follow-up and they did not present [KDP] to the hospital for those additional testings.
>
> Q: So this was the Monday [June 10, 2019] admission that they didn't show up for?
>
> A Yes.
>
> Q: And that was a reason for emergency removal?
>
> A: Yes.

42. While "family reunification" was suggested as the ultimate goal of CPS regarding KDP and the Pardos, CPS has set itself up as the arbiter of the well-being of Texas children, created a situation where parents must do exactly as CPS orders and if not,

---

[57] REC 262

[58] REC 262

then they do not get their children back.[59] This is not how Texas law is structured, nor is such a process of "guilty until proven innocent" in keeping with the Constitutional due-process rights of Texas parents.

Importantly, there was <u>no evidence</u> supporting TDFPS allegations that:

A. KDP was in any continuing or potential danger to his health or safety caused by an act or failure to act of his parents, or KDP's continuing to remain with his parents was contrary to his welfare or best interests;[60]

B. there was any urgent need to immediately remove KDP from his parents, or that reasonable efforts were made to eliminate or prevent KDP's removal;[61]

C. any reasonable efforts had been made to enable KDP to return home;[62]

D. there was any substantial risk of a continuing danger if KDP was returned home;[63]

---

[59] REC 252. Here, CPS insists that the Pardos undergo psychological evaluation, follow all recommendations from that evaluation, follow all the recommendations of doctors employed by Children's Medical Center (presumably without the right to seek second opinions), and provide a social history of their family as well as access to the other Pardo children. This request was adopted by the trial court. REC 286-288 (rulings from the bench).

This is exactly ***backwards*** of Constitutional strictures. The state in the form of CPS is basically requiring the Pardos to provide evidence that might be used against them on pain of losing their children to the state when the Pardos have not been adjudicated as being "unfit" parents by any court. This is directly contrary to the presumptions found in *Troxel*, and contrary to the Fifth Amendment to the U.S. Constitution, which provides that citizens need not testify or provide evidence that might potentially be used against them.

[60] Texas Family Code §262.201(g)(1).

[61] Tex.Fam.Code §262.201(g)(2).

[62] Tex.Fam.Code §262.201(g)(3).

[63] Tex.Fam.Code §262.201(g)(3).

E. KDP's parents had ever neglected or abused him in the past, or were creating or maintaining a dangerous environment in their home that was against KDP's best interests;

F. removing KDP from the custody of his parents was in his best interests, medically or otherwise;

G. reasonable efforts had been made by TDFPS to protect KDP without removing him from his parents' custody;

G. reasonable efforts had been made by TDFPS regarding alternatives to removal, such as court orders requiring disclosure of relevant information from the Pardos; or

H. relatives of Relators or KDP had been contacted and refused to take custody of KDP if the court required his removal from his parents.[64]

ARGUMENT

> Did the trial court abuse its discretion by not returning KDP to his parents and by entering the July 24, 2019 *Temporary Order Following Adversary Hearing* when no evidence before the court indicated the minor child was in danger, was at any risk of harm, had been abused or was being abused in any way, or that remaining with his parents would pose any threat of future harm, danger, or injury to the minor child's mental or physical well-being?

Summary of Argument

The law is clear that parents enjoy Constitutionally-protected rights to the possession, care, custody, and control of their minor children.[65] Even temporary and partial interference

---

[64] Tex.Fam.Code §262.201(e).

[65] *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000)(in *Troxel*, the interference found to be unconstitutional was both temporary and partial and the Supreme Court applied the (continued...)

in a parent's custody of his or her child has serious, Constitutional ramifications. *Id.* (and cases cited therein).

Texas law contains a strong presumption that fit parents act in the best interests of their children, and that appointing a parent as managing conservator is in the child's best interest.[66] This presumption may only be overcome by clear and convincing proof that the child is in some form of immediate danger of harm if he remains in his parent's custody.[67] This statutory and Constitutional presumption was not rebutted in this case by the evidence submitted, and thus the trial court abused its discretion in not returning KDP to his parents.

Mandamus Standards

Relators have no adequate remedy at law, and every day without custody of KDP represents a Constitutional, irreparable injury to his parents as a matter of law.[68]

Mandamus will issue when a trial court abuses its discretion. An abuse of discretion is defined as a ruling that is contrary to or ignores guiding rules and principles of law or is directly contrary to a statutory directive. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992)(orig. proceeding). Mandamus will also issue when a trial court's order is so arbitrary and capricious that it amounts to clear error. *Id.*

---

[65](...continued)
clear and convincing standard without comment).

[66] *In the Interests of F.E.N.*, 542 S.W.3d 752, 769 (Tex.App.–Houston [14th Dist.] 2018, rev. denied)(describing this presumption as "deeply embedded" in Texas law).

[67] Texas Family Code §§161.001, 263.307 ; *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex.1985); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex.1976).

[68] *Santosky v. Kramer*, 455 U.S. 745 (1982).

Finally, a trial court has no discretion in determining the law or in applying the law to the facts of the case, and the failure to analyze or apply the law correctly constitutes an abuse of discretion. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 612 (Tex. 2006)(orig. proceeding); *In re Thompson*, 330 S.W.3d 411, 417 (Tex. App.—Austin 2010, orig. proceeding).

Mandamus is appropriate as a remedy in a situation where a temporary order in a SAPCR case has resulted in a child being removed from his parents' custody by a government agency like CPS. *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 614 (Tex. 2008); *In re J.W.L.*, 291 S.W.3d 79 (Tex.App.–Fort Worth 2009, orig. proceeding).

Relevant Texas Family Law

Texas statutory law provides the guiding rules and principals applicable when a court is considering temporarily removing a child from his parents' custody.[69]

Texas Family Code §262.201(g) states in relevant part (emphasis added):

> (g) In a suit filed under Section 262.101 or 262.105, 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, including a danger that the child would be a victim of trafficking under Section 20A.02 or 20A.03, Penal Code, 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

[69] ***Permanent*** termination of parental rights falls under Tex.Fam. Code, Chapter 161.

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.

This multi-part statutory framework provides for and endeavors to fulfill the Constitutional presumption regarding fit parents, the "guiding rules and principles" applicable to this case, as well as the statutory directives (which are the "shall" provisions emphasized) regarding the court's legal obligation to return the child to his parents.

The trial court violated the statutory directives under §262.201 and abused his discretion in issuing its Order dated July 24, 2019 because there was no evidence that KDP was in any danger from remaining in the custody of his parents, no evidence that an emergency or "immediacy" existed, and no evidence that returning KDP to his parents created a substantial risk of continuing danger. As such, none of the three statutory findings made by the trial court was appropriate under the evidence.

Case Law

Similar situations have occurred in Texas in the past. In every situation even remotely similar to ours, the appellate courts have issued writs of mandamus to correct the abuse of discretion that has occurred.

Where evidence is legally and factually insufficient to support findings upon which an order of removal is based, an abuse of discretion occurs. *In re M.N.M.*, 524 S.W.3d 396,

404 (Tex.App.–Houston [14th Dist.] 2017, orig. proceeding)(court should focus on the issues of urgency and immediacy when deciding removal requests); *In re Allen*, 359 S.W.3d 284, 288 (Tex.App.–Texarkana 2012, orig. proceeding).

If each and every element of the statutory requirements for removing a child are not established by the evidence before the court, the trial court is ***required*** to return the child to the custody of his parents. *In re Pate*, 407 S.W.3d 416, 419 (Tex.App.–Houston [14th Dist.] 2013, orig. proceeding)(all elements must be supported by evidence); *In re Hughes,* 446 S.W.3d 859, 860 (Tex.App.–Texarkana 2014, orig. proceeding)(same). Those elements are:

1. imminent danger to the physical health or safety of the child caused by the act or failure to act of the person entitled to possession;

2. for the child to remain in the home is contrary to the child's best interests; and

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

In *In re Texas Department of Family and Protective Services*, 255 S.W.3d 613 (Tex.2008), the Supreme Court left in place a writ of mandamus issued by the Austin Court of Appeals (2008 WL 2132014) finding that the trial court abused its discretion by all three of the same errors occurring in this case, to wit: (1) the Department failed to establish imminent physical danger to the children would occur from remaining at home; (2) failed to establish any "urgent" need for protection; and (3) failed to make reasonable efforts to eliminate or prevent removal of the children. As here, mandamus was appropriate in that case because there was no proof justifying the removal, and the statute thus ***required*** the trial court to order the children be returned to their parents as a matter of law. Failure to follow

the law constitutes an abuse of discretion.

Application of Law to Facts in This Case

An appalling lack of evidence permeates the record in this case. But the law has also been entirely ignored on another basis: it is not the law that fit parents, for the sin of refusing to cooperate with the government in providing personal, family information on demand, can have their children removed from them "just in case" something might happen in the future that the state is not agreeable with. If that were the standard, every child in every family, no matter how healthy the child or his parents, would be at perpetual risk that the state would, through non-expert employees, based solely on speculation and conjecture, swoop in and take their children.

This risk is not paranoid delusion, as this case amply demonstrates. Literally nothing about the Pardo home or KDP's parents' care for him is suspicious or endangering in any way, and no witnesses testified that it is. The Pardos have three children (two of them older than KDP with no parenting-based issues), and KDP has been seen by trained, expert physicians who themselves do not always agree on what treatment KDP should have for his maladies. As all good parents do, the Pardos are trying their best to listen and learn from these doctors how best to treat their son. Critically, it is undisputed that every action the Pardos have taken up to this point regarding KDP's medical treatment ***was recommended by physicians!***

Yet, CPS thought itself justified—based on an affidavit of a pediatrician who had never examined or treated the child, who is not trained in the particular medical discipline

at issue sufficiently to opine on what is or is not "appropriate" treatment for KDP, and who did not suggest any "emergency" existed and did not recommend forced removal of the child from his home—to swoop in because of what "might happen" in the future, completely unsupported by anything in the past even remotely suggesting their imagined scenario might occur. Even if the Pardos were contemplating KDP getting a G tube, who is CPS or a non-expert physician to opine that such medical treatment is not "appropriate"? The chutzpah of such arrogance shocks the conscience.

Actually, "inappropriateness of care" is not CPS's justification for snatching KDP, "failure to cooperate" is. Undoubtedly, when abuse is occurring, CPS should step in to preserve the status quo until a calm evaluation can be made. But here, no such abuse is occurring or even alleged, and no calm evaluation was performed or even attempted, so there is no legal basis for the state to be involved in the Pardo's lives at all.

Here, the only thing CPS relies on in support for taking KDP from his parents is a doctor's affidavit that does not describe abuse but only a vague, suspected "potential" of KDP receiving some form of medical care in the future which the affiant is not qualified to opine on. Adding to that we have CPS employees upset that the Pardos were not willing to simply lay out for their perusal detailed information about the Pardo's family life without any basis given for doing so.

Indeed, the doctor CPS relied upon, Dr. Dakil, is not professionally qualified to know if KDP needs a G tube inserted or not; she is not a gastroenterologist or an internist, she is only a child abuse pediatrician. The evidence does not stop there, but actually includes

evidence that the entire idea of the G tube was suggested by *qualified* physicians who had actually *examined* KDP and made their recommendations based on their expertise and examination of the facts.

And regarding the present physical condition of KDP, the evidence showed anything but abuse. In fact, it showed him to be a vivacious, "very, very average," normal 4-year-old little boy without any signs of past or ongoing abuse—medical or otherwise. REC 144, 254-258.

Because the trial court lacked ***any*** evidence, much less "sufficient evidence to satisfy a person of ordinary prudence and caution that there was danger to the physical health or safety of the child" from his parents, the trial court was required by statute to return KDP to his parents. Texas law is clear: if a court orders the removal of a child from his fit parents' home by a government entity without substantial proof that the child is at risk of imminent harm, mandamus will issue to correct the trial court's error.

Here, the trial court ignored the statutory presumption, and violated his statutory obligations, when he removed KDP from his parents when there was no evidence that KDP was in any immediate danger or risk of harm if he remained in his parents' custody, and no efforts (much less reasonable efforts) were made to return him to his parents. This failure to follow controlling law and principles constitutes an abuse of discretion.

There was also substantial evidence—some of it from the TDFPS's own witnesses—that there was no "emergency," that KDP was not in any immediate danger or risk of harm, that KDP's well-being was not being adversely affected by his parents' actions

or inactions, and that it would be in KDP's best interests if he remained with his parents.

Despite clear law and overwhelming facts in the record indicating that TDFPS's petition was groundless, the trial court nevertheless entered the July 24 Order removing KDP from his parents' custody. This Court should issue a writ of mandamus ordering the trial court to vacate its July 24 Order and order the return of KDP to his parents custody and control immediately without restrictions of any kind being placed on the Pardos' care and custody of KDP.

Conclusion

CPS walks a tight rope: if they act too quickly, they risk action before any real harm is occurring. If they act too late, they risk allowing a child to be injured when they might have been able to prevent it. No one is saying CPS workers have an easy job.

Trial courts also walk a difficult line. We give trial judges a lot of discretion in making these types of decisions. But that discretion is not unlimited; it is cabined by statutory criteria and procedures trial courts are duty-bound to follow.

CPS and trial courts must be held to proper standards of investigation and evidence before they infringe the Constitutional rights of fit parents to possession of their children. But here, obedience to such standards is not apparent from any angle.

In this particular case, CPS got the cart at least two steps before the horse. CPS did not have any evidence that KDP had been neglected or harmed in the past, and the only thing CPS considered before removing KDP from his parents was an un-investigated affidavit by Dr. Dakil in which the doctor did not recommend removal of KDP from his parents, and did

not have anything other than suspicion that any harm might occur in the future, and alleged "failure to cooperate" by parents who have no legal obligation to cooperate, who were acting on advice of medical and legal counsel, and who have a now-fully-realized fear that when the state gets involved in family matters, even fit parents can be subjected to a myriad of unconstitutional, irrational, arbitrary, unfounded, and intrusive interference in their rights as parents.

The trial court is supposed to be the gatekeeper to ensure that actions taken by CPS conform to Texas Constitutional and statutory law, and the trial court utterly failed to perform that vital function. It appears from the record that the trial court merely accepted the request of CPS, which was itself unsupported, and ordered KDP removed from his home in contravention of clear statutory guidance requiring him to return KDP to his parents in the absence of clear and convincing (or even preponderance) "substantial evidence" of any immediate risk of harm to KDP from remaining at home.[70]

PRAYER

Relators ask this Court to issue a writ of mandamus directing the trial court to vacate its order dated July 24, 2019, require that CPS return care, custody, and control of KDP to his parents immediately, and require the trial court to lift all restrictions on that care, custody, and control unless and until the State comes forward with substantial evidence that such an

---

[70] In the appropriate case, it may be necessary to argue whether Texas Family Code §101.007's clear and convincing evidence standard must apply to any interference with parental rights under the Constitution, not just permanent termination. See statutes cited in *Troxel*, 530 U.S. at 69-70. But here, even using a preponderance standard, the trial court missed the mark.

action is proper.

Relators also pray for such other and further relief as is just.

Respectfully Submitted:

/s/ James A. Pikl
State Bar No. 16008850
Scheef & Stone, LLP
2601 Network Blvd., Suite 102
Frisco, Texas 75034
(214) 472-2100
Fax (214) 472-2150
jim.pikl@solidcounsel.com

ATTORNEYS FOR RELATORS

CERTIFICATIONS

TRAP 52.3(j), 52.3(k)(1)(A), and 52.7(a)

My name is James A. Pikl. I am over the age of 18, and I am fully competent to execute this Certification. I am counsel for Relators in this case. I am the person filing the Petition.

I have reviewed the foregoing Petition and concluded that every factual statement in the Petition is supported by competent evidence included in the Appendix or Record.

The Appendix and Record contain a true and correct copy of every document that is material to the relator's claim for relief and that was filed in the underlying proceeding.

I certify that the July 24, 2019 Order filed with the Appendix is a true and correct copy of the trial court's order showing the matters complained of.

Filed herewith as part of the Record is a properly authenticated transcript of the relevant testimony from the underlying proceeding, including any exhibits offered in evidence, as provided by the court reporter. I have added page numbers to the bottom right corner of each page of the Record for ease of reference and navigation.

TRAP 9.4(i)(2)(B)

I hereby certify that this Petition contains 7,163 words, and was written using WordPerfect X software, Century Schoolbook 13-point font, converted to Adobe Acrobat portable document format (PDF), and is word-searchable.

/s/ James A. Pikl

CERTIFICATE OF SERVICE

I certify that on August 2, 2011, I served by U.S. mail, postage pre-paid, a copy of this Petition for Writ of Mandamus, Appendix, and Record on the following persons:

a. **Attorney Ad Litem for KDP:** Courtney Wortham, 114 North Adelaide Street, Terrell, Texas 75160

b. **Respondent:** Hon. Mike Chitty, Judge, 422nd Judicial District Court,100 W. Mulberry St.,Kaufman, Texas 75142

c. **Attorney for Real Party in Interest:** Clay Watkins, Department of Family and Protective Services, 100 W. Mulberry St., 2525 E. Highway 175, Suite E, Kaufman, Texas 75142

/s/ James A. Pikl