No. 03-22-00107-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

GREG ABBOTT AND JAIME MASTERS, EACH IN THEIR OFFICIAL CAPACITY; AND TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

Appellants,

v.

JANE DOE AND JOHN DOE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF MARY DOE, A MINOR & DR. MEGAN MOONEY

Appellees.

On Appeal from the
353rd Judicial District Court, Travis County

RESPONSE IN OPPOSITION TO APPELLEES' EMERGENCY MOTION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General
State Bar No. 24076720

Counsel for Appellants

ORAL ARGUMENT REQUESTED

To the Honorable Third Court of Appeals:

Texas law recognizes that parents have the primary duty to care for their children. *Interest of N.G.*, 577 S.W.3d 230, 235 (Tex. 2019). If a parent violates that duty by abusing or neglecting a child, however, the State intervenes to protect the child, even to the point of terminating the parent-child relationship. *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014).

Appellees sought and obtained a TRO prohibiting the State from investigating Jane Doe's self-report of potential child abuse. The scope of the trial court's order is troubling standing alone: most everyone investigated for child abuse denies that any abuse occurred, and if a bare denial of wrongdoing warranted emergency relief barring the State even so much as investigating any relevant allegations, Texas would be unable to protect the State's vulnerable children. That is why Texas courts have long recognized that an investigation, standing alone, is not a judicially cognizable injury. This case underscores why: having reported herself to gin up a putative case, Doe neither believes she has committed child abuse nor has she any reason to believe she will be prosecuted for such. Yet a trial court provided her with emergency relief all the same.

That is one of the many reasons the trial court lacks jurisdiction in this case. Another is that the trial court implicitly denied the appellants' plea to the jurisdiction by granting emergency relief in the face of that plea. That grant of relief necessarily denied the plea to the jurisdiction, as a court cannot grant relief in a case over which it lacks jurisdiction. Appellants now appeal that denial. While appellees move to

dismiss the appeal and reinstate the trial court's order, both requests are foreclosed by longstanding precedent and should be denied.

BACKGROUND

Parents are the primary caregivers of their children. *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014). But parents have a duty coextensive with that right: to protect their children from any form of abuse. *T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 42-43 (Tex. App.—Fort Worth 2020); *see* Tex. Const. of 1845, art. IV, § 15. And the State, concomitantly, has a duty to prevent child abuse even by parents.

Child abuse is expressly defined in Section 261.001 of the Texas Family Code. It includes any act or omission that causes mental, emotional, or physical injury to a child that "results in observable and material impairment in the child's growth, development, or psychological functioning." Tex. Fam. Code § 261.001(1)(A)-(D). Sterilization can fall within that definition because it materially impairs a child's development—namely, his or her future procreative ability.

In recent years, some Texas parents have authorized doctors to treat their children with drugs that suppress a child's natural development consonant with their birth sex. Some have authorized surgeries that destroy their child's otherwise healthy sexual organs to modify a child's anatomy. Even the World Professional Association for Transgender Health counsels against such surgeries for children, as they increase mortality and morbidity in children to a degree that is not known to be offset by any persistent health benefit.

Concerned about the incidence of these often-dangerous medical interventions in situations where they are not medically necessary, the chair of the Texas House

General Investigating Committee asked for the Attorney General's legal opinion as to whether such interventions are or could constitute child abuse under Texas law. After reviewing the definition of child abuse in the Texas Family Code and the current state of scientific research in the field, the Attorney General concluded that some elective procedures may fall into up to four different longstanding categories of child abuse. Tex. Att'y Gen. Op. No. KP-0401, at 8.

To prevent such child abuse as quickly as possible, the Governor confirmed the Texas Department of Family and Protective Services (DFPS)'s authority to investigate allegations of abuse in the context of such gender-transition procedures, including, if necessary, by investigating any licensed medical facilities where such abuse occurs. He also reminded licensed professionals whose work brings them into direct contact with children that state law requires them to report any suspected child abuse or neglect to DFPS. *See* Tex. Family Code § 261.101.

Appellees John and Jane Doe are the parents of Mary Doe, a sixteen-year-old child who they allege has been treated with puberty blockers to suppress male sexual development. Jane Doe works for DFPS. The day after the Governor's letter to DFPS, she "self-reported" potential child abuse to her supervisor. DFPS followed its standard procedures following employee self-reports, which it is required to investigate, and it placed Jane Doe on paid leave for the duration of the investigation.

Appellee Megan Mooney is a licensed psychologist who counsels children with gender dysphoria, referring some of them for treatments and procedures that may fall within the Family Code's definition of child abuse. She disagrees with the Attorney General's assessment of the costs and benefits of elective sex-change

procedures and does not wish to report parents who authorize these procedures as child abuse perpetrators under any circumstances.

Last week, appellees moved the trial court for an order restraining DFPS from investigating allegations of child abuse involving sex-change procedures. Appellants filed a plea to the jurisdiction before the TRO hearing. Without ruling on the plea, the trial court granted the TRO on March 2. Appellants promptly filed this appeal of the trial court's denial of their plea, which has stayed the TRO and superseded the trial court's order. *See* Tex. Civ. Prac. & Rem. Code §§ 6.001(b), 51.014(b); Tex. R. App. P. 29.1(b). Appellees have moved to dismiss the appeal and reinstate the TRO.

Summary of the Argument

Appellees argue that the State[1] has sought an impermissible appeal of a TRO and therefore ask the Court to dismiss the appeal and to reinstate the TRO under Rule 29.3 of the Texas Rules of Appellate Procedure. But their argument is flawed in at least two ways. First, it ignores that this is an interlocutory appeal from the trial court's implicit denial of their jurisdictional plea. Second, it misunderstands the nature of Rule 29.3. Each flaw individually suffices to require the Court to deny the emergency relief appellees seek.

[1] For purposes of this filing, the "State" collectively includes the Governor, DFPS, and DFPS's Executive Director.

ARGUMENT

I. The State May Immediately Appeal the Trial Court's Implicit Denial of its Plea to the Jurisdiction.

A. This is not an appeal from a temporary restraining order.

Appellees' motion rests on the false premise that this appeal is of the trial court's grant of a TRO. Mot. at 1–3. It is not. On the contrary, the notice of appeal expressly states that the appeal arises "pursuant to Civil Practice and Remedies Code section 51.104(a)(8)." Ever since 1997, that section has allowed an immediate appeal of the grant or denial of a plea to the jurisdiction. Act of June 20, 1997, 75th Leg., R.S., ch. 1296, § 1, 1997 Tex. Gen. Laws 4936, 4937 (1997); *see also Texas A&M University System v. Koseoglu*, 223 S.W.3d 835, 845 (Tex. 2007). State officials sued in their official capacities are entitled to take such an appeal. *See Texas A&M Univ. Sys. v. Koseoglu*, 223 S.W.3d 835, 840-41 (Tex. 2007). The State has done so here.

B. The trial court's implicit denial of the State's plea to the jurisdiction is immediately appealable.

Appellees argue in the alternative that an interlocutory appeal is not available under section 51.104(a)(8) because the trial court did not expressly deny the State's plea in its order. "[T]here simply is no order, explicit or implicit, denying Defendants' plea to the jurisdiction for them to appeal," appellees say (at 7). In their view, the TRO's silence as to that plea means the trial court did not decide the issue.

But the Supreme Court says the opposite. In *Thomas v. Long*, 207 S.W.3d 334, 339-40 (Tex. 2006), the Court explained that an explicit order denying a plea to the jurisdiction is not necessary to permit an interlocutory appeal. *Id.* "Because a trial

court cannot reach the merits of a case without subject matter jurisdiction," the Court reasoned, "a trial court that rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack has implicitly denied the jurisdictional challenge." *Id.* That is so regardless of whether the trial court's order is explicitly denominated a denial of a plea to the jurisdiction. *See id.*; *Pacific Em'rs Ins. Co. v. Twelve Oaks Med. Ctr.*, No. 03-08-00059-CV, 2010 WL 1511753, at *1 (Tex. App.—Austin Apr. 16, 2010, no pet.) ("[A] trial court that rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack has implicitly denied the jurisdictional challenge.").

A party cannot show a likelihood of success on the merits—a prerequisite to a TRO—if the court lacks jurisdiction in the first place. Appellants' plea to the jurisdiction challenged the trial court's jurisdiction on the face of the pleadings. The issuance of a TRO necessarily implies a finding by the trial court that it likely has subject-matter jurisdiction, and that conclusion necessarily rejects the State's jurisdictional arguments. The State is therefore entitled to immediately appeal the denial of that plea.

The precedent appellees cite does not help their position. In *Bass v. Waller County Sub-Regional Planning Commission,* 514 S.W.3d 908 (Tex. App.—Austin 2017), this Court observed that a trial court may sometimes properly defer ruling on a plea to the jurisdiction until later in the case, but held that a trial court is presumed to have deferred such a decision only if it expressly says so. *Id.* at 913. And this Court recognized that trial court's silence as to a jurisdictional challenge is an implicit denial whenever the court issues any order that requires subject-matter jurisdiction.

Id. at 913-15. Indeed, there are circumstances where jurisdictional issues must be deferred: for example, where fact development is necessary to resolve a jurisdictionally dispositive question.[2] But reviewing courts must presume that a lower court addresses jurisdictional issues before that court proceeds to the merits and ultimately to relief, if any is appropriate. *See Thomas*, 207 S.W.3d at 339-40. It is appellees who must show otherwise, and they make no attempt to do so.[3]

In support of their theory that the trial court did not implicitly deny the State's plea to the jurisdiction, appellees direct the Court to two cases, neither of which is apposite. Appellees first rely on *West Travis County Public Utility Agency v. CCNG Development Co.*, 514 S.W.3d 770, 773 (Tex. App.—Austin 2017), where a trial court dismissed a case for want of prosecution. The plaintiff there moved for a new trial and to reinstate his case, and the state defendant pleaded to the jurisdiction on the theory that the case was moot. *Id.* On appeal, this Court considered whether a grant of a new trial and reinstatement of a case "*necessarily* constitutes an implicit denial of a pending jurisdictional challenge" when the trial court is silent as to that challenge. *Id.* at 774 (emphasis added). Appellees understand this Court to have held that such silence *never* signals such a denial. But that reading misunderstands *CCNG*

---

[2] No such development is necessary here, as the State's plea to the jurisdiction challenges plaintiffs' assertion of jurisdiction on the face of their pleadings.

[3] Insofar as this Court's precedent could be read to authorize a court to defer ruling on a jurisdictional issue while issuing temporary relief, it is in conflict with the Supreme Court's contrary holding. The Court need not reach that question here, however, because there is nothing in the record to indicate the trial court deferred ruling on the State's plea to the jurisdiction.

Development Co., where this Court merely declined to impose a universal rule, instead indicating that that a trial court's silence may or may not signal an implicit jurisdictional determination depending on other facts and context present in the record. *Id.* at 775-76.

Appellees are on no surer ground with *Fernandez v. Pimentel*, 360 S.W.3d 643 (Tex. App.—El Paso 2012, no pet.). There, youth baseballers and their parents were suspended from league games after a brawl. *Id.* at 644. They sought and obtained a TRO to restrain a defendant public baseball league director from imposing that suspension. The director pleaded to the jurisdiction and insisted at the temporary injunction hearing that the trial court must immediately rule on the jurisdictional challenge. *Id.* at 645. The court declined to do so, twice remarking on the record that "the Court has not made a finding on the jurisdiction issue." *Id.* Appellees read *Fernandez* to have been silent as to the jurisdictional challenge—but it was anything but, as the trial court in that case repeatedly noted. No such assertions appear in the record here to render *Fernandez* of any help to appellees.

C. The trial court's order is independently appealable in any event.

An order denominated a TRO can be appealed where its "force and effect . . . is indistinguishable from . . . a temporary injunction." *Lindsey v. State*, No. 01-20-00373-CV, 2021 WL 3868310, at *4 (Tex. App.—Houston [1st Dist.] Aug. 31, 2021, no pet.). That is the case when the order does anything beyond maintaining an uncontested status quo ante. *See id.*; *Glob. Nat. Res. v. Bear, Stearns & Co.*, 642 S.W.2d 852, 854 (Tex. App.—Dallas 1982, no writ); *cf. In re Tex. Nat. Res.*

Conservation Comm'n, 85 S.W.3d 201, 206 (Tex. 2002) (observing a TRO is treated as an appealable temporary injunction where it "alter[s] the status quo").

The status quo ante is "the last, actual, peaceable, non-contested status which preceded the pending controversy." *Clint ISD v. Marquez*, 487 S.W.3d 538, 556 (Tex. 2016); *accord Tex. Health & Human Services Comm'n v. Sacred Oak Med. Ctr. LLC*, No. 03-21-00136-CV, 2021 WL 2371356 (Tex. App.—Austin June 9, 2021, no pet.). Here, the status quo is that DFPS is permitted—indeed, obligated—to investigate allegations of child abuse and neglect. The trial court's order prevents DFPS from doing so. Ordering DFPS to cease an ongoing investigation—indeed, not to initiate any potential investigations which match pre-specified judicial criteria, whether or not yet made aware to the State—radically alters the status quo.

To the extent that appellees argue that the Attorney General's opinion and the Governor's letter changed the status quo, they are wrong. These clarified existing Texas law—nothing more. The Attorney General explained that under some circumstances the procedures at issue here—which the Attorney General concluded can, among other things, result in irreversibly sterilizing a child—*may* constitute child abuse as it is defined in the Texas Family Code. The Governor then confirmed DFPS's preexisting duty to investigate child abuse if it is alleged to arise in such a context, just as DFPS must investigate alleged child abuse in any context in which it arises. That is not a change in circumstances.

Though denominated a TRO, the trial court's order changed the status quo ante by preventing DFPS from pursuing a preexisting investigation into allegations of

child abuse and by prohibiting it from further similar investigations. That is an immediately appealable order.

II. Appellees are Not Entitled to Extraordinary Relief under Rule 29.3.

When Appellants filed their Section (a)(8) appeal, two consequences ensued by operation of law. First, all further proceedings in this case were stayed pending resolution of the jurisdictional appeal. Tex. Civ. Prac. & Rem. Code § 51.014(b); *Tex. Educ. Agency v. Houston Indep. Sch. Dist.*, 609 S.W.3d 569, 577 (Tex. App—Austin 2020) (per curiam). Second, the trial court's order granting Appellees a TRO was superseded pending a ruling on that appeal. Tex. Civ. Prac. & Rem. Code § 6.001(b).

This Court may issue a temporary order to override those defaults only if such an order is "necessary to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3. Appellees move this Court to exercise that discretion to reinstate the TRO. In their view, a failure to do so would cause them "immeasurable" harms that they fail to identify, let alone prove. That request misunderstands Rule 29.3 and should be denied.

The Texas Supreme Court has explained that Rule 29.3 "gives an appellate court great flexibility in preserving the status quo based on the unique facts and circumstances presented." *In re Geomet Recycling LLC*, 578 S.W.3d 82, 89 (Tex. 2019). Appellees never specify what status quo they wish to preserve, let alone how it will be irreversibly destroyed without immediate emergency relief. And, as explained above, the status quo ante is that DFPS is obligated to investigate alleged child abuse. A Rule 29.3 order prohibiting DFPS from conducting its investigation

into Appellee Jane Doe's self-report would not maintain the status quo—it would upend it.

Even if the status quo were that which existed before issuance of the Attorney General's opinion and the Governor's letter (which it is not), Appellees do not so much as hazard a guess as to (1) which rights would necessarily be imperiled (2) in the future absent the extraordinary reinstatement of the TRO. *See* Tex. R. App. P. 29.3. To be sure, Appellees assert they have suffered "stress, anxiety, and fear." Standing alone, however, those are not judicially cognizable injuries—nor do they possess a right to be free of stress, anxiety, or fear notwithstanding the State's obligation to investigate reports of potential child abuse. Anyone investigated for abusing or neglecting a child likely experiences these emotions; they are not, however, cognizable harms that can support extraordinary relief preventing such an investigation.

PRAYER

The Court should deny appellees' emergency motion and adjudicate this appeal under the usual procedures applicable to accelerated appeals.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)

/s/ Judd E. Stone

JUDD E. STONE II
Solicitor General
State Bar No. 24076720

Counsel for Appellants

Austin, Texas 78711-2548

Certificate of Service

On March 7, 2022, this document was served electronically on Paul Castillo, lead counsel for Appellees, via pcastillo@lambdalegal.org.

/s/ Judd E. Stone II
Judd E. Stone II

Certificate of Compliance

Microsoft Word reports that this brief contains 3912 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Judd E. Stone II
Judd E. Stone II