IN THE SUPREME COURT OF TEXAS

No. 21-0235

IN RE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

~ and ~

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JUSTICE LEHRMANN, dissenting to the denial of the petitions for writ of mandamus.

M.M. was less than three months old when a CT scan showed she had suffered one rib fracture, fractures involving multiple costochondral junctions,[1] and "suggested" fractures involving additional ribs. M.M. was also diagnosed with an injury to her uteropelvic junction—where the ureter connects to the kidney—which caused fluid buildup in her belly. A board-certified pediatrician specializing in child abuse pediatrics examined M.M., reviewed all her medical records, spoke to several of her treating physicians, and concluded that the injuries were

[1] The costochondral junctions are where the ribs join with the cartilage that holds them to the breastbone. *See Costochondritis*, WEBMD, webmd.com/pain-management/costochondritis (last updated June 16, 2020).

caused by nonaccidental trauma. However, M.M.'s parents, the primary caregivers with whom she lived when the injuries occurred, refused to believe it was possible that the injuries were caused intentionally, and neither parent could provide an explanation for the injuries. Accordingly, before M.M. was discharged from the hospital, the Department of Family and Protective Services sought and obtained an emergency removal order.

At the adversary hearing conducted just over three weeks later, the reasons for the Department's concerns that led to the removal had not changed: the child abuse pediatrician maintained that the injuries were nonaccidental and refuted testimony offered by the parents' expert to the contrary, and the parents continued to refuse to acknowledge that M.M.'s injuries could have been caused intentionally, provided no explanation for the injuries, and offered no alternative means to ensure the child's safety while the case was being investigated. While the Department could not yet definitively pinpoint who had caused the injuries, it maintained, with supporting evidence, that the injuries were intentionally caused. Yet the court of appeals held that the trial court abused its discretion in refusing to order M.M. returned to her parents because "reasonable efforts" had not been made "to enable [her] to return home." TEX. FAM. CODE § 262.201(g)(3).

The court of appeals' holding that a child must be returned to her parents under these circumstances sets an impossibly high bar for the Department and hamstrings trial courts' ability to protect children. Given M.M.'s young age and associated lack of verbal and motor skills, the fact that M.M.'s parents were the primary caregivers with whom she lived when she was injured, the evidence that the injuries were intentionally caused, each parent's inability to explain the injuries, and the parents' refusal to entertain the possibility that anyone (including the other

parent) had injured her intentionally, I fail to see how returning the child to either parent could be considered a reasonable option. Instead, the process is working exactly as it should: M.M. is in a safe environment with her paternal grandfather and step-grandmother while the case is being investigated and prepared for trial (which must occur within a statutorily required period of time) and by all accounts is doing very well; the parents are engaged in a service plan and have increasing amounts of supervised visitation with M.M.; and the trial court is continuing to monitor the progress of all involved. I would allow that process to continue until final trial and would hold that the court of appeals abused its discretion in disrupting it under these circumstances.

I

M.M. was born in early March 2020. During a video appointment with M.M.'s pediatrician on April 29, the pediatrician noticed a bruise on M.M.'s cheek and asked what happened. Mother did not know the cause but speculated that Father might have used his fingers on M.M.'s cheeks to push her lips open while he was feeding her. On the evening of May 19, M.M.'s grandmother noticed that M.M.'s belly was distended. The following day, May 20, Father took M.M. to a scheduled appointment with her pediatrician, who advised Father to immediately take her to the hospital.

An ultrasound conducted at the hospital showed fluid in M.M.'s belly, and during an exam to investigate the cause, the hospital discovered possible rib fractures. A "skeletal survey" performed on May 22 showed "a healing fracture of the posterior aspect of the right 11th rib" and noted that "[w]idening and irregularity of the anterior aspect of the right eighth, ninth and 10th ribs and the left 10th and 11th ribs are suspicious for healing fractures." A follow-up chest

CT scan performed the same day noted the following fractures and suggested fractures involving M.M.'s ribs:

> Multiple bilateral rib fractures are noted or suspected. There is a posterior right 11th rib fracture. Fractures involving the costochondral junctions are noted involving the right 7th, and bilateral 8th and 10th ribs. Suggested fractures involving the right 3rd, bilateral 6th and 9th ribs are also noted.

The hospital also later determined that "at least one cause" of the fluid buildup in M.M.'s belly was an injury to the uteropelvic junction—where the ureter connects to the kidney—causing urine to leak out of the ureter into her belly.

The Department became involved on May 22, when it received a referral alleging physical abuse of M.M. Tamara Kiser, a Department investigator, along with a special investigator and a detective, interviewed M.M.'s parents.[2] Kiser also spoke with M.M.'s grandparents and her pediatrician. According to Kiser, neither Mother nor Father was able to provide an explanation as to how M.M. had been injured. On May 23, after speaking with their attorney, the parents signed a safety plan under which they had to be supervised when caring for M.M.[3]

On June 4, the day before M.M. was released from the hospital, the Department filed a petition seeking emergency removal of M.M. *See* TEX. FAM. CODE § 262.101. At the emergency hearing that same day, Kiser testified about M.M.'s injuries and the parents' failure

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[2] According to Father, the special investigator and the detective told Father they believed he had intentionally caused M.M.'s injuries. Kiser disagreed with that characterization, though she was not present for a portion of the detective's interview.

[3] The parents testified that after signing the plan, they were not permitted to visit M.M. at all. Kiser explained that the Department did not oppose the supervised contact permitted under the safety plan but that because of COVID-19, the hospital allowed only one person in the room with M.M. at a time.

to explain those injuries. The trial court granted the request for emergency removal and ordered that M.M. be placed with her paternal grandfather and step-grandmother.

On June 30, the trial court commenced a three-day adversary hearing. *See id.* § 262.201(a) (requiring, in a suit filed under section 262.101 in which the child has not been returned to the parent, that a full adversary hearing be held within fourteen days after the governmental entity takes the child into its possession, unless the court grants an extension for certain permitted reasons).[4] The Department's position at the hearing was: M.M.'s injuries were the result of intentional trauma; the injuries occurred while Mother and Father were M.M.'s primary caregivers with whom the child lived; the parents refused to acknowledge the extent of the injuries and could not provide an explanation for them; and M.M. was in danger of further injury if returned to her parents. The parents' position was: the Department had no proof of when M.M. was injured or that either parent was responsible; the records revealed only one definitive rib fracture, which was most likely caused by M.M.'s difficult birth or a natural condition; and the medical records showed the injury to M.M.'s ureter most likely occurred after her admission to the hospital, possibly from a test the hospital conducted called a retro pyelogram.

Dr. Angela Bachim, a child abuse pediatrician who was called in to consult on M.M.'s case, testified at the hearing. Dr. Bachim had spoken to Father, reviewed M.M.'s medical records, consulted with several of her treating physicians, and conducted a physical exam of M.M. Dr. Bachim stated that M.M.'s rib fractures are "highly concerning for child abuse" and

[4] On June 18, the parties agreed to extend the temporary emergency order and begin the adversary hearing on June 30.

that Father provided her with no information that could explain them. She opined that the fractures were not caused during M.M.'s delivery based on the healing stages of the fractures. She also testified that she saw no signs of certain underlying conditions that could have affected M.M.'s bone formation and healing, such as osteogenesis imperfecta or metabolic bone disease, particular given that a repeat skeletal survey on June 11 showed no new abnormalities and that M.M.'s fractures were "pretty much healed." When asked about discrepancies between the initial skeletal survey and the CT scan as to the number of fractures, she explained that a CT scan "is a better mode of imaging." She also opined that a lack of bruising was not uncommon with rib fractures, particularly given that they were already healing when M.M. was treated. As to the injury to the uteropelvic junction, Dr. Bachim opined that it was caused either by "blunt force trauma" (to the abdomen or the back) or by "some sort of acceleration–deceleration force where the whole body is slammed against something and the — that quick acceleration and deceleration injures the kidney in that area." When asked whether other causes of the injury were possible or whether she was aware of any explanation that would support M.M.'s injuries being accidental, she replied, "No." She opined that M.M. was at risk for "further injury, increasing worse injury, and death" if she were returned to the environment in which the injuries occurred.

Dr. Gary Brock, a pediatric orthopedic surgeon who examined M.M. on June 25 and reviewed some of her pediatric and hospital records, also testified at the hearing. Dr. Brock opined that given the number and bilaterality of the rib fractures and the lack of bruising, the possibility that the fractures occurred during the birthing process "would be at the top of my differential diagnosis." He testified he would "have liked to have seen a Vitamin D panel" as well as calcium and phosphorus levels to investigate possible underlying conditions that affected

the healing process. When asked whether rib fractures inflicted during delivery would have been reflected in the birth records, he testified that it is "fairly common" for such fractures to be diagnosed "well after the birth history reflected nothing."

During Mother's testimony, she described a difficult delivery during which M.M. was "stuck in [the] birth canal" for four hours before the doctor ultimately conducted a vacuum-assisted delivery. She testified this "could have affected" M.M.'s chest, shoulders, and neck. However, she had no concerns after the birth that M.M. had suffered such injuries, and no doctors were monitoring M.M. out of concern for any such injuries. She offered no other evidence, such as hospital records or a history of symptoms, indicating that the injuries had occurred during the birthing process. When asked whether Mother believed M.M. had suffered any rib fractures, Mother stated, "I know the doctors believed there are rib fractures" and "I believe there needs to be more testing." She had no explanation for how any fractures or the kidney injury occurred, though she testified that she did not believe anyone would have hurt M.M. or caused her injuries and that she did not believe it was possible that the injuries were intentionally caused. She testified that if someone "proved" to her that Father had injured M.M., she would keep him away from M.M., but the Department had not taken that step.

Father testified that he did not know how M.M.'s cheek got bruised and did not think he had caused it. He was asked whether he believes M.M.'s ribs were fractured and responded that he didn't know. He also stated he does not believe M.M. suffered a kidney injury before May 20 and that he does not believe any of her injuries were caused by an intentional act. When asked whether he believed he needed to do anything "other than what you've been doing" to keep M.M. safe if she were returned to him, he replied, "No, sir." He testified that if he were given

evidence that Mother had injured M.M., he would protect the child and that the Department had not asked him to do so.

Kiser testified that the Department had sought removal because "we had a two-month old child with . . . physical injuries that no one could explain and we felt like she was not in a safe environment." When discussing efforts to avoid removal, Kiser agreed that "[t]here were no services that [she] could come up with that would have prevented [M.M.] from being removed under these circumstances" and that there was "an immediate and continuing danger" to M.M. if she were returned home. M.M.'s court-appointed special advocate similarly testified that it was in M.M.'s best interest to remain with her grandparents pending further investigation "because no one [yet] knows how her injuries occurred."

At the conclusion of the hearing on July 2, the trial court appointed the Department as M.M.'s temporary managing conservator and approved M.M.'s placement with her paternal grandfather. The court pronounced the following findings:

> The Court finds sufficient evidence to satisfy a person of ordinary prudence and caution that there was a danger to the physical health or safety of the child. The urgent need for protection required 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 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.

The trial court subsequently signed written temporary orders to that effect.

M.M.'s parents sought mandamus relief in the court of appeals. The court granted relief, concluding that the evidence does not support the trial court's finding that "reasonable efforts have been made to enable [M.M.] to return" to the parents' home under Family Code section 262.201(g)(3). Nos. 14-20-00703 & 14-20-00706, 2021 WL 865363, at *4–5 (Tex. App.—

Houston [14th Dist.] Mar. 9, 2021, orig. proceeding) (mem. op.). The court noted that the Department failed to take any steps "such as implementing a family service plan" or asking Father to move out of the house. *Id.* at *4.

II

Family Code section 262.201 provides in pertinent part that at the conclusion of a full adversary hearing following a child's emergency removal, the trial court:

> shall order the return of the child to the parent . . . 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, . . . 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.

TEX. FAM. CODE § 262.201(g).

Faced with the evidence that M.M.'s injuries were the result of nonaccidental trauma, the absence of an explanation for the injuries, the parents' denial of the possibility that the injuries were intentionally caused, and the parents' corresponding inability to demonstrate to the trial court that they could protect M.M. pending further investigation, I fail to see how "reasonable efforts" were not undertaken to enable M.M. to return home only three weeks after her release from the hospital. The Department gave the parents ample time to explain the injuries and to demonstrate concern for the child's ongoing safety by erring on the side of caution as the case

was being investigated. The parents note that they had complied with the Department's safety plan while M.M. was in the hospital, but that plan required their contact with M.M. to be supervised, which was not a viable option if she were returned to their home. The court of appeals opined that the Department could have implemented a service plan. However, as the Department notes, service plans are governed by a separate chapter of the Family Code and are due no later than forty-five days *after* the court renders a temporary order appointing the Department temporary managing conservator. *Id.* § 263.101. Moreover, in response to Kiser's testimony that another investigator was in the process of creating a service plan, Mother's counsel objected to the relevance of that testimony.

The court of appeals also opined that the Department could have offered to condition M.M.'s return on Father's moving out of the house. But that was not a viable option either. The Department's position was that it did not know who had injured M.M., so Father's moving out of the house would not address the concern about M.M.'s remaining in danger if returned to a primary caregiver. Further, although Mother testified that she was willing to keep Father away from M.M. if someone "proved" that he had injured her, Mother refused even to accept that M.M. had suffered fractured ribs, let alone the possibility that they or the ureter injury were intentionally caused. *See id.* § 262.201(g)(3) (requiring *reasonable* efforts to return the child home and a "substantial risk of continuing danger" if the child is returned).

The parents further contend that the Department made no effort to follow up on what they considered to be conflicting evidence in the medical records about the nature of M.M.'s injuries. Leaving aside the short timeframe between the removal and the adversary hearing, giving the Department little time to further investigate a complicated medical situation, the existence of

such conflicting evidence did not mandate M.M.'s return to her parents. The Department had been presented with significant evidence that M.M.'s injuries were intentionally caused, and Dr. Bachim disagreed with the alternative causes suggested by Dr. Brock and the parents' counsel at the adversary hearing. The trial court was entitled to credit Dr. Bachim's testimony on that front. *See In re Walton*, No. 11-16-00230-CV, 2017 WL 922418, at *2 (Tex. App.—Eastland Feb. 28, 2017, orig. proceeding) (mem. op.) (holding, in a mandamus proceeding involving a challenge to temporary orders in a modification proceeding, that the trial court has discretion to evaluate the weight to be assigned the evidence and the credibility of the witnesses); *see also In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) ("It is well established Texas law that an appellate court may not deal with disputed areas of fact in an original mandamus proceeding.").

In light of this evidence, I cannot conclude that the trial court abused its discretion in determining that "a person of ordinary prudence and caution" could find that there was a danger to M.M.'s physical safety caused by one or both parents; remaining in the home was contrary to M.M.'s welfare; the urgent need for protection required immediate removal and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent M.M.'s removal; and reasonable efforts were made to enable M.M. to return home, but a substantial risk of continuing danger existed. The absence of uncontroverted proof regarding M.M.'s injuries cannot be dispositive, particularly given the early stage of the proceedings and the interests at stake. While the Department did not know definitively at this early stage who caused the injuries, it did have evidence that the injuries were intentionally caused and that M.M.'s parents were her primary caregivers, and it was in the process of investigating the genesis of those serious injuries. The Department's burden at that point was not to prove its

entire case but to establish emergency removal grounds, which focus on the existence of "a continuing danger to the physical health or safety of the child" based on "sufficient evidence to satisfy a person of ordinary prudence and caution." TEX. FAM. CODE § 262.201(g), (h).[5]

Finally, in responding to the Department's petition for writ of mandamus in this Court, Mother attached transcripts of hearings held in October 2020, November 2020, and January 2021 indicating that the parents had been actively participating in their service plans, that the parenting coach had no concerns about their interactions with M.M., that family reunification remained the Department's goal, that the parents' access to M.M. had been expanded, and that they were "doing really well" with her. In my view, the hearings reflect that the system is working exactly as it should. The witnesses spoke positively about M.M.'s placement with her grandfather, the parents have increasing access to M.M. in a safe environment, and the trial court is continuing to monitor the progress of the case and all interested parties.

III

It is beyond question that a parent's right to the care, custody, and control of her children is one of constitutional magnitude. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1976) (describing parental rights as "essential," "a basic civil right," and "far more precious than property rights"). However, "[j]ust as it is imperative for courts to recognize the constitutional underpinnings of the parent–child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve

[5] By contrast, parental termination proceedings require clear and convincing evidence of both a statutory termination ground and the child's best interest. TEX. FAM. CODE § 161.001(b); *see also In re E.C.R.*, 402 S.W.3d 239, 240 (Tex. 2013) (noting that the heightened burden of proof in parental termination cases "protect[s] the parent's fundamental liberty interest in the companionship, care, custody, and management of her children").

that right." *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). Requiring the Department to essentially prove its entire case within three weeks of emergency removal in order to protect a subject child finds no support in the law and deprives trial courts of their ability to protect children while the case is under investigation. In this case, the trial court's temporary orders were supported by the evidence and correctly prioritized the child's safety and welfare, and the court of appeals abused its discretion in ordering the child to be returned to her parents' home. I would grant the Department's petitions for writ of mandamus, and I respectfully dissent to the Court's denial of the petitions.

Debra H. Lehrmann
Justice

OPINION DELIVERED: May 14, 2021