

2022 WL 4359561

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SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Austin.

Jaime MASTERS, in Her Official Capacity as
Commissioner of the Texas Department of Family
and Protective Services, and the Texas Department
of Family and Protective Services, Appellants

v.

Mirabel VOE, Individually and as Parent and
Next Friend of Antonio Voe, a Minor, and
Wanda Roe, Individually and as Parent and
Next Friend of Tommy Roe, a Minor, Appellees

NO. 03-22-00420-CV

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Publication Ordered September 20, 2022

**FROM THE 459TH DISTRICT COURT OF TRAVIS
COUNTY, NO. D-1-GN-22-002569, THE HONORABLE
AMY CLARK MEACHUM, JUDGE PRESIDING**

Attorneys and Law Firms

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Individually and as Parents and Next Friends of M.B., a
Minor, PFLAG, Inc.

Courtney Corbello, for Greg Abbott, in His Official Capacity
as Governor of the State of Texas.

Before Chief Justice Byrne, Justice Triana, and Justice Smith

ORDER

PER CURIAM

*1 After the trial court granted a temporary injunction in appellees' favor, appellants Jaime Masters, in Her Official Capacity as Commissioner of the Texas Department of Family and Protective Services, and the Texas Department of Family and Protective Services filed a notice of appeal, which superseded the trial court's temporary injunction by operation of law. *See* Tex. Civ. Prac. & Rem. Code § 6.001(a)-(b); Tex. R. App. P. 29.1(b). Appellees, Mirabel Voe, individually and as parent and next friend of Antonio Voe, a minor, and Wanda Roe, individually and as parent and next friend of Tommy Roe, a minor, then filed an emergency motion for temporary injunctive relief pursuant to Rule 29.3. In their motion, Voe and Roe asked the Court to grant temporary relief and reinstate the trial court's July 8, 2022 order granting their application for a temporary injunction. *See* Tex. R. App. P. 29.3. ("[T]he appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal "). To preserve the status quo while the Court considered the motion for temporary relief and sought a response from appellants, we temporarily reinstated the trial court's July 8, 2022 "Order Granting Plaintiffs Voes' and Roes' Applications for Temporary Injunction Against Jamie Masters, in Her Official Capacity as the Commissioner." Having considered the appellees' motion, appellants' response, appellees' reply, and other filings by the parties, for the reasons explained below, we now order that the trial court's temporary injunction remains reinstated throughout the pendency of this appeal.

This case arose after the Department announced on February 22, 2022, that it would comply with Governor Abbott's February 22, 2022 letter directing Masters and the Department to investigate certain gender-transitioning procedures as child abuse and to "follow Texas law as explained in [the] Attorney General opinion" released on February 21, 2022. The Department subsequently began investigations into the Voe and Roe families, who later filed the underlying suit against Masters and the Department. In their trial-court petition, Voe and Roe seek declaratory and injunctive relief, alleging improper rulemaking by the Department, Department actions contrary to the Department's

enabling statute, ultra vires actions by State actors, and interference with Voe's and Roe's constitutional rights.

The Texas Supreme Court has recognized that Rule 29.3 authorizes courts of appeals in some circumstances to reinstate a temporary injunction “ ‘to preserve the status quo and prevent irreparable harm’ to the parties during the pendency of the appeal, even if the temporary order has ‘the same practical effect as denying supersedeas of the trial court's injunction.’ ” *In re Abbott*, 645 S.W.3d 276, 282 (Tex. 2022) (orig. proceeding) (quoting *In re Texas Educ. Agency*, 619 S.W.3d 679, 680 (Tex. 2021) (orig. proceeding)). In its July 8, 2022 order granting the temporary injunction, the trial court enjoined Masters and the Department from enforcing a new rule “expanding the definition of ‘child abuse’ to presumptively treat the provision of gender-affirming medical care, including puberty blockers and hormone therapy, as necessitating an investigation” (“Department Rule”). The trial court concluded that Voe and Roe state a valid cause of action against Masters and the Department and have a probable right to the declaratory and permanent injunctive relief that they seek. The trial court found the Department Rule had been “adopted without following the necessary procedures under the [Administrative Procedures Act], is contrary to [the Department's] enabling statute, is beyond the authority provided to the Commissioner and [the Department], and is otherwise contrary to law, as alleged in Plaintiffs’ Petition.” The trial court further found “that an allegation about the provision of gender-affirming medical care, such as puberty blockers and hormone therapy, without more, was not investigated as child abuse by [the Department] until after February 22, 2022” and that the Department Rule “changed the *status quo* for transgender children and their families.”

*2 The trial court also found that unless Masters and the Department were immediately enjoined from enforcing the Department Rule against Voe and Roe, Voe and Roe would suffer probable, imminent, and irreparable injury in the interim:

Such injury, which cannot be remedied by an award of damages or other adequate remedy at law, includes, but is not limited to:

- being subjected to an unlawful and unwarranted child abuse investigation

- intrusion and interference with parental decision-making
- the deprivation or disruption of medically necessary care for the parents’ adolescent children
- the chilling of the exercise of the right of Texas parents to make medical decisions for their children relying upon the advice and recommendation of their health care providers acting consistent with prevailing medical guidelines
- intrusion into the relationship between patients and their health care providers
- gross invasions of privacy in the home and school, and the resulting trauma felt by parents, siblings, and other household members
- outing an adolescent as transgender
- adverse effects on grades and participation in school activities
- fear and anxiety associated with the threat of having a child removed from the home
- increased incidence of depression and risk of self-harm or suicide
- having to uproot their lives and their families to seek medically necessary care in another state
- being placed on the child abuse registry and the consequences that result therefrom
- and criminal prosecution and the threat thereof.

(Formatting altered.) Based on its conclusion that Voe and Roe had satisfied the requirements for a temporary injunction, the trial court enjoined and restrained Masters and the Department from implementing or enforcing the Department Rule and from implementing the Governor's directive and the Attorney General's opinion in the following manners:

- (1) investigating MIRABEL VOE or WANDA ROE, individually or as next friends of ANTONIO VOE or TOMMY ROE, for possible child abuse or neglect solely based on allegations that they have a minor child or are

a minor child who is gender transitioning or alleged to be receiving or being prescribed medical treatment for gender dysphoria, and

- (2) taking any actions, including investigatory or adverse actions, against Plaintiffs Voe and Roe and their minor children, with open investigations solely based on allegations that they have a child who is transgender, gender nonconforming, gender transitioning, or receiving or being prescribed medical treatment for gender dysphoria, except that [the Department] shall have the ability to administratively close or issue a “ruled out” disposition in any of these open investigations based on the information [the Department] has to date—if this action requires no additional contact with members of the Voe or Roe families.

The Texas Supreme Court recently upheld in part this Court's reinstatement in a different appeal of a similar temporary injunction, which we ordered pursuant to our Rule 29.3 authority. *See id.* at 283-84. In that case, the plaintiffs are a married couple who are the parents of a child diagnosed with gender dysphoria and a doctor who treats such children. *Id.* at 279. They sued Governor Abbott, Masters, and the Department (collectively “State Defendants”), challenging the Governor's letter directing compliance with the Attorney General's opinion and the Department's February 22, 2022 statement that it would follow the Governor's directive. *Id.* The trial court issued a temporary injunction restraining the defendants from, among other actions: “taking any actions against Plaintiffs based on the Governor's directive and [the Department] rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate”; investigating reports based solely on alleged child abuse “where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment”; and prosecuting or referring for prosecution such reports. *Id.* After this Court reinstated the trial court's injunction, the State Defendants sought mandamus relief seeking to vacate our order. *Id.* at 280. Although the supreme court granted mandamus relief in part, vacating the order as it applied to nonparties and the Governor, it denied mandamus relief to Masters and the Department as to the

order's application to enjoin those defendants from taking the prohibited actions against the plaintiffs. *Id.* at 284. In reaching its holding, the supreme court recognized our authority to preserve the status quo and prevent irreparable harm to the parties during the pendency of an appeal, and it noted that the State Defendants' argument to the supreme court did not focus on the circumstances of the plaintiffs' child. *Id.* at 283.

*3 In their motion for Rule 29.3 relief, Voe and Roe assert that Masters's and the Department's actions changed the status quo as it existed before February 22, 2022, and thus, that reinstating the temporary injunction is necessary to preserve the status quo that existed before the pending controversy. “In the context of injunctions, ... status quo means ‘the last, actual, peaceable, non-contested status which preceded the pending controversy.’ ” *Texas Educ. Agency v. Houston Indep. Sch. Dist.*, 609 S.W.3d 569, 572 (Tex. App.—Austin 2020, order), *mand. denied sub nom. In re Texas Educ. Agency*, 619 S.W.3d 679, 683-84 (Tex. 2021) (explaining that supersedeas of temporary injunction in underlying case would “have the contradictory effect of permitting the status quo to be altered, because if compliance with the injunction were not required,” the parties' status would change “from ‘the last, actual, peaceable non-contested status [that] preceded the pending controversy’ ” (quoting *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016))). Masters and the Department respond that ordering the Department to stop an ongoing investigation does not maintain the status quo because the status quo is that the Department is obligated to investigate allegations of child abuse and neglect. We agree that the Department has “the same discretion to investigate reports of child abuse that it had before issuance of OAG Opinion No. KP-0401 and the Governor's letter.” *In re Abbott*, 645 S.W.3d at 284. However, we conclude that here, similarly to the injunction at issue in *In re Abbott*, the trial court's injunction prohibits the Department from investigating and taking actions against Voe and Roe based *solely* on allegations that they have a minor child or are a minor child who is transgender, gender nonconforming, gender transitioning, or alleged to be receiving or being prescribed medical treatment for gender dysphoria. Thus, reinstating that injunction “temporarily reinstates [the Department's] policies as they were prior to the February 22 directive, leaving [the Department] free to screen and investigate reports based on its preexisting policies regarding medical abuse and neglect.” *Id.* at 286 (Lehrmann, J., concurring).

Voe and Roe also urge that reinstating the temporary injunction is necessary to protect their right to judicial review of the appellants' allegedly unlawful acts and to prevent irreparable harm. They argue that absent an injunction, the Department's Rule presents them with "an impossible choice—either they continue to be subjected to an unwarranted and invasive abuse investigation, or they do not provide prescribed medically necessary treatment to their transgender adolescents who need it for their gender dysphoria." Masters and the Department respond that Voe and Roe cannot demonstrate irreparable harm because the alleged harms are speculative and because an injunction "would perpetuate the *proven* risk of harm to their children." In support of their argument, they point to potential risks from the medical treatments prescribed for gender dysphoria, contending that there is a greater likelihood of irreparable harm from Voe's and Roe's children continuing with the medical treatment "that alter[s] them physically, mentally, and emotionally without [the Department] investigating claims that such treatment is not medically necessary."

Both parties presented evidence to the trial court in support of their competing irreparable-harm arguments. Voe and Roe testified that Antonio and Tommy have been diagnosed with gender dysphoria and that their medical providers have recommended counseling and have prescribed gender-affirming treatment. They also attested to serious and ongoing effects on their children's mental health from the Department Rule and the Department's investigations of their families. While Masters and the Department assert a number of potential side effects from specific procedures and medications that they argue can cause severe harm when given to children, they offered no evidence that supports their argument that there is a potential for severe irreparable harm to these specific children from not being investigated. *See id.* at 283 (noting that "none of the State's argument in this Court focuses on the circumstances of *this* child" (emphasis added)). While we need not and do not resolve the merits of the parties' arguments about the medical benefits and risks of gender-affirming treatment for purposes of determining whether the temporary injunction should remain in place during the pendency of this appeal, we do conclude that, on balance, Voe and Roe have shown a greater risk of irreparable

harm to themselves and to their children from a potentially unlawful investigation that intrudes upon and interferes with their right as parents to make medical decisions for their children, relying upon the advice and recommendation of their health-care providers. Voe and Roe have shown "compelling circumstances" that require the Court to keep the trial court's temporary injunction in place to preserve the parties' rights during the pendency of the appeal. *See Texas Health & Human Services Comm'n v. Sacred Oak Med. Ctr. LLC*, No. 03-21-00136-CV, 2021 WL 2371356, at *7 (Tex. App.—Austin June 9, 2021, order) (ordering reinstatement of temporary injunction allowing psychiatric hospital to reopen during appeal); *McNeely v. Watertight Endeavors, Inc.*, No. 03-18-00166-CV, 2018 WL 1576866, at *1 (Tex. App.—Austin Mar. 23, 2018, order) (per curiam) (reinstating temporary injunction to allow business to operate during appeal and citing *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 786 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1990, no writ) (requiring movant for Rule 29.3 relief to make a clear showing it is entitled to relief, including "compelling circumstances" establishing necessity for relief)).

*4 While there is some overlap between our authority to preserve the status quo and prevent irreparable harm and the requirements that a party must satisfy to establish its entitlement to a temporary injunction, we do not address the merits of the trial court's grant of the temporary injunction because to do so would be to prematurely decide this appeal without the benefit of full briefing from the parties. Instead, we conclude based on the record before us that reinstating the temporary injunction is necessary to preserve the parties' rights during the pendency of this appeal. *See* Tex. R. App. P. 29.3. Therefore, we order that the trial court's July 8, 2022 temporary injunction remains reinstated throughout the pendency of this appeal.

It is ordered on September 20, 2022.

All Citations

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