IN THE SUPREME COURT OF TEXAS

NO. 04-1043

IN RE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE O'NEILL, dissenting.

Two years ago, the court of appeals granted Joy Higdon (the children's mother) and Ruby Ludwig (the children's great-grandmother) mandamus relief, holding that the trial court was required to dismiss the Department's suit seeking termination of Higdon's parental rights because no final judgment was rendered within the time limit established by section 263.401 of the Family Code. We stayed that order, and presumably the children have remained in foster care pending the outcome of these proceedings. The Court now agrees that the trial court was required to dismiss the case, but holds that the court of appeals erred in granting mandamus relief because Higdon and Ludwig had an adequate remedy in the accelerated appeal afforded by section 263.405 of the Family Code. Neither the Department nor any of the real parties in interest raise this issue, perhaps because it is inconsistent with our mandamus jurisprudence. Because I believe that mandamus review is appropriate in this case, I respectfully dissent.

First, as the Court acknowledges, we have regularly granted mandamus relief in cases affecting child custody. *See*, *e.g.*, *Powell v. Stover*, 165 S.W.2d 322, 324 (Tex. 2005); *In re Forlenza*, 140 S.W.3d 373, 379 (Tex. 2004). Child-custody proceedings touch on constitutional interests of parents and critical issues affecting children's welfare. *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). In this sensitive context, we have afforded mandamus review even though an appeal may have been available. *Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex. 1994).

I agree with the Court that mandamus is generally not available to a party that has an adequate remedy by appeal. But we have said that the concept of "adequacy" is not inexorably fixed, and "rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue." *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004). In recent years, we have allowed mandamus review to protect interests of far less consequence than those at stake in this case. We have, for example, granted mandamus relief to a party wrongfully denied arbitration, *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992); a party seeking to enforce a forum-selection clause, *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004); a party seeking relief from overbroad discovery orders, *In re CSX Corp.*, 124 S.W.3d 149 (Tex. 2003); a party seeking to enforce a pre-trial jury waiver, *In re Prudential Ins. Co.*, 148 S.W.3d 124; and a party denied a legislative continuance under § 30.003 of the Texas Civil Practice and Remedies Code, *In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005). Yet when a child lingers in foster care while the legal process determines whether the parental relationship will be forever severed, the Court decides that an adequate appellate remedy precludes mandamus review. Under the circumstances this case presents, I disagree.

On the dates Higdon and Ludwig filed their mandamus petitions in the court of appeals, August 11 and 12, 2004, respectively, no appeal was then available because the trial court had not yet rendered a final judgment. I seriously doubt that the Court would question the propriety of mandamus relief if, for example, the trial court had denied Higdon and Ludwig's motion to dismiss and issued a six-month continuance. Further, although the trial court did enter a judgment terminating parental rights and appointing the Department the children's managing conservator on August 13th, after the mandamus petition was filed, the trial court had no power to render any judgment but dismissal under both the court of appeals' and this Court's construction of the Family Code. At this point in the proceedings, it is questionable whether Ludwig or Higdon will be able to appeal the trial court's judgment. *See* TEX. R. APP. P. 26.1(b) (notice of appeal in accelerated appeal must be filed within 20 days after the judgment or order is signed).

This Court has suggested that a party may be excused from pursuing an appellate remedy when a trial court acts with a "complete lack of authority" in a manner that adversely affects our legal system, or if it commits an error that is clear and simple to correct. *In re Prudential Ins. Co.*, 148 S.W.3d at 137. In this case, the Court agrees that the trial court lacked authority to do anything but dismiss the Department's action. The error was clear, and the solution straightforward — an order directing the trial court to dismiss the case. While the overall effect on the legal system of the trial court's failure to dismiss may not be widespread, the consequence to the family in this case is deep and potentially irremediable. If the avenue of appeal proves to be foreclosed in this case, the family will be permanently dissolved even though the path to review that Ludwig and Higdon chose

was entirely appropriate at the time. Under these circumstances, I would deny the Department's petition for writ of mandamus.

Harriet O'Neill
Justice

OPINION DELIVERED: December 15, 2006.