



HB 3331

Protecting the Rights of Families and Preventing Trauma to Children

by Andrew C. Brown, J.D.

Director

Purpose

House Bill 3331 clarifies statutory guidelines and thresholds that CPS and the courts rely upon for removing children and potentially seeking termination of parental rights. The statutory clarifications in this legislation are designed to avoid traumatizing children through unnecessary removal from their homes and ensure that the fundamental constitutional rights of children and parents are respected.

Background

The Texas Family Code tasks the Department of Family and Protective Services with protecting children from abuse and neglect. The department, in collaboration with the judicial system, carries out this responsibility through investigating allegations of child maltreatment, removing children who have suffered abuse or neglect from their homes, ordering families to participate in services to address the issues that caused the abuse or neglect, and, in some cases, terminating parental rights. Although there is a stated priority for preventing children from entering foster care, in recent years a growing number of Texas children have been removed from their homes—often without strong justification and in violation of fundamental constitutional rights.

Both the United States Supreme Court and the Texas Supreme Court have long held that the parent-child relationship is a fundamental right that the government may not interfere with except in very limited circumstances. For nearly a century, the Supreme Court has consistently applied strict scrutiny, our nation's highest standard of judicial review, to government intervention into the private realm of the family. This precedent recognizes that the family is an institution that predates and exists independently of the state. It also recognizes that government intervention into any part of society is never an innocuous event.

State child welfare interventions are inherently traumatic, leaving long-lasting psychological impacts on children and families who are subjected to them. Research has shown

that the mere removal of a child into foster care is a trauma that can cause measurable, lasting harm to the child. Children who have any contact with the child welfare system are more likely to experience negative behavioral and developmental impacts regardless of such factors as the length of time in foster care, the child's age, or the number of foster care placements. It is, therefore, critical that lawmakers enact clear statutory guidelines and limitations to ensure that child welfare interventions are narrowly tailored to achieve the compelling government interest of protecting children from immediate risk of harm.

Since FY 2009, removals by DFPS have increased by nearly 71 percent. In FY 2018 alone, more than 20,000 children were removed from their families—the highest number of removals in well over a decade. The vast majority of these were for “neglectful supervision,” a broad and ill-defined category focused on the risk that abuse, neglect, or some other harm may occur. Of the 74,167 confirmed child maltreatment cases during FY 2018, 73 percent were categorized as neglectful supervision. By comparison, 11 percent of confirmed cases that year were for physical abuse and 9 percent were for sexual abuse.

The growing number of children removed from their families by the state should drive lawmakers to take a critical look at the laws and regulations governing interventions by the Department of Family and Protective Services. HB 3331 advances Texas' efforts to implement much-needed reforms to its child welfare system by addressing vague standards and, in some cases, unconstitutional violations of due process in current statute that deny children and families their fundamental rights.

Analysis

HB 3331 is a comprehensive child welfare reform package that increases accountability for government interventions into the private realm of family and provides more

opportunities for children in the foster care system to achieve permanency.

Sections 1, 3, and 8 of the bill address vagueness in the statutory definition of neglect that can lead to unwarranted investigations and removals by CPS. These sections of the bill prevent DFPS from taking possession of a child or seeking termination of parental rights based solely on evidence that the parents allowed the child to engage in certain age-appropriate, independent activities. These sections of the bill list examples of such activities and point to the definition of “age-appropriate normalcy activities” in Section 264.001 for purposes of application.

Section 2 applies Chapter 10 of the Texas Civil Practice and Remedies Code as well as Rule 13 of the Texas Rules of Civil Procedure to petitions filed by DFPS seeking the termination of the parent-child relationship. These two standards require that any civil pleading or motion include only those allegations or factual contentions that have, or likely will have, evidentiary support. This change was recommended by the CPS Pleading Practice Workgroup commissioned during the 85th Legislature to address the problem of DFPS pleading grounds for termination for which there is no supporting evidence. Similar language was amended into SB 999 during the 85th Legislature but was later removed. In the LBB analysis for that amendment, DFPS estimated approximately 75 percent of its pleadings contained allegations or contentions that did not have sufficient factual support. Section 2 provides greater accountability for DFPS and ensures that due process rights are respected by requiring that the department plead only those specific allegations or facts that can be supported by evidence in court.

Sections 4, 5, 6, 7, and 10 recognize that the removal of a child from his or her family, even for a short period of time, is a traumatic event that can have lasting negative psychological impacts. These sections require DFPS and the courts to consider this trauma and balance it with the immediate risk to the child’s physical health and safety when determining whether to remove a child or pursue a less invasive intervention.

Sections 9 and 10 make changes to Family Code Section 262.201 that prioritize the placement of a child who must be removed from the custody of one parent with the parent who did not cause harm to the child (the “non-offending parent”). The language change in Sections 9 and 10 is the result of discussions held by the CPS Pleading Practice Workgroup concerning the lack of provisions under Chapter 262 requiring an independent adjudication of the non-custodial parent’s unfitness. Since Chapter 262 does not mandate that a court render independent findings as to

each parent’s fitness, the removal process is unconstitutional under the Due Process and Equal Protection Clauses of the 14th Amendment. The new language fixes this constitutional issue by requiring the court to make independent findings regarding each parent’s fitness and to grant possession of the child to the non-offending parent unless there is evidence of a continuing danger to the child’s health or safety. This not only protects the rights of the parent who did not cause harm to the child, it also minimizes the trauma experienced by the child by ensuring that they are placed in a familiar setting.

Section 10 also raises the evidentiary standard of proof that DFPS must meet at the full adversary hearing to support the removal of a child into DFPS custody. The current evidentiary standard under Texas law is “sufficient evidence to satisfy a person of ordinary prudence and caution,” which is roughly equivalent to probable cause. Given that removal of a child from his or her family is one of the most severe actions government can take against the liberty of its citizens, the state should be required to meet a much higher burden of proof. In nearly a century of precedent, both the United States Supreme Court and the Texas Supreme Court have consistently recognized that the parent-child relationship is a fundamental liberty interest and subjected any state interference with this relationship to strict scrutiny. The United States Supreme Court in *Santosky v. Kramer* (1982) held that the Due Process Clause of the 14th Amendment demands that the state clear a high bar of factual certainty when terminating parental rights. Writing for the Court, Justice Blackmun noted that while the precise burden of proof in these circumstances is for the legislature to decide, the Constitution demands that it be at least equal to, if not greater than, clear and convincing evidence. Since CPS pleading practice under Texas law automatically puts termination on the table by triggering a 12-month time limit for the final resolution of the case once a petition for removal has been filed, the standard of proof for the initial removal should also meet the clear and convincing evidence standard required by the Constitution. Under HB 3331, the standard of proof for removals is increased to a preponderance of evidence. While this is a step in the right direction, we believe the proper constitutional standard is clear and convincing evidence.

Section 11 of the bill promotes reunification of a child with his or her family by requiring that the court order the return of the child at the end of each permanency hearing unless it finds that there is a continuing danger to the physical health or safety of the child and returning the child to the child’s parent would be contrary to the welfare of the child. Current Texas law merely requires that the court review

the placement of a child who is in the temporary managing conservatorship of the department and make a finding of whether the return of the child is (1) safe and appropriate, (2) in the best interest of the child, (3) whether return is contrary to the welfare of the child. The changes made by HB 3331 would make the return mandatory unless the court finds that there is a specific continuing danger to the child's physical health, safety, and welfare. This provision, if enacted, would speed up the process of reunifying children with their families and reduce the trauma experienced by children while in foster care.

Section 12 addresses the lack of a statutory requirement requiring the speedy resolution of suits implicating parental rights once a trial on the merits has commenced. In 1997, the Legislature enacted Family Code Section 263.401, which set a one-year time limit for resolution of parental termination suits. This action was taken in response to the recommendation of a committee convened by then-Gov. George W. Bush that sought to ensure that children in DFPS custody attain permanency as quickly as possible—either through reunification or adoption. Section 263.401 only required that a trial on the merits commence within one year but did not establish a timeframe for when a court must bring the trial to final resolution. Over the years, there have been multiple instances of trials commencing before the 12-month time limit has elapsed, but lingering on for months or even years due to recesses and other delays. The most famous example is the case *In the Interests of J.D.G. and A.E.G.J., Children*, which lasted for three years before being finally resolved. This practice negatively impacts children by leaving them in a sort of legal limbo and preventing them from achieving permanency. Section 12 of HB 3331 addresses this problem by requiring that a trial on the merits be brought to final resolution within 90 days after the trial has commenced. Subsection (d) allows a party to file a mandamus proceeding if the court fails to render a final order within this time frame. To make this section more effective, we recommend amending the language to automatically dismiss the case and terminate the court's jurisdiction if it fails to render a final order once the 90-day time limit has expired. Such language would be consistent with the outcome in 263.401(c) when a court fails to commence a trial on the merits within the 12-month statutory limit.

Section 13 promotes timely permanency for children in the conservatorship of DFPS by requiring additional findings before granting the department Permanent Managing Conservatorship (PMC) over a child without terminating parental rights. Under Texas law, a child is only free for adoption once parental rights have been terminated. HB 3331 requires that a court make additional findings that

termination of parental rights is not possible or is not in the child's best interests before awarding the department PMC.

Section 14 increases the frequency of case reviews when a child's permanency goal is adoption or conservatorship with a relative or other designated caregiver. Under current law, these reviews are conducted every six months. HB 3331 would require that a court review these cases every 90 days to speed up the process of achieving permanency for the child.

Section 15 reforms the lack of due process when courts order families to comply with services at the request of DFPS. Family Code Section 264.203 allows a court to order a family to comply with any services that the department requests for "alleviating the effects of abuse or neglect that has occurred" or "reducing the reasonable likelihood that a child may be abused or neglected in the immediate or foreseeable future." The intent of Section 264.203 was to provide an alternative to removal of a child when in-home services can address the immediate risk to the child's physical health or safety. However, current law provides inadequate due-process protections for families and grants the department unbridled discretion to order a family to comply with open-ended and arbitrary services demanded by the department under threat of removal and possible termination of parental rights. Additionally, the provision in current law that allows services to be ordered based on "the reasonable likelihood that a child may be abused or neglected in the immediate or foreseeable future" is unconstitutionally vague and requires families to disprove hypothetical future events. The current construction and application of this law allows the department to remove children for punitive, not safety, reasons. A pending lawsuit in Kerr County brought against DFPS by Myra and Jordan Eads, who were subjected to months of court-ordered oversight by the department despite the lack of sufficient evidence of abuse or neglect, is currently challenging the constitutionality of Section 264.203. Section 15 of HB 3331 addresses these issues by (1) establishing fair, constitutional processes for courts to order families to comply with services requested by the department, (2) eliminating the ability of a court to order services for unprovable future events, (3) requiring the court to order specific services that are narrowly tailored to alleviate the effects of abuse or neglect that has occurred or reducing a continuing danger to the child caused by an act or failure to act of the parent, (4) setting clear time limits for services, and (5) allowing a party to petition the court for termination of the order at any time. Consistent with the changes made to the standard of proof during the full adversary hearing in Section 10 of the bill, this section also requires the department to prove that services are necessary

by a preponderance of evidence. As stated above, we believe that the increased standard of proof is a step in the right direction, but believe this provision remains unconstitutional without raising the evidentiary standard to clear and convincing evidence to meet the constitutional requirements articulated by the U.S. Supreme Court in *Santosky v. Kramer* (1982).

Recommendations

The changes proposed by HB 3331 will make significant improvements to how Texas protects the fundamental rights of families against unconstitutional government intervention, reduces trauma to children caused by being removed from their families, and allows children in foster care to either return home or be adopted more quickly. As stated above, we believe a few key changes would further improve the effectiveness of HB 3331 at achieving these important

goals. One is increasing the burden of proof on the department to clear and convincing evidence when removing a child or ordering a family to comply with services. The second is to automatically dismiss a suit implicating parental rights and terminate the court's jurisdiction over the matter if the court fails to bring the suit to final resolution within an established time limit after a trial on the merits has commenced.

While the state has an important role to play in protecting children from immediate risk of harm and has the right to intervene in situations where a child's physical health, safety, and well-being are threatened, such interventions should be narrowly tailored to protect the fundamental right parents and children have in their relationship with one another. HB 3331 is an important step forward in achieving this critical goal. ★

ABOUT THE AUTHOR



Andrew C. Brown, J.D., is the director of the Center for Families & Children at the Texas Public Policy Foundation.

Andrew has dedicated his career to serving vulnerable children and strengthening families through community-focused, liberty-minded solutions. As an attorney, he has represented children in the child welfare system, advocated for the rights of parents, and helped build families through domestic and international adoption.

Andrew earned his B.A. *magna cum laude* in political science from Baylor University and his J.D. from Southern Methodist University Dedman School of Law. He is licensed to practice law in Texas

and Virginia. His work on international adoption law and other child welfare issues has been published in leading legal journals and respected media outlets.

About Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

