No. 03-08-00235-CV

In the Court of Appeals

for the Third Judicial District

Austin, Texas

Request for Extraordinary Relief from
the 51st District Court of Schleicher County, Texas

IN RE SARA STEED, ET AL.,
RELATORS

REAL PARTY IN INTEREST'S RESPONSE
TO AMENDED PETITION FOR MANDAMUS

To The Honorable Justices of the Court of Appeals:

The Texas Department of Family and Protective Services, "Department", Real Party in Interest, files this "Response to Amended Petition for Mandamus", and in support states:

PARTIES

1. Relators are set forth on page two of the Relators' "Amended Motion for Petition for Writ of Mandamus" in the above-styled and -numbered cause. Relators

Faith Ann Jessop and Kathryn W. Jeffs are also Relators in the companion case filed in this Court under No. 03-08-00236-CV.[1]

2. The Honorable Barbara L. Walther, Presiding Judge for the 51st Judicial District Court of Schleicher County, Texas, is Respondent.

3. The Texas Department of Family and Protective Services is a Real Party in Interest.

4. An amicus brief was filed by the Liberty Legal Institute, asserting that the "religious autonomy doctrine" does not apply to this case. However, they are not a party to this case.[2]

REQUEST FOR ORAL ARGUMENT

The Department requests that the Court set this case for oral argument.

STATEMENT OF THE CASE

On April 4, 2008, the Department filed an "Original Petition for Protection of Children in an Emergency and for Conservatorship in Suit Affecting Parent-Child Relationship," which was designated as Cause No. 2902.[3] APPENDIX 1. On that date,

[1] Relators Faith Ann Jessop and Kathryn W. Jeffs, Relators here and in the companion case filed in this Court under No. 03-08-00236-CV, assert, "none of the pleadings in this case or others identified Relators or their children." No. 03-08-00236-CV, PETITION FOR WRIT OF MANDAMUS 5.

[2] The Liberty Legal Institute contends the strict scrutiny standard applied to the fundamental liberty interest implicated in parental rights can be overcome by proof of sexual exploitation of children and/or misconduct endangering children. *Westbrook v. Penly,* 231 S.W. 3d 389 (Tex. 2007); *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998); *Destefano v. Grabrian*, 763 P.2d 275 (Col. 1988); AMICUS BRIEF 2.

[3] Due to the immense volume of records, which is now estimated to exceed 100,000 pages, the Department's appellate attorneys do not have the Clerk's Official Record from which to reference pleadings. The Department has requested that this Honorable Court appoint a

the Department also filed an additional 122 petitions, involving 122 individual children, and one petition naming 16 children.[4] No petition filed by the Department regarding any of the children from the YFZ Ranch contained a request for termination of` parental rights. On April 7, 2008, Judge Barbara L. Walther signed an "Order for Protection of a Child in an Emergency and Notice of Hearing." APPENDIX 2. The adversary hearing was scheduled for April 17, 2008, at 10:00 a.m.

On April 7, 2008, the Court entered an order appointing CASA as guardian *ad litem* for the subject children and ordered the Department to, "consent to releases to the Court Appointed Special Advocate of copies of the children's medical records, school records, psychiatric and psychological records, and case history, if requested by the Court Appointed Special Advocate." ORDER AUTHORIZING APPOINTMENT OF A COURT APPOINTED SPECIAL ADVOCATE (CASA); APPENDIX 3. On April 7, 2008, Judge Walther entered an order appointing attorneys *ad litem* for all the children.

On April 17 and 18, 2008, the court held an adversary hearing pursuant to Family Code § 262.201. TEX. FAM. CODE § 262.201 (Lexis 2007); APPENDIX 4. On April 18, 2008, the court ruled that the Department had carried its burden of proof under Family Code § 262.201, and that the Department would be named temporary managing conservator of the subject children. 4 RR 340. On April 22, 2008, the court signed an "Order on Placement of Children." APPENDIX 5. On April 24, 2008, the

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special master to assist in compiling a more concise record by excluding duplicative pleadings. REAL PARTY IN INTEREST'S REQUEST FOR RELIEF.

[4] There was an additional petition filed subsequent to the adversary hearing regarding a child, *Baby Boy Jeffs, a/k/a, Baby Boy Jessop*, born to one of the child mothers on April 29, 2008, at the Central Texas Medical Center in San Marcos, Texas.

court entered four hundred sixty-eight (468) "Temporary Orders Following Adversary Hearing and Notice of Hearing" in the underlying cases. APPENDIX 11.

On April 23, 2008, Relators filed an "Emergency Motion for Stay Pending Review of Petition for Writ of Mandamus." APPENDIX 6. On April 25, 2008, this Honorable Court denied Relators' request for emergency stay and directed the Department to respond to Relators' "Petition for Writ of Mandamus" by May 2, 2008. On April 30, 2008, Relators filed an "Amended Petition for Writ of Mandamus." APPENDIX 7. This Court later issued an order pursuant to the Department's "Motion for Extension", allowing the Department until May 8, 2008 to file its response.

STATEMENT OF THE FACTS

WITNESS TESTIMONY

Angie Voss

Angie Voss is a Department supervisor. 4 RR 147. On March 29, 2008, at 11:32 p.m., the Department received a report that a sixteen-year-old girl was being physically and sexually abused. 4 RR 149, 152. On April 3, 2008, Ms. Voss and a team of twelve investigators went to the YFZ Ranch to investigate the allegations. Law enforcement went with them. 4 RR 153. The investigators were permitted to enter the ranch with the consent of Merrill Jessop. 4-RR 158-61. The entrance had a guard tower. 4 RR 159. The investigators started to conduct an investigation concerning the alleged victim, Sarah, and learned that two or three young girls could have been her. However, the investigators were given five different names. 4 RR 177.

The Department's investigation was thwarted due to misinformation about the identities of the girls. The children would switch their names, use a different last name than they had previously reported, and falsely report that they had no middle names. 4 RR 193. Investigators discovered a large shredder in one of the rooms with the light still on and paper dangling from it; the paper shredder was full of shredded paper. 4 RR 195. Ms. Voss indicated she believed she was encountering a "brick wall" because some girls were saying that they were going to plead "the Fifth" and not answer questions. 4 RR 195-96. The girls refused to answer questions about the identity of persons in their home. 4 RR 197. From the time the children were removed from the ranch, until after the children arrived at the civic center, teenage children continued to provide investigators with different names. 4 RR 233. The children would provide no explanation as to why they were providing different names. 4 RR 234. The Department, under extraordinarily difficult circumstances, exercised its best efforts to ascertain the identity of the children. However, the Department was not able to compile a complete list of the children or determine identities of their parents due to the children's refusal to cooperate and due to misinformation provided by some of the alleged mothers. 4 RR 236-37. One alleged mother identified four children as being hers and later indicated that they were not. 4 RR 237.

Interviews revealed a pattern of girls reporting that there was no age too young for girls to be "spiritually married." 4 RR 201, 238. During the course of the investigation, Ms. Voss began to note that there were sixteen-year-old mothers who had given birth and had small children with them. These mothers were also married

and were part of a household with other wives. 4 RR 192. The investigation revealed that the children appeared to have a pervasive belief that when the prophet, Uncle Merrill, decided for them to be married, they would be married. 4 RR 206, 214. No age was too young to be spiritually married, and the young girls wanted to have as many babies as they could. 4 RR 206. Ms. Voss based her initial conclusions upon the interviews before removing twenty-five girls. 4 RR 206.

Investigators from the Department documented at the time of the pre-removal investigation the following:

> Girl "number three" reported that she knows a sixteen-year-old girl, Sarah Elizabeth Johnson, who has a five-month-old baby, and that she is married to "Dan B.", whom girl number three believed to be twenty-three years old. 4 RR 212.
>
> Girl "number four" reported in her journal entry dated 10/03/07 that law enforcement was looking for the husband and wives, quoting "Mother Milly and Mother Lori, because they were underage when they got married." 4 RR 213.
>
> Girl "number six" advised that there is no age limit for girls to get married and have children. 4 RR 213.
>
> Girl "number eight" stated there is a girl named "Mother Beth," and that she is a teenager. 4 RR 214.
>
> Girl "number nine" advised that the prophet told her to lie to authorities, because the prophet receives his messages from the "Heavenly Father." 4 RR 214. She further reported that "Uncle Merrill", after being advised by her that she hadn't seen her mom in two years, stated, "it's none of her business." Uncle Merrill decides who she will marry and when she will marry, and that the age depends upon what the "Heavenly Father" decides. 4 RR 214.
>
> Suzanne Johnson is seventeen years old and had a one-year-old son named Seth. 4 RR 215.

Five entries in the "Bishop Records" 6 RR, PETITIONER'S EXHIBIT 4; 4 RR 252-53 reveal the following:

> The "second child" is sixteen years old and is currently pregnant. 4 RR 253.
>
> The "third child" was sixteen years old when she conceived a child. 4 RR 253.
>
> The "fourth child" was fifteen years old when she conceived a child. 4 RR 253.
>
> The "fifth child" was fifteen years old when she conceived a child. 4 RR 253.
>
> The "second to last one" was thirteen years old when she conceived a child. RR 4 254.

Ms. Voss testified she believed the boys were being groomed to be perpetrators. 4 RR 261. Part of the danger to the boys is that it is their belief system requires them to follow the prophet. 4 RR 281-82. Ms. Voss expressed the opinion that girls are born and grown to be sexual abuse victims. 4 RR 257. She indicated that as of April 18, 2008, the investigation established that there were ***over twenty*** girls who had either conceived or given birth younger than sixteen or seventeen years of age. 4 RR 30.

Ms. Voss testified that after contact with the children and adults at YFZ Ranch, "they explained that they are one big family, one large community, and they have the same belief system." 4 RR 258. All of the woman are called mothers to all of the children in the home, and the children call each other brothers and sisters. It appears that a mother is married to one man, and that man is married to other women. 4 RR 230. Although the YFZ Ranch has several houses on it, its occupants consider themselves to be part of one large community. 4 RR 271. Ms. Voss indicated that this

investigation was analogous to other investigations where the Department finds one victim in a home and then has concerns for all of the other children in that home. In this case, since the occupants of the ranch consider themselves as living in one large home or community, Ms. Voss had concerns for all of the children there. 4 RR 304.

Based upon the investigation of documented sexual abuse of the children, including Ms. Voss' observation of how the mothers and children were responsive to Merrill Jessop and how they were living under an umbrella of belief that girls of a young age having children is a blessing, Ms. Voss concluded that the environment at the YFZ Ranch would not be safe for any of the children. 4 RR 262. Further, according to Ms. Voss, it would not be safe for any of the children to be returned to the ranch, because the adults on the ranch whom she had interviewed had expressed that they are not doing anything harmful to their children, and that the practice of children being united and having children, is part of their culture and belief system. 4 RR 260.

Dr. Bruce Duncan Perry

Dr. Bruce Duncan Perry is a child psychiatrist (M.D.) who specializes in child maltreatment and child development. 5 RR 57-58. In the past, he has worked professionally with children removed from the Branch Davidian Compound, and has worked with groups such as the Children of God, Moon Group, Posse Comitatus, and the Fundamentalist Latter Day Saints (FLDS). 5 RR 61, 63.

Dr. Perry met with two young adults who grew up in the FLDS community. 5 RR 63. He talked with them about their beliefs and life in the community. 5 RR 64.

One girl described to Dr. Perry that although she didn't have to get married, her father had driven her to the YFZ Ranch where, unbeknownst to her, a marriage had already been arranged. 5 RR 75-76. When she arrived, her father informed her that the prophet said she was to be married to this man and she said yes, although she would not have had to. 5 RR 76. However, Dr. Perry testified that when persons are raised in an environment where it is a blessing to have children and to be compliant to your father and the prophet, whether to marry is not really free choice. 5 RR 76.

Dr. Perry interviewed another FLDS member, Becky Musser, who had been married to Rulon Jeffs. When Rulon Jeffs died, she was told to marry Warren Jeffs, which she refused. She then left the FLDS. 5 RR 77.

Dr. Perry declared that the pregnancy of the YFZ children was the result of sexual abuse. 5 RR 92. Dr. Perry testified that children of the age of fourteen, fifteen, or sixteen are not emotionally mature enough to consensually enter into a healthy relationship or marriage. 5 RR 72. He further testified that FLDS members believe that continued disobedience of a father, elders, or the prophet would lead to eternal damnation. 5 RR 73-74.

Regarding the boys, Dr. Perry expressed two concerns: 1) the pervasive belief, and pervasive obedience to that belief, that it is okay to have sex with and marry young women, is unhealthy; and 2) this pervasive practice and belief creates an environment that develops people who have a high potential of replicating sexual abuse of young children as a part of their belief system. 5 RR 77. Regarding both male and female children, Dr. Perry stated that when children are socialized into a

belief system and behavior that is embedded in their religion, it is extremely deeply ingrained. 5 RR 83. Further, when a child is raised in an environment where there are unhealthy relationships, a child's brain will not develop properly; this lack of development adversely affects the part of the brain that is involved in independent decision making. 5 RR 79. Children who have grown up in "very controlling or authoritarian environments that determine what you eat, how you dress, who you socialize with, and so forth," have the "independent thinking capability of a much younger child." 5 RR 81-82. A child of fifteen or sixteen has "the capacity to make independent decisions like a six-year-old." 5 RR 82. This lack of independent decision making would make a fifteen- or sixteen-year-old child who left the group highly vulnerable to individuals willing to exploit them and take advantage of their child-like qualities. 5 RR 82.

With respect to the Department keeping the alleged mothers with their children after the removal, Dr. Perry believed that it was the reasonable and responsible thing to do. 5 RR 69. However, he expressed concern that the investigators would not be able to conduct any useful forensic interviewing with the parents around. 5 RR 71.

As far as the other children who were not forced into under-age marriage were concerned, Dr. Perry concluded that the child-rearing environment is very similar for all of the children, and it is highly likely that they are at the same risk as children who are living in a household where there has been sexual abuse. 5 RR 109. Even with respect to boys from age five to eleven, Dr. Perry had concerns that they would continue to be exposed to beliefs that include under-age marriage and, essentially,

sexual abuse of girls. 5 RR 133. Dr. Perry also stated that if any of the children were returned to the ranch, there would be "cause for concern that the children could either be hidden or removed from the jurisdiction of the Court." 5 RR 162.

Dr. William John Walsh

Dr. William John Walsh was called as an expert witness by five alleged fathers, James Dockstader, Don Jessop, Leland Jessop, Leland Keates, and Lamar Johnson. 4 RR 40; 5 RR 167. Dr. Walsh defined a household in the FLDS faith as being centered around a patriarch or husband who will have one or more wives. The wives are not necessarily his legal wives. Finally, there are children resulting from those unions. 5 RR 173. Dr. Walsh identified Warren Jeffs as the prophet who leads FLDS. 5 RR 180. He acknowledged that under Warren Jeffs, under-age marriage has taken place. 5 RR 180.

Dr. Walsh clearly indicated that among FLDS, the age of physical development for a girl made them eligible for marriage. 5 RR 183. He did qualify his opinion, however, by indicating that some in the church expressed that age eighteen was a good age. Other church members have said that sixteen is a good age if the parents agree. 5 RR 183. Others expressed the opinion that when a female begins her menstrual cycle, that is a sign that the girl is ready for marriage. 5 RR 183.

Respondent Alleged Mothers

Merilyn Jeffs

Merilyn Jeffs, age twenty-nine, has one seven-year-old girl and is married to Wendell Nielson. 5 RR 249-51. She has been at the YFZ Ranch since 2004. 5 RR 256. Ms. Jeffs has a nineteen-year-old sister who has a baby. Ms. Jeffs estimates that her sister's baby is two years old, but doesn't remember how old her sister was when the baby was born. 5 RR 262. At first, she stated that her sister has been married since 2004, but then stated she didn't know when her sister got married. 5 RR 261. However, she knows that she is married, because her sister has a baby. 5 RR 261. Ms. Jeffs testified that she has another sister, Pamela, who is eighteen years old and has a baby who is walking. 5 RR 263-64.

Lori Jessop

Lori Jessop, age twenty-five, is married to Joseph Jessop, age twenty-seven. 5 RR 270. Ms. Jessop attended college and received certificates for intermediate EMT. 5 RR 272. She has three children, ages four, two and one-half, and eleven months. 5 RR 270. She has seen pregnant teenagers at the YFZ Ranch, but doesn't know their exact ages. 5 RR 279.

Linda Musser

Linda Musser is fifty-six years old and has a son, Damien Jayson Musser, who is thirteen years old. 5 RR 285. She has eleven adult children. 5 RR 291. She has lived at the YFZ Ranch since August of 2007. 5 RR 294. Ms. Musser testified that she was not familiar with the marriages that take place and is not aware of any girls under seventeen that are married on the ranch. 5 RR 292.

Lucille Nielson

Lucille Nielson is twenty-four years old, and has a two-year-old son whose father is Jin Jessop. Her son, Wendell Leroy Jessop, has not had any immunizations. 5 RR 299, 318. Jim Jessop is Ms. Nielson's "spiritual husband." Jim Jessop's "legal wife" is Sarah Jessop. 5 RR 300. Megan Dockstader is also Jim Jessop's spiritual wife. 5 RR 301. There are a total of seven children that live with Ms. Nielson, her sister wives, and Jim Jessop. 5 RR 301-02. Ms. Nielson believes that a good age to marry is twenty. 5 RR 304. However, she knows of at least a dozen women who married under the age of eighteen. 5 RR 308.

ADVERSARY HEARING PROCEDURE

When the adversary hearing began, Judge Walther admonished all attorneys and parties it was absolutely essential that the Court and its staff gave everyone the opportunity to have their information provided to the Court, so that the Court could "do its job." 4 RR 1-8. She made certain that all attorneys in the auditorium understood they would be given the opportunity to ask questions, when she stated:

> … I want to make sure that the attorneys in the city auditorium understand that they will be given the opportunity to ask questions. They may have to do it from there, but we're going to work with that. And I think that the procedure for that has been explained to them in the auditorium. And the District Clerk of Tom Green County is standing by over there to assist the Court in processing attorneys and questioning that [sic] they need to do.

4 RR 8.

Other than an objection to the "format of this hearing" made by attorney Polly Ray O'Toole, who represented Viola Spencer Barlow, there is nothing in the record

indicating that any attorney made an objection to conducting the hearing with *ad litem* attorneys at the adjunct facility in the city hall auditorium via video link. 4 RR 12.

The trial court gave the alleged parents' attorneys broad latitude in arguing objections, including complaints under the 1st, 4th, and 14th Amendments to the U.S. Constitution. 4 RR 68-78. When Judge Walther proposed an objection procedure whereby she would hear one objection from each side, four attorneys went on the record as having no objection and no other attorneys present, including Julie Balovich and Rebecca G. Flanigan, made an objection.[5] 4 RR 251. Further, there were no objections on the trial court's procedure for cross-examining Respondent mothers' witnesses. 5 RR 243.

Judge Walther gave attorneys ample opportunity to review documentary evidence before formulating and making objections. She called recesses to give attorneys in the city hall auditorium time to review documents. 4 RR 28-30.

Judge Walther stated:

> Ladies and Gentleman, we are going to do the following, so that we can – and aid all of you and give you an opportunity to review these documents. When the lawyers in this courtroom have an opportunity to look at these documents, the bailiff will deliver these documents to the lawyers at the city hall. They will have the opportunity to review it.
>
> If you-all have the ability to come up with some sort of group and form objection, that's fine. If you feel like you can't, we'll try to work through it in groups. But I'm going to step off the bench, let you-all look at all of this. Then

[5] Julie Balovich is one of the attorneys representing the Relators in this case, No. 03-08-00235-CV. Rebecca G. Flanigan is one of the attorneys representing the Relators, Faithann Jessop, Loretta Jessop, and Kathryn Jeffs in the companion case, No. 03-08-00236-CV.

> when you-all have looked at it, we will send it over to the lawyers at the city hall and then we'll reconvene.

4 RR 29-30.

Judge Walther refined the procedure for attorneys to have ample opportunity to review evidentiary documents beforehand when at the conclusion of the first day of the hearing, she advised:

> First announcement, there are going to be documents available for those of you that want to look at documents. They will be available at 7:30 [a.m.]. I am taking the bench at 9:30 [a.m.].

4 RR 338.

Alleged mothers who left the pavilion were allowed to leave and return for the second day of the adversary hearing. 4 RR 343-45. When Judge Walther was first advised of the complaint that mothers in the coliseum were being "detained", she quickly and emphatically responded:

> **Court**: But I want to make one thing very, very clear. There is no mother at the coliseum or at the Wells Fargo that is an adult that everyone agrees is an adult that is detained. They are free to go. The Department has said that they may stay and provide care for their children, should they choose. So your client [attorney Flanigan's clients], the mothers, are not being held by this Court. Now you look like you want to respond, so go ahead.
>
> **Flanigan:** It will get me into trouble, Your Honor, so I won't.
>
> **Court**: No, no.
>
> **Flanigan:** I'm supposed to tell the mother of my two-year-old she's free to go, the two-year-old gets to stay. That's detention, Your Honor.
>
> **Court:** I'm sorry?
>
> **Flanigan:** That – my client [is] being detained. That's the practical effect of it.
>
> **Court:** Well, the side effect, and were this an individual case, it is oftentimes the practice of the Department not to allow the continued contact of any of the parents when they remove them. That solves the problem of parents being

> detained without a court order, which you just said was a problem. Would you like for me to instruct the Department that, unless they have an order, they should get voluntary releases from any woman out there because I – I will be the first person to tell you, I will not hold someone against their will if they're an adult. And if you want to take the position that these women are being held by this Court, I want you to go tell them they can leave. If they want to stay, they're going to have to sign something saying they want to stay.

4 RR 319-20.

The Department's key witness was Angie Voss, Investigations Supervisor. The Court allowed every attorney who wanted to make objections the opportunity to do so. The Court allowed every attorney who wanted to cross-examine Angie Voss the opportunity to do so. During the course of her direct examination, at least thirteen (13) attorneys made thirty-six (36) objections. 4 RR 157-265. At least five (5) attorneys, not including Department attorneys, made thirty-four (34) objections during cross-examination. Ms. Voss was cross examined by twenty-one (21) different attorneys: Hennington, Motl, Hawkins, Keenun, Sutherland, Bale, Garcia, Jarvis, Sloan, Lock, Gregg, Flanigan, Fuller, DeLong, Edwards, Haralson, Butler, Alvarez, Goodman, Lewis, and Brown.

The Department's expert witness was Dr. Bruce Duncan Perry. 4 RR 57. The Court allowed every attorney who wanted to make objections the opportunity to do so. The Court allowed every attorney who wanted to cross-examine Dr. Perry the opportunity to so. During Dr. Perry's direct examination, at least seven (7) attorneys made twelve (12) objections. 4 RR 57-85. During Dr. Perry's cross-examination, not including Department attorneys, two (2) attorneys made ten (10) objections. Dr. Perry was cross-examined by twenty-seven (27) attorneys: Jacobson, Gregory, DeLong,

Hargrove, "unidentified attorney," Alvarez, Dorsch, Johnson, Sloan, Mapes, Foster, Henly, Templeton, Edmonds, Roach, O'Toole, Flemming, Dabeau, Shelton, Foster, Pickering, Allen, Joyton, Diaz, Morrison, Ellis, and Caldwell. 5 RR 86-164.

Judge Walther went to great lengths to advise Respondents of the procedure for securing free legal representation:

> If we have any respondents over there, parent-respondents that do not have a lawyer, and they are seeking to have a lawyer, someone over there that is with the legal aid services will volunteer there to stand in the foyer and take their names and talk to them about that.

4 RR 340.

The respondent alleged parents put on one expert witness, Dr. William John Walsh (5 RR 167), and four alleged mothers, Merilyn Jeffs (5 RR 247), Lori Jessop (5 RR 270), Linda Musser (5 RR 285), and Lucille Nielson (5 RR 297). Judge Walther limited the cross-examination of the alleged mothers to the Department, the fathers related to her, and the *ad litem*s of her children. 5 RR 243.

At the conclusion of the testimony, Judge Walter went to great lengths to determine if there were any other attorneys or parties who wanted to call any other witnesses before the respondents rested their case. At the close of Ms. Hennington's case, after repeated inquiries from Judge Walther, no other attorneys or parties indicated that they had any more witnesses. 5 RR 323-28. Judge Walther then requested the bailiff to check the hall to determine if there was any other party who wished to be heard. The bailiff and the District Clerk, who was assisting at city hall, affirmed there was no one else who wanted to be heard or put on evidence. 5 RR 327.

ARGUMENT

RELATORS HAVE NOT ESTABLISHED A RIGHT TO MANDAMUS RELIEF

1. Mandamus does not lie when facts of consequence are in dispute

To prevail on mandamus, Relators must show this Court that the trial judge could have reached only *one* decision on the facts: not to continue the Department as temporary managing conservator of the YFZ children. Relators must demonstrate that there is *no dispute as to any fact of consequence*. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). The Department maintains that not only are the material facts of consequence in dispute, but they are overwhelmingly in favor of the trial court's decision to continue the Department as the temporary managing conservator of the children, including those children who may be the children of some of the Relators.

While traditionally the writ of mandamus issued only to compel performance of a ministerial act or duty, mandamus is also proper in cases where the trial court has abused its discretion by committing an error of law for which appeal is an inadequate remedy. *Walker*, 827 S.W.2d at 840; *In re Ford Motor Co.*, 211 S.W.3d 295, 297-98, (Tex. 2006, orig. proceeding) (per curiam). The Supreme Court also has held that mandamus may be used to correct a "clear abuse of discretion" committed by the trial court. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 555 (Tex. 1990).

With respect to resolution of factual issues or matters committed to the trial court's discretion, the reviewing court **may not** substitute its judgment for that of the trial court, and an appellate court may not deal with disputed matters of fact in an original mandamus proceeding. *See Brady v. The Fourth Court of Appeals*, 795

S.W.2d 712, 714 (Tex. 1990); *Dikeman v. Snell*, 490 S.W.2d 183, 186-87 (Tex. 1973). Mandamus relief is available only in the absence of a factual dispute of consequence. *Walker*, 827 S.W.2d at 839-40. The trial court does not abuse its discretion when its judgment is based on conflicting evidence and some of this evidence reasonably supports the court's decision. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002). If a relator seeks to overrule a court's decision based on factual issues or matters committed to the trial court's discretion, (s)he has the burden to show that the trial court could have reached only *one* decision on the facts. *Walker*, 827 S.W.2d at 839-40. As is discussed below, such is not the case here. Mandamus does not lie.

2. Relators have not established a justiciable interest in this case

To be entitled to mandamus relief, Relators must have a justiciable interest in the underlying controversy. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); *Mitchell v. Dixon*, 140 Tex. 520, 168 S.W.2d 654, 656 (Tex. 1943). To establish a justiciable interest in the children, Relators must unequivocally identify and claim their offspring. They have repeatedly declined to do so. Nowhere in their Original or Amended Petitions for Writ of Mandamus do the Relators name or identify any of their children. AMENDED PETITION FOR WRIT OF MANDAMUS. Furthermore, Relators have presented absolutely no evidence, proof, testimony, or adjudication that they are, in fact, the mothers of any of the children who are the subject of the underlying cases. Moreover, since Relators do not name or identify any children, **there are no** children subject to this mandamus. Relators cannot refuse to cooperate with the Department, attempt to thwart the trial court's proceedings by refusing to cooperate in identifying, or

equivocating about the identity of, the children who are the subject matter of this action, and then claim to have standing to challenge the proceedings and the orders of the trial court.

After the conclusion of the adversary hearing, and in light of Relators' refusal to cooperate, the trial court ordered maternity and paternity testing for each child to resolve these parental ambiguities. 5 RR 341-42. While the Department does not know whether the Relators have submitted samples for maternity testing, it can assure the Court that, as of this date, the Department has not received any test results. Other than a vague claim by "Lead Relator, Sara Steed" that she "has six boys and girls, one of whom is six months old and breastfed," there is nothing in Relators' pleadings specifically naming or identifying any child as belonging to a specific mother. EMERGENCY MOTION FOR STAY PENDING REVIEW OF PETITION FOR MANDAMUS 6.

In fact, as noted in the Department's petition, *In the Interest of 330 Children from the YFZ Ranch*, the Department could identify only three Relators in the case before the Court at that time: Nancy J. Barlow, Elizabeth Jessop, and Patricia Johnson. The Department has since identified Relators Amy Holm Barlow, Viola Spencer Barlow[6], Martha Emack, Lori Jessop[7], Neola Jessop, Ruth Eliza Jessop, Patricia Johnson, Lorene Keate, Linda Musser, Lucille Nielson[8], Sarah Nielson, Audrey Ritcher[9], Zavenda Steed, Karen Johnson and Josephine Johnson.[10]

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[6] Ms Viola Spencer Barlow is represented by Polly Ray O'Toole. 4 RR 12.

[7] Ms. Lori Jessop is represented by Nancy Delong. 5 RR 132.

[8] Ms. Lucille Nielson is represented by attorney Alvarez. 5 RR 94-95.

[9] Ms. Audrey Richter, a/k/a Rosie Richter, is represented by attorney Alvarez. 5 RR 94-95.

After reviewing the pleadings filed with the trial court, the Department could not find the names of the following Relators: Sara Steed, Carlene Jessop, Kathryn W. Jeffs, Nancy J. Barlow, Faith Ann Jessop, Loretta Jessop, Elizabeth Jessop, Dora Mae Barlow, Merilyn Allred, Ruth Edna Fisher, Lenore Harker, Jeanetta Jeffs, Vicki Nelson, Cynthia Joy Jessop, Irene Julia Jessop, Alice Johnson, Rosinith Richter Jessop, Fawn Steed, Jennifer Steed, or Leona Steed.[11]

By refusing to identify their children in the underlying child protection case and in their petitions for writ of mandamus, the Relators have clearly failed to establish a justiciable interest that would entitle them to mandamus relief. It is not incumbent upon the trial court, this Court, or the Department, to establish Relators' interest in this cause. Nor should the trial court, this Court, or the Department be forced to play guessing games when the safety and well-being of these children are at stake.

3. The trial court did not abuse its discretion by holding a consolidated adversary hearing.

Relators complain the "format of the hearing heavily favored the Department," and that "[t]he Court denied motions to sever that would have divided the Department staff among various courtrooms and visiting judges, and permitted individualized hearings". AMENDED PETITION FOR WRIT OF MANDAMUS 9. Relators' complaints are without merit; assuming, *arguendo*, that the complaints had merit, the Relators did not raise these objections during the adversary hearing.

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[10] This list was compiled by doing a computer search of Relators' names in the pleading in the possession of the Department's office in San Angelo, Texas.

[11] It is the Department's hope that this matter will be resolved when the Clerk's Records are properly indexed.

A. Waiver of Error

A review of the record indicates that no attorney argued or urged a motion to sever during the adversary hearing. On April 16, 2008, Kirk Hawkins, attorney for Mabel Jessop, filed a Motion for Separate Trials in Cause No. 2902 (*In re 330 Children*). This motion, however, was not urged at the adversary hearing, and Mabel Jessop is not a Relator in this case. While Attorney Edwards referred to a motion to sever at the adversary hearing, there is no record of him ever arguing a motion to sever. 4 RR 35, 69.

During the hearing, Polly Ray O'Toole, Viola Spencer Barlow's attorney, objected to the "format of this hearing," and argued that, "Section 262.201 entitles each individual child that we represent to a full adversary hearing." 4 RR 12-13. It is unclear from Ms. O'Toole's objection to "the format," however, whether she is complaining about the consolidated hearing or about the hearing being conducted in two locations via video teleconference. Following Ms. O'Toole objection, the trial judge stated that the Department's case is applicable to every child, so the adversary hearings would be consolidated. 4 RR 15.

B. Trial Court's Discretion to Consolidate

This case is the largest child protection removal in the history of the United States. Adding to the logistical complexity of managing this many children and alleged parents are the time constraints and deadlines placed on the trial court by Texas Family Code § 262.201. This statute mandates that the trial court hold an

adversary hearing within fourteen (14) days from the date the trial court orders the children into the Department's custody. TEX. FAM. CODE § 262.201(b).

The full adversary hearing is designed to allow parents the opportunity to challenge the Department's right to retain custody of any child who has been removed under a court's ex parte order. If, after the adversary hearing, the court finds that the Department has met its burden under Texas Family Code § 262.201, the statute requires the court to enter temporary orders governing any child taken into custody pending a full adjudication of parental rights. *In re E.D.L.*, 105 S.W.3d 679, 688 (Tex. App.–Fort Worth 2003, pet. denied).

According to Texas Rule of Civil Procedure 174, "[w]hen actions involving a common question of law or fact are pending before a court" the court "may order a joint hearing or trial of any or all matters in issue in the actions." The rule also allows the court to "make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." TEX. R. CIV. P. 174(a)[12]; APPENDIX 8. This rule was specifically developed to allow trial courts the flexibility to manage complex, multiple party cases such as this one. The plain language of the rule clearly gives the trial court the discretion to consolidate the adversary hearing.

The Texas Supreme Court affirmed the expansive scope of this rule as recently as 2004, when it discussed a Fort Worth trial court's broad discretion to grant or deny separate trials or hearings in a large, complex case. *Tarrant Reg'l Water Dist. V. Gragg*, 151 S.W.3d 546, 556-57 (Tex. 2004). This inverse condemnation case

[12] It is interesting to note that the corollary rule relating to severance refers to only "separate trials." TEX. R. CIV. P. 174(b).

involved numerous parties and several weeks of testimony on issues of liability and compensation. The trial court found that bifurcating the trial on the issue of damages would result in considerable unnecessary evidentiary repetition. The Supreme Court agreed, finding that the trial court's decision to hold a unitary proceeding instead of separate trials *was not an abuse of discretion. Id*.

The Department put on three witnesses during the adversary hearing. Because the hearing was consolidated, all of the alleged mothers, including Relators, had the opportunity to confront and cross-examine the Department's witnesses. The hearing lasted two days and was completed within the required fourteen-day time period. By proceeding in this manner, the trial court protected Relators' due process rights and acted in the best interests of the children. To the contrary, the Department would argue that such a waste of judicial, county, and Department resources would have been an abuse of the trial court's discretion.

By conducting one adversary hearing in the manner in which it was conducted, the trial court ensured each Respondent and each child received due process. Judge Walther's only viable option was to conduct a consolidated adversary hearing involving the four hundred sixty-eight children. For Judge Walther to have conducted four hundred sixty-eight separate hearings would have been, at the very least, an extraordinary waste of judicial resources, as well as being a logistical nightmare. Imagine four hundred sixty-eight separate hearings involving the same three Department witnesses, the same documentary evidence, and most likely the same Respondent expert witness. It most likely would have taken several weeks, if not

months, to conduct that many hearings, even if there were strict time limits imposed by the court. Under these extraordinary circumstances, separate hearings would not have provided the Respondent alleged mothers and fathers with the due process they received. Further, multiple hearings would not have served the best interest of the children.

C. Waiver of right to individual hearings

It has long been the rule that a litigant cannot create a conflict during the course of a trial and subsequently complain on appeal of error which (s)he induced. *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999). It is the Department's contention that Relators, by their conspiracy of silence, purposefully confused the identity of the children, which forced Judge Walther to conduct the proceedings as she did. Relators, by throwing up a wall of deception and engaging in a conspiracy of silence, waived their rights to individual hearings. Relators' obfuscation made it impossible for Judge Walther to align alleged mothers and fathers with their children with any degree of certainty whatsoever. Imagine the consequences of conducting a separate adversary hearing for each of the children only to discover that some or none of the alleged respondent parents were the biological parents of the subject children? This would have created a legal nightmare. Relators, in effect, forced the trial court to conduct the adversary hearing as a consolidated proceeding. In other words, in light of Relators' purposeful obfuscation and persistent conspiracy to confuse the identity of the children and alleged parents, separate adversary hearings were not a viable option.

4. Mandamus is an inappropriate proceeding to attack the trial court's decision to consolidate the adversary hearing

Mandamus is an inappropriate proceeding to attack the trial court's decision to consolidate the adversary hearing. The Supreme Court has held that mandamus cannot be used as a mechanism to micromanage trials or to interfere with trial judges' ability to manage their dockets. *Polaris v. Inv. Mngt. Corp. v. Abascal*, 892 S.W.2d 860, 862, (Tex. 1995). In *Polaris*, the Supreme Court reviewed a trial court's order that the claims of a small group of plaintiffs proceed in a separate trial. The *Polaris* relators complained that plaintiffs' counsel handpicked the first group of plaintiffs without the defendants' participation or any scrutiny by the trial judge. In denying relators' petition, the Supreme Court explained that selection of trial plaintiffs is an incidental ruling and it is well settled that, even if the trial judge selected the trial plaintiffs in error, mandamus relief would be inappropriate. *Id.* at 861; *see also Abor v. Black*, 695 S.W.2d 564, 566-67 (Tex. 1985); *Walker*, 827 S.W.2d at 840 n. 8 (Tex. 1992); *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969), *cert. denied* 397 U.S. 997 (1970).

5. The trial judge's appointment of the Department as the children's temporary managing conservator is not an abuse of her discretionary authority

Relators contend that the Department failed to meet its burden of proof under all three prongs of Texas Family Code § 262.201, and that the trial judge abused her discretion by not returning Relators' children to their mothers. RELATOR'S AMENDED PETITION FOR WRIT OF MANDAMUS 1.

A. Insufficient Facts/Defective Pleadings/Ambiguous Relief

While the Department contends Relators have not recited any facts upon which mandamus relief can be granted, it also admits that it is, quite frankly, confused about what relief the Relators are requesting. In their petition, Relators state:

> In this mandamus, Relator mothers are not asking to return to life as if it was before their children were removed. They are not seeking to stop the Department's investigation. They only want possession of their children, subject to any reasonable conditions the Department and the trial court wish to impose. And if they cannot obtain the return of their children, they seek reasonable visitation with their children, to which they are entitled under statute.

RELATOR'S AMENDED PETITION FOR WRIT OF MANDAMUS 7.

This request begs one question: If this Court vacates the temporary order in the trial court below, by what authority can the Department and trial court impose "reasonable conditions" on Relators with respect to the children? The Department can only think of a court-ordered services case in which the Department would not have physical or legal custody of the children. In this type of case, the Department, or more importantly the trial court, has no remedy if Relators flee the jurisdiction with the children. It is the Department's position that to vacate the temporary order giving the Department temporary managing conservatorship of the children is to return the children to the *status quo ante* either at the YFZ Ranch in Eldorado, Texas, or in another state beyond the Texas courts' jurisdictional limits. Relators' failure to identify their children creates a second conundrum. How is this Honorable Court to determine what children are to be returned if it were to grant Relators' request to vacate the temporary order in the court below?

B. Confused Standard

The Relators contend, "the wholesale removal of children from their mothers was not justified by evidence sufficient to meet the **heightened standard** of section 262.201" and later refer to the standard as the "high statutory requirements." RELATOR'S AMENDED PETITION FOR WRIT OF MANDAMUS 6, 9.

Relators paint a misleading "heightened standard" of proof in this case. They have merged the strict scrutiny standard involved in the termination of parental rights, which implicates a liberty interest, with the standard of proof set forth in the Family Code for continuing the Department as temporary managing conservator of a child. *See* TEX. FAM. CODE § 262.201(b) & (c). *See also Santosky v. Kramer*, 455 U.S. 745 (1982); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976); *Vela v. Marywood*, 17 S.W.3d 750, 759 (Tex. App.-Austin 2000, pet. denied), *In re J.J.*, 911 S.W.2d 439 (Tex. App.-Texarkana 1995, writ denied).

The standard of proof, and the three prongs that the Department must satisfy, are set forth in § 262.201(b) of the Family Code:

> At the conclusion of the full adversary hearing, the court shall order return of the child to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession 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 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 effort has 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(b) (emphasis added).

Section § 262.201(d) further provides that:

> In determining whether there is continuing danger to the physical health or safety of the child, the court may consider whether the **household** to which the child would be returned includes **a person** who: (1) has abused or neglected another child in a manner that caused serious bodily injury to or death of the other child; or (2) **has sexually abused another child.**

TEX. FAM. CODE § 262.201(d) (emphasis added)

A review of the record reveals more than sufficient evidence to support the trial court's ruling and easily meets the standard of proof set forth in the Family Code for continuing the Department as temporary managing conservator of the YFZ children.

6. There was sufficient evidence to satisfy a person of ordinary prudence and caution that that there was a danger to the physical health or safety of the YFZ children which was caused by an act or failure to act of the person(s) entitled to possession of the children, and for the children to remain at the YFZ Ranch is contrary to the welfare of the children

The thrust of Relators' complaint is that, "the evidence admitted at the hearing does not pertain to the overwhelming majority of the children or their parents, nor did it establish that each child was at risk of physical danger." AMENDED PETITION FOR WRIT OF MANDAMUS 9. They complain that the Department failed to show any evidence of abuse or neglect "as to approximately 400 of the 416 children that were removed." AMENDED PETITION FOR WRIT OF MANDAMUS 9.

A. The Standard for Endangerment

Relators completely misstate the law. The Department is not required to show that a majority of children at the FYZ Ranch were at risk due to sexual abuse, or that the evidence pertains to the parents of the majority of the children. Although Family Code § 262.201 does not contain a definition of "endanger," an examination of the litany of cases interpreting the term "endanger" in the context of termination grounds under Family Code § 161.001(1)(D) and (E), gives us clear guidance.

B. Case Law on Endangerment

Over twenty years ago, the Texas Supreme Court established it is not necessary to prove an actual or concrete threat to a child to establish endangerment; danger can be inferred from parental misconduct alone. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). It is not necessary that the conduct be directed at the child or that the child actually suffers injury. *Id*.; *In re N.K.*, 99 S.W.3d 295, 300 (Tex. App.–Texarkana 2003, no pet.) (it is not necessary to show that a parent personally committed direct physical or emotional abuse of child before endangering the child).

It is well settled that a parent who commits sexual abuse of a child engages in conduct that endangers the physical and emotional well-being of the child. *In re S.F.*, 141 S.W.3d 744, (Tex. App.–Texarkana 2004, no pet.); *In re King*, 15 S.W.3d 272, 276 (Tex. App.–Texarkana 2000, pet. denied) (overruled on other grounds in *In re C.H.*, 89 S.W.3d 17 (Tex. 2002); *In the Interest of K.M.M.*, 993 S.W.2d 225 (Tex. App.–Eastland 1999, no pet.). Further, to endanger a child, **it is not necessary that the sexual abuse be directed against the parent's own child, or even that the child**

of the parent be aware of the sexual abuse. *Tex. Dep't Human Servs. v. Boyd*, 727 S.W.2d 531 (Tex. 1987); *In re N.H.*, 122 S.W.3d 391 (Tex. App.–Texarkana 2003, no pet.); *In re N.R.*, 101 S.W.3d 771 (Tex. App.--Texarkana 2003, pet. denied).

The Texarkana Court of Appeals found that mother's unwillingness or inability to ensure the emotional well-being of her other children, because of her denial that two older children sexually abused their younger siblings, and her failure to participate in counseling and refusal to take children to counseling, contributed to continued exposure to sexual abuse and the children's hesitancy to report future sexual abuse. *In re A.B.*, 125 S.W.3d 769, 775-76 (Tex. App.–Texarkana 2003, pet. denied). The Texarkana Court of Appeals found that mother endangered her children's physical health and emotional well-being. *Id*.

The Amarillo Court of Appeals has concluded that abuse or neglect supports a finding of endangerment even as to a child not yet born at time of the endangering conduct. *In re C.J.F.*, 134 S.W.3d 343 (Tex. App.–Amarillo 2003, pet. denied).

The Fort Worth Court of Appeals held that to determine whether termination is necessary because of endangerment, courts may look to parental conduct both before and after the child's birth. *In re D.M.*, 58 S.W.3d 801 (Tex. App.–Fort Worth 2001, no pet.). The Fort Worth Court of Appeals further found that a mother consistently endangers her children by exposing them to abusive partners. *In re M.N.G.*, 147 S.W.3d 521 (Tex. App.–Fort Worth 2004, pet. denied).

In the instant case, the evidence of endangerment of the YFZ children by a pattern of systematic and institutionalized sexual abuse adduced at the adversary hearing is overwhelming.

C. Evidence of Endangerment

At the adversary hearing at issue, the Department adduced compelling evidence of endangerment of children by a pattern of systematic and institutionalized sexual abuse. Interviews revealed a pattern of girls reporting that there was no age too young for girls to be "spiritually married". 4 RR 201, 238. Ms. Voss noted that there were sixteen year old mothers who had given birth and had small children with them. These mothers were also married and were part of a household with other wives. 4 RR 192. The investigation revealed that the children appeared to have a pervasive belief that when the prophet, Uncle Merrill, decided for them to be married, they would be married. No age was too young, and they wanted to have as many babies as they could. (4 RR 206). This pattern of information was based upon the initial interviews before the removal of twenty-five girls. 4 RR 206.

Investigators from the Department documented at the time of the pre-removal investigation the following:

> Girl "number three" reported that she knows a sixteen-year-old girl, Sarah Elizabeth Johnson, who has a five-month-old baby, and that she is married to "Dan B.", whom girl number three believed to be twenty-three years old. 4 RR 212.
>
> Girl "number four" reported in her journal entry dated 10/03/07, that law enforcement was looking for the husband and wives, quoting "Mother Milly and Mother Lori, because they were underage when they got married." 4 RR 213.

Girl "number six" advised that there is no age limit for girls to get married and have children. 4 RR 213.

Girl "number eight" stated there is a girl named "Mother Beth," and that she is a teenager. 4 RR 214.

Girl "number nine" advised that the prophet told her to lie to authorities, because the prophet receives his messages from the "Heavenly Father." 4 RR 214. She further reported that "Uncle Merrill", after being advised by her that she hadn't seen her mom in two years, stated, "it's none of her business." Uncle Merrill decides who she will marry and when she will marry, and that the age depends upon what the "Heavenly Father" decides. 4 RR 214.

Suzanne Johnson is seventeen years old and had a one-year-old son named Seth. 4 RR 215.

Five entries in the "Bishop Records" (6 RR, PETITIONER'S EXHIBIT 4; 4 RR 252-53 revealed the following:

The "second child" is sixteen years old and is currently pregnant. 4 RR 253.

The "third child" was sixteen years old when she conceived a child. 4 RR 253.

The "fourth child" was fifteen years old when she conceived a child. 4 RR 253.

The "fifth child" was fifteen years old when she conceived a child. 4 RR 253.

The "second to last one" was thirteen years old when she conceived a child. 4 RR 254.

Ms. Voss testified that that she believed the boys were groomed to be perpetrators. (4 RR 261). Part of the danger to the boys is that their belief system requires that they follow the prophet. 4 RR 281-82. In her professional opinion, Ms. Voss believes that girls are born and raised to be victims of sexual abuse. 4 RR 257.

As of April 18, 2008, Ms. Voss indicated that the investigation established there were ***over twenty*** girls who had either conceived or given birth younger than sixteen or seventeen years of age. 4 RR 30.

All of the 468 children were removed from one compound on the YFZ Ranch, and the investigation revealed that the FYZ Ranch, for all intents and purposes, was essentially one household comprised of extended family subgroups. The community has one common belief system that young girls are called on to be wives and no age is too young to be married. 4 RR 201, 238.

Ms. Voss testified that during interviews with the children and adults at YFZ Ranch, "they explained that they are one big family, one large community, and they have the same belief system." 4 RR 258. All of the women are called mothers to all of the children in the home, and the children call each other brothers and sisters. It appears that a mother is married to one man, and that man is married to other women. 4 RR 230. Although the YFZ Ranch complex contains several houses, it is one large community. 4 RR 271. Ms. Voss indicated that this investigation was analogous to other investigations in that when one victim is found in a home, the investigator will have concerns for all of the children in that home. In this case, since the ranch was considered one large home or community, Ms. Voss had concerns for all the children there. 4 RR 304.

Even Relators' own expert, Dr. William John Walsh, established that the FLDS social structure involves an extended family unit centered around a patriarch or husband who will have one or more wives. The wives are not necessarily his legal

wives. Finally, there are children resulting from those unions. 5 RR 173. Dr. Walsh identified Warren Jeffs as the prophet who leads the FLDS. 5 RR 180.

Dr. Walsh further corroborated the evidence that under-age girls are viewed by the FLDS faith as being eligible for marriage at the age of physical development. 5 RR 183. He did qualify his opinion, however, by indicating that some in the church expressed that age eighteen was a good age. Other church members have said that sixteen is a good age if the parents agree. 5 RR 183. Others expressed the opinion that when a female begins her menstrual cycle, that is a sign that the girl is ready for marriage. 5 RR 183.

Dr. Bruce Duncan Perry declared that the pregnancy of the YFZ children was the result of sexual abuse. 5 RR 92. In Dr. Perry's opinion, children between the ages of fourteen and sixteen are not emotionally mature enough to consensually enter into a healthy relationship or marriage. 5 RR 72. He testified that continued disobedience of a father or elders or the prophet would lead to eternal damnation. 5 RR 73-74.

Regarding the boys, Dr. Perry expressed two concerns: 1) the pervasive belief, and pervasive obedience to that belief, that it is okay to have sex with and marry young women, is unhealthy; and 2) this pervasive practice and belief creates an environment that develops people who have a high potential of replicating sexual abuse of young children as a part of their belief system. 5 RR 77. Dr. Perry opined that when one is socialized into a belief and certain behavior is embedded in your religion, it is very deeply ingrained. 5 RR 83. He also testified that such socialization adversely affects the part of the brain that is involved in independent decision making.

5 RR 79. This environment would make a fifteen- or sixteen-year old child highly vulnerable to individuals who are willing to exploit them and take advantage of their child-like qualities. 5 RR 82.

D. Relators' Witnesses

Four of the Relators' fact witnesses at the adversary hearing failed to controvert any of the Department's evidence on the material issue of endangerment caused by the sexual abuse of young, under-age girls.

Merilyn Jeffs. Relators' witness, Merilyn Jeffs, testified that she has a nineteen year old sister who has a baby. Ms. Jeffs estimates that her sister's baby is two years old, but she doesn't remember how old her sister was when the baby was born. 5 RR. 262. At first Ms. Jeffs said her sister has been married since 2004, but then she claimed that she didn't know when her sister got married. 5 RR 261. Ms. Jeff's testified that she had another sister, Pamela, who is eighteen years old and has a baby who is walking. 5 RR 263-64.

Lori Jessop. Lori Jessop testified that she has seen pregnant teenagers at the YFZ Ranch, but doesn't know their exact ages. 5 RR 279.

Linda Musser. Linda Musser is not aware of any girls under seventeen that are married on the ranch. 5 RR 292.

Lucille Nielson. Lucille Nielson knows of at least a dozen girls who married under the age of eighteen. 5 RR 308.

Rather than controvert the Department's evidence, Relators' own witnesses repeatedly affirm the Department's claims.

7. There is sufficient evidence to satisfy a person of ordinary prudence and caution that there was an urgent need for protection that required immediate removal of the YFZ children, and reasonable efforts, consistent with the circumstances and providing for the safety of the YFZ children, were made to eliminate or prevent the YFZ children's removal

The removal of the four hundred sixty-eight (468) YFZ children is the largest child protection case documented in the history of the United States. The Department as well as other agencies, including the Department of Public Safety, the Texas Rangers, the Federal Emergency Management Agency, the Texas Department of Health, and many other county and local agencies, as well as countless volunteers, assisted in the massive undertaking in a manner that was designed to protect the best interest of the children. In an attempt to lessen the trauma incident to removing the children from the YFZ compound, the Department attempted to accommodate Relators by allowing the alleged mothers to remain with their children. 4 RR 234.

In light of the compelling evidence revealed by the investigation and testimony adduced at the adversary hearing, the Department could not risk leaving children in an environment that promoted, even encouraged, the systematic sexual exploitation of children. Furthermore, the sheer magnitude of numbers and the logistics of the situation precluded the Department from pursuing other options that it may have considered in more typical child protection cases, such as placing the children with relatives or fictive kin.

As discussed earlier, the conduct of the adults and children has handicapped the Department's ability to match up alleged mothers and fathers with their children. The Department's investigation was thwarted due to misinformation about the identities of

the girls. The children would switch their names, use a different last name than they had previously reported, and falsely report that they had no middle names. 4 RR 193. Investigators discovered a large shredder in one of the rooms with the light still on and paper dangling from it. The paper shredder was full of shredded paper. 4 RR 195. Ms. Voss indicated she believed she was encountering a "brick wall", because some girls were saying that they were going to plead "the Fifth" and not answer questions. 4 RR 195-96. The girls refused to answer questions about the identity of persons in their home. 4 RR 197. From the time the children were removed, until after the children arrived at the civic center, teenage children continued to provide investigators with different names. 4 RR 233. The children would provide no explanation as to why they provided different names. 4 RR 234. The Department, under extraordinarily difficult circumstances, exercised its best efforts to ascertain the identity of the children, but was unable to provide a complete list of children or determine identities of their parents due to the children's refusal to cooperate and due to misinformation provided by some of the alleged mothers. 4 RR 236-37. One alleged mother identified four children as being hers and later indicated that they were not. 4 RR 237.

8. There is sufficient evidence to satisfy a person of ordinary prudence and caution that reasonable efforts have been made to enable the children to return home, but that there is a substantial risk of a continuing danger if the children are returned home

In addition to the concerns of Angie Voss, *supra*, she stated it would not be safe for any child to return to the ranch. This was because the YFZ adults to whom she had spoken expressed the belief that they aren't doing anything harmful to their children. The YFZ adults affirmed that the practice of being united and having children is part

of their belief system. 4 RR 260. The reasonable inference from these statements ,coupled with the information gleaned from the investigation, is that "being united and having children" allows under-age "spiritual" marriages as directed by the prophet to be appropriate behavior at the ranch.

In *In re V.A.*, No. 13-06-237-CV, 2007 Tex. App. LEXIS 805 (Tex. App.–Corpus Christi Feb. 1, 2007, no pet.) (mem. op.), the court held that a fact finder can infer that the "identified risk factors establish[ing] endangerment … in the past … would continue to be present thus endangering the children's well-being in the future if the children are returned" to the parent; a fact finder can infer that mother's past inability to appropriately care for her children is indicative of the quality of care she is capable of providing the children in the future. *Id.* at *17-*18. Clearly, Judge Walther could have concluded that to return any of the children to any parent would subject the children to a substantial risk of continuing danger. Further, Judge Walther had overwhelming evidence from which to find, as provided in Family Code § 262.201(d), that the YFZ Ranch household, where the children would have been returned, included persons who had sexually abused other children. TEX. FAM. CODE § 262.201(d).

Relators assert that the Department failed to avail itself of the alternative to removal by not filing for a temporary restraining order for the removal of the alleged perpetrator under Family Code § 262.1015; APPENDIX 9. The Department contends that this approach under the circumstances was untenable and impracticable. How could the Department have identified the alleged perpetrator or perpetrators when the evidence demonstrated that the entire male and female population at the YFZ Ranch

had been enculturated into the belief that under-age marriage was sacrosanct? Further, the Department was confronted by a conspiracy of silence from adult respondents that made it impossible for the Department to identify perpetrators. Relators complain that the Department over-reached in its handling of this case. The Department steadfastly maintains it could not have availed itself of Family Code § 262.1015 to avoid bringing the children into care in this case.

The evidence adduced at the adversary hearing is overwhelmingly sufficient to support the trial court's finding that the YFZ Ranch household, to which the children would have been returned, included persons who sexually abused children. TEX. FAM. CODE § 262.201(d). Accordingly, the trial judge did not abuse her discretion in concluding that returning any children to the YFZ Ranch would subject them to a substantial risk of continuing danger.

9. Relators' Authority does not Support their Arguments

Relators' reliance on *In re Mata* and *Cochran* is misplaced. *In re Mata*, 212 S.W.3d 597 (Tex. App.–Austin 2006, no pet.); *Cochran v. Hotz*, 151 S.W.3d 275 (Tex. App.–Texarkana 2004 no pet.). *Mata* involved a no-evidence case in an original suit affecting parent-child relationship where a non-parent was seeking custody of a child; the mother had placed her child in the home of the non-parent in anticipation of adoption. *Mata*, 212 S.W.3d at 603-05. The mother changed her mind and did not execute an affidavit of relinquishment of parental rights. The non-parent instituted an action seeking custody of the child. *Id.* The trial court entered an order appointing the non-parent as temporary managing conservator of the child. The appeals court

determined that there was no evidence to establish that the appointment of the mother would significantly impair the child's physical health or emotional development. *Id.* at 609-10; *see* TEX FAM. CODE § 153.131 (Lexis 2007).

In *Cochran*, 151 S.W.3d 275, the Texarkana Court held that the evidence at the adversary hearing was insufficient for the trial court to deny parents possession of their newborn child, despite a prior termination of mother's parental rights to eight other children under Texas Family Code § 161.001(1)(D) and (E). When the mother gave birth to a ninth child, the Department removed her. In that case, there was no evidence that the current conditions were a danger to the newborn's health or safety. *Id*. at 279-81. Despite granting the writ of mandamus, the Texarkana Court explicitly refused to grant mandamus relief under Texas Family Code § 262.201(2)(b), holding:

> Subsection (2) [262.201(b)(2)] arguably allows the trial court to exercise its discretion in finding what efforts were reasonable in any given case by requiring it to find that "reasonable efforts, *consistent with the circumstances* and for the safety of the child, were made to eliminate or prevent the child's removal." TEX. FAM. CODE ANN. § 262.201(b)(2) (emphasis added). The plain language of this provision allows some flexibility in the trial court's determination of what efforts, if any, were reasonable in the given circumstances. Therefore, **we also decline** to issue a writ of mandamus with respect to the trial court's finding under Section 262.201(b)(2) of the Texas Family Code.

Id. at 279 -280.

10. The trial judge acted within her discretionary authority not to grant Relators standard visitation

The trial judge's decision to appoint the Department as temporary managing conservator of the children and not to grant Relators standard visitation, was not arbitrary and unreasonable. In fact, the Family Code provides:

> The rebuttable presumptions established in favor of the application of the guidelines for a child support order and for the standard possession order under Chapters 153 and 154 apply to temporary orders. The presumptions do not limit the authority of the court to render other temporary orders.

TEX FAM. CODE § 105.001(g); APPENDIX 10.

The comment to § 105.001(g) in Sampson & Tindall's *Texas Family Code Annotated*, August 2007 ed., provides in part, "A trial court has great discretion in rendering temporary orders, particularly because those orders are not appealable. … The broad power of a trial court permits modification of temporary orders at any time. The test for rendition of a new temporary order in a SAPCR is identical to that of the original order, i.e. 'for the safety and welfare of the child.' " SAMPSON & TINDALL'S FAMILY CODE ANNOTATED, AUGUST 2007 EDITION 496.

In support of Relators' argument that Judge Walther abused her discretion in not granting Relators standard visitation, they rely upon *Roosth v. Roosth*, 899 S.W.2d 445 (Tex. App.–Houston [14th Dist.] 1994, writ denied). Curiously enough, this case soundly supports Judge Walther's decision to allow Relators "with such access and visitation to be at such times and places and under such circumstances as mutually agreed to by the Department." STANDARD TEMPORARY ORDER, page 3, Section 5.2 and 5.3. The Houston 14th Court stated in *Roosth*:

> The best interest of the child is the primary consideration of the court in determining questions of possession of a child. See MacCallum v. MacCallum, 801 S.W.2d 579, 582 (Tex. App.--Corpus Christi 1990, writ denied). Trial courts have wide discretion in determining the best interests of the child. Id. Because the trial court's decision regarding possession of a child is a discretionary function, we may only reverse if we conclude the trial court

> abused its discretion. Id. The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. Id.

Id. at 451.

The Department contends that the guiding rules and principles in child protection cases dictate that when children are shown to be endangered by abuse, that until such time that the trial court can identify the perpetrators and insure that the children can be protected from further abuse, limited supervised visitation is both appropriate and essential. The court is later free to modify the visitation provisions when it is confident that it can do so in a manner that protects the children and is in the children's best interest.

In the instant case, the evidence is overwhelming that there has been systematic and institutionalized sexual abuse of children. As of the date of the adversary hearing on April 18, 2008, the Department had documented twenty individual cases of sexual abuse of the children from YFZ Ranch. However, none of the perpetrators had been identified. No alleged mothers had come forward with any information about the identity of the alleged perpetrators. In fact, alleged mothers had been dismissive of the practice of under-age marriage by expressing to investigators the belief that they aren't doing anything harmful to their children, and that the practice of being united and having children is part of their belief system. 4 RR 260. Under these circumstances, not only was Judge Walther soundly within her discretion in ordering the limited supervised visitation, she simply had no other option that guaranteed the continued welfare and safety of the children.

Under these circumstances, the trial judge was soundly within her discretion in ordering limited supervised visitation.

11. The trial judge conducted the adversary hearing in a manner that accorded all parties with due process of law

The Department incorporates the section above entitled, "Adversary Hearing," as if the same were copied verbatim in this argument. At no time did Judge Walther limit any respondent from cross-examining the Department's witnesses. At no time did Judge Walther limit any respondent from calling any witness. The only limitation Judge Walther imposed was to limit the parties who could cross-examine respondent alleged mothers. Judge Walther limited the cross-examination of the alleged mothers to the Department, the fathers related to her, and the *ad litem*s of alleged mothers' children. 5 RR 243. Even if the Relators can demonstrate some difficulty in the manner in which the adversary hearing was conducted, they have failed to show harm and they have failed to show the trial judge abused her discretion.

12. Conclusion

First, Relators' "Petition for Writ of Mandamus" is facially defective because it requests this Honorable Court to vacate the order below and somehow confer on the trial court and the Department the authority to place upon Relators "any reasonable condition" to safeguard the children. This request is not legally possible. Second, Relators fail to show a single ground upon which mandamus relief can be granted. Third, Relators fail to show they have a justiciable interest because Relators have not identified their children in their petition before this Court. Fourth, Relators fail to

show that Judge Walther clearly abused her discretion in finding that the Department met its three-pronged burden under Family Code § 262.201(b). Fifth, Relators entirely fail to show the absence of a factual dispute of consequence, and that the trial court could have reached only one decision on the facts. To the contrary, the evidence adduced by the Department at the adversary hearing is not even controverted by the respondents' witnesses. Sixth, Relators do not show that Judge Walther abused her discretion in not granting them standard visitation. The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles, and Relators do not meet this burden. Finally, Relators do not show that Judge Walther abused her discretion by committing an error of law for which appeal is an inadequate remedy.

PRAYER

For the reasons set forth in this Response, the Department respectfully requests that this Court deny Relators' Petition for Writ of Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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