

No. _____

*In The
Supreme Court of Texas*

**IN RE TEXAS DEPARTMENT
OF FAMILY AND PROTECTIVE SERVICES,
RELATOR**

From Cause No. 03-08-00235-CV
in the Third Court of Appeals
Austin, Texas

PETITION FOR WRIT OF MANDAMUS

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IDENTITY OF PARTIES AND COUNSEL

The following is a complete list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel:

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2. The Texas Third Court of Appeals, at Austin, is Respondent.
3. Sara Steed and thirty-five (35) other mothers are Relators in the underlying mandamus proceed in the Third Court of Appeals at Austin and are identified in their

“Amended Motion for Petition for Writ of Mandamus” in Cause No. 03-08-00235-CV.

They are interested parties in the case before this Honorable Court.

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4. Carey D. Cockerell, Commissioner of the Department, is an interested party.

5. The Honorable Barbara L. Walther, Presiding Judge of the 51st Judicial District Court of Schleicher County, Texas, is an interested party.

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STATEMENT OF THE CASE

- Nature of the Case:* Emergency removal and grant of Temporary Managing Conservatorship under chapter 262 of the Texas Family Code.
- Trial Court:* The Honorable Barbara L. Walther, presiding judge for the 51st Judicial District Court of Schleicher County, Texas.
- Disposition in the Trial Court:* In an adversary hearing to the bench for temporary managing conservatorship of the subject children, the trial court found that the Department met its burden of proof under Family Code subchapter 262.201 and granted the Department temporary managing conservatorship of the subject children.
- Parties in the Court of Appeals:* Sara Steed, *et al.*, Relators
The Honorable Barbara L. Walther, Respondent
Department of Protective and Regulatory Services, Real Party in Interest
- Court of Appeals:* Third Court of Appeals, a panel consisting of Chief Justice Law, Justice Pemberton, and Justice Waldrop. A per curiam opinion in an original mandamus proceeding styled *In re Steed, et al.*, No. 03-08-00235-CV, ___ S.W.3d ___ (Tex. App.—Austin May 22, 2008, pet. filed).
- Court of Appeals' Disposition:* Reversed the trial court's grant of temporary managing conservatorship to the Department for the children the subject of the underlying mandamus.

STATEMENT OF JURISDICTION

The Supreme Court of Texas has jurisdiction to hear this Petition for Writ of Mandamus under Texas Government Code § 22.001 and 22.002. TEX. GOV'T CODE §§ 22.001 and 22.002.

ISSUE PRESENTED

Whether the Third Court of Appeals erred in granting mandamus in the underlying case?

No. _____

In The
Supreme Court of Texas

**IN RE TEXAS DEPARTMENT
OF FAMILY AND PROTECTIVE SERVICES,
RELATOR**

From Cause No. 03-08-00235-CV
in the Third Court of Appeals
Austin, Texas

PETITION FOR WRIT OF MANDAMUS

To The Honorable Justices of the Supreme Court:

The Texas Department of Family and Protective Services [Department] files this Petition for Writ of Mandamus relating to the per curium memorandum opinion issued by the Third Court of Appeals on May 22, 2008, in *In re Sara Steed, et al.*, No. 03-08-00235-CV. APPENDIX 1. This case is about adult men commanding sex from underage children; about adult women knowingly condoning and allowing sexual abuse of underage children; about the need for the Department to take action under difficult, time-sensitive and unprecedented circumstances to protect children on an emergency basis, as expressly authorized by the Legislature and about the intermediate court's mandate to return the children without giving the court the opportunity to determine which parents are entitled to possession of which children.

STATEMENT OF FACTS

On March 29, 2008, the Department received a report that a sixteen-year-old girl was being physically and sexually abused at the YFZ Ranch in Eldorado, Texas. 4 RR 149, 152. On April 3, 2008, Angie Voss, supervisory investigator of the Department, and a team of twelve investigators investigated the allegations. 4 RR 153.

From the outset, the Department's investigation was thwarted due to misinformation about the identities of the girls. The girls 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. Ms. Voss indicated that she believed she was encountering a "brick wall, because some girls were saying 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 the home. 4 RR 197. From the time they were removed from the YFZ Ranch until after the children arrived at the civic center, teenage children were providing investigators with different names. 4 RR 233. The children gave no explanation as to why they were providing different names. 4 RR 234. The Department exercised its best efforts to ascertain the identities of the children, but was unable to provide a complete list of the children and the identities of their parents due to the conduct of the children and misinformation from 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. Relator Lucille Nielsen testified that when the alleged mothers were asked to identify themselves and

their children on the bus after removal and again at their temporary placement, stated, “We would not identify ourselves.” 5 2 RR 316-17.

Interviews revealed a pattern of girls reporting that there was no age too young for girls to be “spiritually married”. 4 RR 201, 238. There were sixteen-year-old mothers who had given birth and had small children with them; these child mothers were married and were part of a household with other wives. 4 RR 192. The investigation revealed the children appeared to have a pervasive belief that when “Uncle Merrill” decided for them to be married, they would be married. 4 RR 214. No age was too young to marry, and they wanted to have as many babies as they could. 4 RR 206.

Ms. Voss testified she believed the boys were groomed to be perpetrators. 4 RR 261. “What I mean by that is there are adult men who have united with adolescent girls and there are boys that are growing up in an environment that supports that.” 4 RR 262. Ms. Voss testified, “girls become sexual assault victims.” 4 RR 257. As of April 18, 2008, the investigation established that there were over twenty girls younger than sixteen or seventeen years of age who had either conceived or given birth. 4 RR 30.

The following sexual abuse was documented at the pre-removal investigation:

- Girl “number three” reported she knows a sixteen-year-old girl, Sarah Elizabeth Johnson, who is married and has a five month old baby. 4 RR 212.
- Girl “number six” advised that there is no age limit for girls to get married and have children. 4 RR 213.
- Girl “number nine” reported that “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 was seventeen years old and had a one year old son named Seth. 4 RR 215.

Five entries in the FLDS's "Bishop Records" also revealed sexual abuse:

- 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.

6 RR PETITIONER'S EXHIBIT 4; 4 RR 253-54. By necessity, the record establishes not only that children as young as age thirteen were pregnant, but also that men must have been engaged in the sexual abuse of children at least nine months before, if not at an even earlier age.

Ms. Voss testified that the children and adults at the YFZ Ranch "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 woman is married to one man, and that man is married to other women. 4 RR 230. Ms. Voss stated that because the children and adults indicated they were one large community and had the same belief system, and she already had "been able to identify several victims, my concern is that all the children there are potential victims." 4 RR 258. When asked why the babies needed to be removed, Ms. Voss responded, "the little boys, the babies, the girls, what I have found is that they are living under an umbrella of belief that having children at a young age is a blessing and therefore any child in that environment would not be safe." 4 RR 262. When asked if she had concerns about immediate danger to a two-year-old child,

Ms. Voss responded, “when you find one child that’s a victim in a home, you have concerns for all of them. And the ranch is considered one large home, one large community. I would have concerns for any children there.” 4 RR 304. The question immediately following her answer was, “What about a six-month-old child?” Ms. Voss responded, “Any children, sir.” 4 RR 304. Ms. Voss testified it would not be safe for “any child to return to the ranch” because the adults on the ranch expressed that they “aren’t 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 is a child psychiatrist who specializes in child maltreatment and child development. 5 RR 57-58. He has worked with children removed from the Branch Davidian Compound, and with groups such as the Children of God, Moon Group, and Posse Comitatus. 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. Dr. Perry testified that when you are raised in an environment where it is a blessing to have children and to be compliant to your father and the prophet, free choice is not really possible. 5 RR 76. Dr. Perry declared that the pregnancy of the YFZ children was the result of sexual abuse. 5 RR 92. It was his belief that children of the age of fourteen, fifteen, and sixteen are not emotionally mature enough to consensually enter into a healthy relationship or marriage. 5 RR 72. He testified that under the FLDS belief system, continued disobedience of a father, the elders, or the prophet, would lead to eternal damnation. 5 RR 73-74.

Regarding the boys, Dr. Perry expressed two concerns: 1) the pervasive obedience and belief that it is okay to have sex with and marry young women is unhealthy; and 2) this pervasive 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 testified that this type of environment “is a danger that applies to all the children, including the boys.” 5 RR 78. As far as the other children who were not forced into underage 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 underage marriage and 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 was called as an expert witness by five alleged fathers. 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 the FLDS. 5 RR 180. He acknowledged that under Warren Jeffs underage marriage has taken place. 5 RR 180. Dr. Walsh indicated that among the FLDS, the age of physical development for a girl made them eligible for marriage. 5 RR 183. Some FLDS members expressed the opinion

that when a female begins her menstrual cycle, that is a sign the girl is ready for marriage.
5 RR 183.

ARGUMENT

THE THIRD COURT OF APPEALS ERRED IN GRANTING MANDAMUS IN THIS CASE

Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1990); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985). The court of appeals, therefore, acts in excess of its writ power (abuses its discretion) when it grants mandamus relief absent these circumstances. *Johnson*, 700 S.W.2d at 917.

A trial court, on the other hand, abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Johnson*, 700 S.W.2d at 917. A relator who attacks the ruling of a trial court as an abuse of discretion “labors under a heavy burden.” *Id.* The relator must establish, under the circumstances of the case, that the facts and law permit the trial court to make but *one decision*. *Id.* This determination is essential, because mandamus will not issue to control the action of a lower court in a matter involving discretion. *Id.* In order to find an abuse of discretion, the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter. *Id.* at 918.

As this Honorable Court stated in *Johnson*:

We apply these principles in mandamus proceedings. Our focus remains on the trial court’s order regardless of the court of appeals’ decision on man-

damus. We make an independent inquiry whether the trial court's order is so arbitrary, unreasonable, or based upon so gross and prejudicial an error of law so as to establish an abuse of discretion. A mere error in judgment is not an abuse of discretion. Although we may believe than the court of appeals has exercised better judgment than the trial court in the matter, we must nevertheless grant the mandamus and direct the court of appeals to vacate its judgment if there is some basis in reason and law for the order of the trial court. If the matter is truly one requiring the exercise of discretion, such discretion lies with the trial court. An appellate court may not substitute its discretion for that of the trial court.

Johnson, 700 S.W.2d at 918.

The Third Court of Appeals Has Abused Its Discretion

The factfinder enjoys the right to resolve credibility issues and conflicts within the evidence and may freely choose to believe all, part, or none of the testimony espoused by any particular witness. *In re E.S.M.*, 550 S.W.2d 749, 757 (Tex. Civ. App.–Houston [1st Dist.] 1977, writ ref'd n.r.e.). Where conflicting evidence is present, the factfinder's determination on such matters is generally regarded as conclusive. *In re B.R.*, 950 S.W.2d 113, 121 (Tex. App.–El Paso 1997, no writ). Appellate courts cannot weigh witness credibility issues that depend on demeanor and appearance as the witnesses are not present. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). Even when credibility issues are reflected in the written transcript, the appellate court must defer to the jury's determinations, at least so long as those determinations are not themselves unreasonable. *Id.* The Texas Supreme Court specifically warns reviewing courts not to “second-guess the trial court's resolution of a factual dispute by relying on evidence that is either disputed, or that the court could easily have rejected as not credible.” *In re L.M.I. and J.A.I.*, 119 S.W.3d 707, 712 (Tex. 2003). The “reweighing of the evidence is improper.” *Id.* In a

case “where so much turns on the witnesses’ credibility and state of mind, appellate fact-finding is particularly dangerous.” *Id.*

Errors by the Third Court of Appeals

The Third Court of Appeals neither states, nor applies, the appropriate standard for granting relief by mandamus as set out by this Court. Instead, the Third Court offers a poor analysis of misstated facts, at a variety of differing standards of review, including a preponderance of the evidence standard and discussions of legal and factual insufficiency. The court below committed a basic fundamental and critical error in that the issue before the court on mandamus was not what is right based on the preponderance of the evidence, which could be available today, but rather, what was prudent and cautious based on the evidence available at the adversary hearing.

The Relators in the Third Court of Appeals clearly misstate the burden of proof required in a Family Code § 262.201 removal hearing, stating, it requires “three specific findings based on a preponderance of the evidence.” REALTORS’ REPLY TO REAL PARTY IN INTEREST’S RESPONSE TO AMENDED PETITION FOR WRIT OF MANDAMUS 9. The Third Court holds the Department and the trial court to this much higher, and erroneous, standard of proof, rather than the much lower, and proper, standard of proof under Family Code § 262.201. TEX. FAM. CODE § 262.201 (Lexis 2007); APPENDIX 2. The burden of proof set forth in the statute as articulated by the Legislature is:

(b) At the conclusion of the full adversary hearing, the court shall order the 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 the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal; and

(3) reasonable efforts have been made to enable to child to return home, but there is a substantial risk of continuing danger if the child is returned home.

(d) In determining whether there is a 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:

(2) has sexually abused another child.

TEX. FAM. CODE § 262.201(b), (d) (Lexis 2007); APPENDIX 2. (Emphasis Added).

Rather than conducting a proper review of a petition for mandamus, the appellate court completely stands mandamus practice on its head. Instead of conducting an abuse of discretion review, the court of appeals engages in a full out re-trial of the issues at the appellate level, including reweighing the evidence and second-guessing the trial court's resolution of both uncontradicted evidence supporting the trial court's finding and factually disputed issues. *See L.M.I.*, 119 S.W.3d at 712.

The court of appeals not only misses the distinction between a direct appeal and a mandamus proceeding, it erases that distinction. In a mandamus review for an abuse of discretion, the appellate court cannot concern itself with the burden of proof or conduct a legal or factual sufficiency review. The only issue the appellate court can consider is whether the trial court abused its discretion. In the instant case, the court of appeals completely ignored long-standing precedent of this Court, as it embarked on a detailed review of the evidence in the record. The appellate court completely reversed the roles of the appellate and trial court as it conducted its analysis as if this were a direct appeal of a

trial on the merits. The underlying opinion is a clear example of the appellate court substituting its judgment for the trial court, which: (1) threatens the structure of our judicial system; and (2) undermines the ability of trial courts to do their job.

To show that the trial court abused its discretion, the appellate court must find that: (1) the trial court reached a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law; and (2) under the circumstances of the case, the facts and law permit the trial court to make but one decision. *Johnson*, 700 S.W.2d at 917. In order to find an abuse of discretion, the reviewing court must conclude that the facts and circumstances of the case extinguish *any* discretion in the matter. *Id.* at 918. The appellate court in its opinion neither sets out the above standard, nor makes the necessary findings to establish that the trial court abused its discretion. Rather, the appellate court “find[s] that the Department did not carry its burden of proof under section 262.201. The evidence adduced at the hearing held April 17-18, 2008, was legally and factually insufficient to support the findings required by section 262.201 to maintain custody of Relators’ children with the Department. Consequently, the district court abused its discretion in failing to return the Relators’ children to the Relators.” *In re Steed*, No. 03-08-00235-CV, at 9; APPENDIX 1.

As stated above, interviews in the case revealed a pattern of girls reporting that there was no age too young for girls to be “spiritually married.” 4 RR 201, 214, 238. The evidence clearly established that there were children married under the age of 16, one child having been married at the age of twelve. 4 RR 30, 192, 212-15, 253-54. Specifically, the FLDS’s own “Bishop Records” reveal that one child was thirteen years

old when she conceived a child. 4 RR 254. Under Texas law, parents cannot consent to these underage marriages. The Third Court's effort to minimize or explain away this evidence is not only improper in a mandamus review, it is also incorrect as it misstates Texas law. The evidence is uncontroverted that adult men engage in "spiritual marriages" with underage children. In the record of the adversary hearing, there are only a few alleged mothers and/or fathers who came forward claiming parentage of specific children. The vast majority of the four-hundred sixty-three children (463) had no one step forward to claim them at the adversary hearing. Based on both the children's and women's repeated deceptions, lies, and misinformation, the trial court had *no* reliable evidence as to: (1) the names of the children; (2) the identity of persons in their homes; or (3) the identity of the children's biological parents. 4 RR 193, 195-96, 233-34, 236-37. The Third Court of Appeals essentially shifted the burden to establish parentage to the Department. Who actually had the burden at the adversary hearing to establish a legal relationship to each child the subject of the suits underlying the mandamus?

An appellate court must hear and determine a case on the record as filed, and it cannot consider documents attached as exhibits or appendices to briefs or motions. *Perry v. Kroger Stores Store No. 119*, 741 S.W.2d 533, 534 (Tex. App.–Dallas 1987, writ denied). The mere attachment of documents as exhibits or appendices to a brief or motion is not a formal inclusion in the record. *Id.* at 533-534. At the adversary hearing, only two Relators in the underlying mandamus testified as to the identities of her alleged children. Thus, regarding the remaining Relators, and the remaining four-hundred fifty-nine (459) children, the trial court had *no evidence* before it establishing familial relationships be-

tween any child and any alleged parent. The Relators, with the exception of Lori Jessop and Lucille Nielsen, do not identify their children until the “mere inclusion” of a self-generated list of purported children attached to not the first, but to the third pleading filed by Relators in the underlying mandamus. RELATORS’ REPLY TO REAL PARTY IN INTEREST’S RESPONSE TO AMENDED PETITION FOR WRIT OF MANDAMUS APPENDIX 3. This attachment is not part of the record and cannot be considered as evidence. Accordingly, the appellate court erred in considering the attachment. Thus, the appellate court had no evidence of any relationship between any Relator and any child, absent Lori Jessop and Lucille Nielsen. Consequently, the appellate court had no one to return the vast majority of these children to when the court of appeals granted the mandamus. At the time of the adversary hearing, neither the Department nor the trial court knew which child belonged to which adult as no one came forward at the adversary hearing to establish parentage. This is precisely why the trial court ordered maternity and paternity testing.

The uncontroverted evidence established that the children and adults at the YFZ Ranch “explained they are one big family, one large community, and they had the same belief system.” 4 RR 258. This is the only evidence the trial court had before it involving whether the entire community should be considered one household.

Evidence adduced at the adversary hearing specifically addressed all three prongs of § 262.201. Ms. Voss stated that because the children and adults indicated they were one large community and had the same belief system, and she already had “been able to identify several victims, my concern is that all the children there are potential victims.” 4 RR 258. When asked why the babies needed to be removed, Ms. Voss responded, “the

little boys, the babies, the girls, what I have found is that they are living under an umbrella of belief that having children at a young age is a blessing and therefore any child in that environment would not be safe.” 4 RR 262. When asked if she had concerns about immediate danger to a two-year-old child, Ms. Voss responded, “when you find one child that’s a victim in a home, you have concerns for all of them. And the ranch is considered one large home, one large community. I would have concerns for any children there.” 4 RR 304. The question immediately following her answer was, “What about a six-month-old child?” Ms. Voss responded, “Any children, sir.” 4 RR 304. Ms. Voss testified it would not be safe for “any child to return to the ranch” because the adults on the ranch expressed that they “aren’t 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.

Even though it was error for the appellate court to even reach the issue of burden of proof and legal and factual sufficiency of the evidence, the evidence as set out above is sufficient to satisfy a person of ordinary prudence and caution that the three statutory prongs under § 262.201 were met, including: (1) there was a danger to the physical health or safety of every child at the ranch, and for any child to remain at the ranch would be contrary to the welfare of that child, no matter if the child was male or female, and no matter the age of that child; (2) there was an urgent need to protect every child in the underlying cases, which required the immediate removal of each child at the ranch, and that the Department made reasonable efforts to eliminate or prevent each child’s removal; and (3) the Department made reasonable efforts to return each child to his or her alleged

parents, but a substantial risk of a continuing danger to each child existed if that child were returned home. In determining that a continuing danger existed to the physical health or safety of every child the subject of the suits underlying the mandamus, there was sufficient evidence to satisfy a person of ordinary prudence and caution that the household to which each child would be returned included a person(s) who had sexually abused another child. TEX. FAM. CODE § 262.201(b), (d) (Lexis 2007); APPENDIX 2. It is well settled that a person 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.). Regardless of the above analysis, the Department steadfastly maintains that the court of appeals should have limited its review as to whether “there is some basis in reason and law for the order of the trial court”. *Johnson*, 700 S.W.2d at 918. The appellate court neither asserts, nor establishes “under the circumstances of the case, that the facts and law permit the trial court to make but one decision”, and that one decision was to return each child then subject of the suits underlying the mandamus to their alleged parents. *Id.* at 917. To find an abuse of discretion, the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter. *Id.* at 918. These determinations are essential because mandamus will not issue to control the action of a lower court in a matter involving discretion. *Id.* at 917. Because the appellate court did not engage in this analysis and did not reach these determinations, it has abused its discretion and acted in excess of its writ power by granting mandamus relief absent these circumstances. *Id.*

PRAYER

For these reasons, the Department prays that this Court find that the trial court did not abuse its discretion; that the Third Court of Appeals abused its discretion in granting the mandamus in the underlying case; issue the Department's Petition for Writ of Mandamus; and a stay as requested in the Department's Motion for Emergency Relief..

Respectfully submitted,

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VERIFICATION

Before me, the undersigned authority, on this day personally appeared Michael Shulman, who, upon his oath deposed and said as follows:

1. “My name is Duke Hooten. I am an Appellate Attorney for the Texas Department of Family and Protective Services. I have read the above and foregoing Petition for Writ of Mandamus and Motion for Emergency Relief and every factual statement contained therein is within my knowledge true and correct.

2. “The Appendix to this Petition contains a pleading and the underlying opinion from the Third Court of Appeals, which copies are true and correct.

DUKE HOOTEN

Subscribed and Sworn to before me by Duke Hooten on May 23, 2008, to certify which witness my hand and official seal of office.

Notary Public, State of Texas

CERTIFICATE OF CONFERENCE

I hereby certify that on May 23, 2008, at approximately 8:00 a.m., the Department conferred with opposing counsel, Robert Doggett and was unable to resolve the pending controversy. Mr. Doggett indicated that he is opposed to this petition being granted.

DUKE HOOTEN

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2008, I mailed a copy of this brief by certified mail, return receipt requested, to the following parties and attorneys of record:

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Third Court of Appeals
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DUKE HOOTEN