

No. 03-08-00235-CV

IN THE THIRD COURT OF APPEALS

AUSTIN, TEXAS

IN RE: SARA STEED, et al.
RELATORS

Original Proceeding from the 51st Judicial District, Schleicher County, Texas

AMENDED PETITION FOR WRIT OF MANDAMUS

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Respondent:

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IN THE THIRD COURT OF APPEALS

AUSTIN, TEXAS

IN RE: SARA STEED, et al.
RELATORS

Original Proceeding from the 51st Judicial District, Schleicher County, Texas

AMENDED PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE COURT OF APPEALS:

This Court should act to reverse the continued separation of Relators' children from their mothers in violation of Texas law. Relators request this Court issue mandamus compelling the trial court to vacate its Temporary Orders which appoint the Department of Family and Protective Services (the "Department") sole temporary managing conservator of the children of above Relators. In the alternative, Relators seek to vacate those orders which limit Relators' access to and possession of their children subject to the discretion of the Department. The trial court clearly abused its discretion in entering these orders because the Department did not carry its burden to prove all three prongs of Section 262.201, Family Code, with respect to Relators' children; in the

alternative, there is no evidence to support a total limitation or denial of access of the mothers to the children.

I. STATEMENT OF THE CASE

Nature of the Case: This was a suit brought by the Department of Family and Protective Services pursuant to Chapter 262 of the Family Code to seek temporary managing conservatorship of Relators' children.

Trial Court: Hon. Barbara Walthers, 51st District Court, Schleicher County.

Trial Court Disposition: Entered temporary orders appointing the Department temporary sole managing conservatorship over Relators' children and denying Relators access to and possession of their children except subject to the mutual agreement of the Department.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition for writ of mandamus under Section 22.221(b) of the Texas Government Code.

III. ISSUES PRESENTED

- A. Whether the trial court abused its discretion in failing to return Relators' children to their mothers even though the State failed to meet its burden under Section 262.201, Family Code.**
- B. In the alternative, whether the trial court abused its discretion in failing to provide Relators standard possession and access to their children pursuant to Chapter 153 of the Family Code absent evidence to justify any restriction of visitation.**

IV. STATEMENT OF FACTS

On March 29, 2008, at 11:32 p.m., the Department of Family and Protective Services Child Protective Services division (the "Department") received a report of

physical and sexual abuse of a sixteen year-old girl at the YFZ Ranch in Eldorado, Texas. 4 RR 149: 18-25; 4 RR 152: 5-14. Five days later, on April 3, at 9:00 p.m., Department case workers under the supervision of Angie Voss showed up to investigate the allegations. 4 RR 156: 12-13. Law enforcement officers preceded the caseworkers. 4 RR 156: 21-24; 4 RR 157: 1-3. Residents of the ranch who met law enforcement officers and caseworkers permitted the caseworkers to come in and interview girls age 17 and under. 4 RR 158: 21-24; 4 RR 160: 23-25; 4 RR 161: 19-25. The residents were cordial and cooperative with the investigation, and brought the girls to the interviewers within ten or fifteen minutes. 4 RR 162: 4-11. Through the interview process, investigators learned that some girls under the age of 18 years old living at the ranch were pregnant or had children. 4 RR 178: 13-15. No person was found who matched the description of the initial report that caused the caseworkers to investigate. 4 RR 290: 9-11.

At approximately 3:00 a.m. on Friday, April 4, the decision was made to remove several of the girls due to Ms. Voss's concern of a "global pattern of what appeared to be the pervasive belief that underage marriage and children having children is what they were supposed to do." 4 RR 204: 7-13; 4 RR 216: 18-20. At approximately 10:00 a.m. on Friday, a decision was made to start transporting additional children off the property because Ms. Voss saw a tank coming onto the property, and law enforcement officers showed up to serve search warrants. 4 RR 218: 6-24; 4 RR 222: 17-25; 4 RR 223: 1-4. On Saturday, April 6, Ms. Voss told the rest of the adults at the ranch that the Department

planned to remove all the children from the property. 4 RR 225: 1-3. The adults at the ranch were cooperative. 4 RR 225: 9-19.

Children were initially taken to the Civic Center, and later the San Angelo Coliseum and Fort Concho. Mothers were initially permitted to remain with their children. On April 14, 2008, the Department allowed only mothers with children under the age of five to stay with their children; the others were required to leave their children. 5 RR 316: 2-5.

On April 7, 2008, the Department filed 124 lawsuits involving individual children and families. In addition, it filed two group petitions, one referencing 330 children (Cause 2902) and the other referencing 16 children (Cause 2903). All of the children and most of their mothers were located in custody at Fort Concho or the San Angelo City Coliseum. Service was done by personal service or publication. However, not all women were served. 4 RR 316: 9-23. Among Relators, some were not served with papers related to the lawsuit. *See* Cause No. 03-08-00236-CV; *In re Faith Ann Jessop, et al.*; Original Proceeding; Third Court of Appeals, Austin.

On April 17 and 18, the trial court conducted one *en masse* adversary hearing on all 126 cases involving approximately 416 children. 4, 5 RR *passim*. At the conclusion of the two-day hearing, the trial court entered oral findings on the record. 5 RR 240:10-17. Following the hearing, the trial court signed Temporary Orders in the individual

cases.¹ The Temporary Orders appointed the Department temporary managing conservator over the children subject of the suits, and denied Relators access to and possession of their children, except as agreed to by the Department.

Certified copies of all petitions and temporary orders relevant to this amended petition have been requested of the district clerk, who has indicated that they are in the process of preparing them. Copies of one of the petitions and temporary orders affecting one of Relators, verified by counsel, are provided as exhibits in anticipation of obtaining certified copies from the district clerk. TEX. R. APP. P. 52.3(j)(1)(A). These temporary orders will list the children of Relators. On information and belief, with the exception of the names of the parties and children, and dates for status hearings, the petitions and temporary orders for all Relators are identical.

V. SUMMARY OF THE ARGUMENT

This case is not about whether the Department is entitled to investigate allegations of child abuse in a community, or whether the Department is entitled to act to prevent the risk of child abuse in a community. This case is about whether the Department may deprive mothers of possession of their children without evidence that the mothers pose an

¹ At the time that Relators filed their initial petition for mandamus on April 23, they were not aware that any Temporary Orders had been entered by the trial court. The “April 21st order” referenced by this Court in its per curiam order of April 25, 2008, does not have a cause number, parties, or signature of the trial court, and appears to be a form of the order that was submitted by one of the parties. The signed orders that Relators have received since filing the original petition are signed April 23 and April 24.

immediate physical danger to the children. Under Texas law, the Department was required to use reasonable efforts to avoid removal of the children.

The wholesale removal of Relators' children from their mothers was not justified by evidence sufficient to meet the heightened standard of section 262.201. The Department was required to prove all three elements of section 262.201 of the Family Code in order to justify retaining possession of the children. At most, the Department proved one of those elements as to one group of children: girls 15 and over. The Department failed to produce any evidence of the other two required elements as to that group. And as to the rest of the children – girls under 15 and all boys – the Department failed to provide any evidence of any of the three required elements. Accordingly, the trial court's orders upholding the Department's removal of Relators' children should be vacated.

If these orders are vacated, the trial court and the Department will still be able to ensure the protection of these children. The trial court could order the men – the alleged perpetrators of abuse – to vacate the ranch, or it could order the women to live elsewhere with the children during the pendency of the investigation. The trial court could issue protective orders against the men preventing any contact with the women and children. The women and children could be ordered to undergo psychological evaluations and counseling.

In this mandamus, Relator mothers are not asking to return to life as 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 by statute.

VI. ARGUMENT AND AUTHORITIES

A. **Mandamus is the appropriate remedy because there exists no adequate relief at law.**

“Mandamus is proper when the trial court has abused its discretion by committing a clear error of law for which appeal is an inadequate remedy.” *In re Ford Motor Co.*, 211 S.W.3d 295, 297-98 (Tex. 2006) (per curiam) (orig. proceeding) (citing *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-36 (Tex.2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992) (orig. proceeding)). This Court has held that mandamus is appropriate relief from improper temporary custody orders:

Because temporary orders in a suit affecting a parent-child relationship are not subject to interlocutory appeal under the family code and because there is a need to resolve issues related to child custody quickly, courts have held that mandamus is an appropriate vehicle to challenge a lack of jurisdiction in child custody matters. Further, mandamus may be used to challenge a temporary order that deprives a parent of the physical possession of her child.

In re Mata, 212 S.W.3d 597, 603-04 (Tex.App.--Austin 2006, no pet.); *see also Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) (granting mandamus relief to vacate temporary order granting visitation in suit to establish paternity); *Cochran v. Hotz*, 151 S.W.3d 275 (Tex. App.—Texarkana 2004) (no pet.) (mandamus from full adversary hearing).

B. The trial court clearly abused its discretion because there is no evidence in the record to support the three findings that are necessary to deny Relator mothers present possession of their children.

Under Family Code § 262.201, a child who has been removed into state custody must be returned to the parent unless, after a full adversary hearing, the Department has proved 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 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) (Vernon Supp. 2007). All three findings must be made as to each child, or the child must be returned. *Id.*

At the beginning of the adversary hearing conducted on April 17, the trial court acknowledged that the Department has this burden as to each child by stating that the hearing would proceed “one client at a time.” 4 RR 8: 5-6. The trial court’s decision to hear the evidence *en masse* did not relieve the Department of this obligation to meet the “high statutory requirements” to allow it to deny Relators present possession of their children.² *See Cochran*, 151 S.W.3d at 276. But a review of the record reflects that the Department failed to produce *any* evidence of abuse or neglect as to approximately 400 of the 416 children that were removed. Nor is there evidence as to specific actions or omissions of each of the Relators.

A few of Relators’ children were mentioned at the hearing or did appear in the documentary evidence admitted at trial. But the evidence that the Department introduced

² The format of the hearing heavily favored the Department. The court denied motions to sever that would have divided the Department staff among various courtrooms and visiting judges, and permitted individualized hearings. 4 RR 35-36; 4 RR 108: 9-10. Many of the Respondents were not able to be present to assist their counsel in their defense because the Department would not permit them to return to their children at the Coliseum if they left. 4 RR 93: 11-21; 4 RR 319: 8-24. Respondents’ attorneys struggled, especially those stationed in the city auditorium or those at the back of the courtroom unable to hear due to the chaotic atmosphere and conferencing equipment 4 RR 148: 5-21; 4 RR 166: 18-24; 4 RR 173: 19-25; 4 RR 174: 1-3. Even the Department’s exhibits were in disarray. In one instance, the Department made only one extra copy of an exhibit tendered as evidence for approximately 400 lawyers to review. 4 RR 28: 8-25; 4 RR 29:1-6. One attorney stepped out of line to question a witness via conference from the auditorium and lost her chance to review an exhibit. 4 RR 67: 16-19. Finally in frustration, an attorney for a mother directly addressed the dearth of a fair process, both in and out of the courtroom, imploring the court: “It’s really difficult, Your Honor, to work under these circumstances when you don’t have things, like access to your client, notice to your client, clients who haven’t been served with anything, but they and their children are in detention.” 4 RR 320: 23-25; 4 RR 321: 1-2. At the end of the day, the trial court’s prediction that the hearing would not be “a perfect solution” (4 RR 15: 9) came true. The court considered the hearing “something catastrophic” (5 RR 334: 23), but the court considered the fourteen-day hearing a “forced requirement” (5 RR 334: 25). However, the court was not so bound by the statute as it assumed. *See In Re E.D.L.*, 105 S.W.3d 679, 688 (Tex. App.—Fort Worth 2003, pet. denied) (holding the court retains some discretion as to the timing of fourteen-day hearing and stating “the fourteen-day limitation affords parents a prompt, orderly procedure by which they can present their case and hold [the agency] to its evidentiary burden.”); *see also In the Interest of B.T.*, 154 S.W.3d 200, 208 (Tex. App.—Fort Worth 2004, no pet.). The fourteen-day hearing was created to protect parents, but the timing appears to have overshadowed the procedures used to provide each mother, father and child a fair hearing.

did not even begin to meet its statutory burden for each child that there was a danger to physical health or safety caused by their parent's action or failure to act; that there was an urgent need for protection that necessitated immediate removal; that the Department made any reasonable efforts to avoid or prevent removal; that any reasonable efforts had been made to enable the children to return home; and, that there was a continuing danger if the child was returned to the home.

- 1. The Department introduced no evidence that there was a danger to the physical health or safety of Relators' children or to the other several hundred children in custody.**

The plain language of Section 262.201(b)(1) permits removal only upon proof of danger to physical health or safety. TEX. FAM. CODE § 262.201(b)(1). The evidence admitted at the hearing does not pertain to the overwhelming majority of the children or to their parents, nor did it establish that each child was at risk of physical danger.

The entirety of the Department's proof of danger to the physical health or safety of the children at the YFZ ranch was this: there were five teenagers under the age of 18 who were or had been pregnant, and several other women who had first had children when they were 16 or 17 years old. This evidence came from four sources: (1) the testimony of Child Protective Services investigation supervisor Angie Voss, who stated that she and the other caseworkers interviewed nineteen girls (4 RR 276: 5-16), and

fifteen to twenty adults (4 RR 293: 15-18; 6 RR Ex. 26);³ (2) a series of CPS investigation summaries that described those interviews (6 RR Exs. 5-25); (3) medical records cumulative of Ms. Voss' testimony that three girls had been pregnant before the age of 18 (6 RR Exs. 1-3); and (4) an unauthenticated list entitled "Bishop's Record" that had been seized from the ranch in a law enforcement raid and purportedly reflected the names of residents of 37 households, seven of which included one of the above listed girls as a "wife" at the age of 16 or 17 (6 RR Ex. 4). This evidence, regarding fewer than 20 girls, was the sum total of the evidence of danger to the physical health and safety of the over 416 children removed.⁴

The Department attempted to bolster its case against all the mothers of the YFZ ranch with Ms. Voss's testimony that the women and children claimed a "culture" (5 RR 30: 10-12), a "belief" (4 RR 262: 14-23), and a "mindset" (4 RR 241: 10-21) that she thought was dangerous. However, none of these terms implicate the immediate *physical* danger contemplated by the Legislature in giving the power to the Department to remove children from their parents. TEX. FAM. CODE § 262.201(b)(1). At most, they suggest an

³ The Department's Exhibit 26 is a summary of Ms. Voss's testimony based on reports from her caseworkers who had interviewed some of the women and girls at the ranch. 4 RR 243: 8-23. The exhibit reflects her testimony that there are five girls currently under the age of 18 who were sexually active at the age of 15 or 16. 4 RR 252: 22-25; 4 RR 253: 1-22. The exhibit further reflects that there are 15 other women who were pregnant before the age of 18. Of those 15 women, 7 would have been underage and pregnant within the last 4 years and there is no evidence to confirm whether they were pregnant while living at the YFZ ranch or in another community. 6 RR Ex. 26. The women who were alleged to have conceived at age 13 and 14 are listed as being 22 years old now, which means they first became sexually active over eight or nine years ago. 6 RR Ex. 26.

⁴ The estimated number of how many children the Department has removed continues to change. At the time this suit was brought, the Department only claimed to have removed 416 children.

emotional or psychological risk. The Department's own expert witness, child psychiatrist Dr. Bruce Perry, testified that the danger posed to the children remaining with their families was a danger to their "emotional, their cognitive, their social" – not their *physical* – health. 5 RR: 133, 1.

The record is devoid of any evidence of danger to the physical health or safety of girls under the age of 15 years. It is also devoid of any evidence of any danger to physical health or safety to any boys.⁵ Ms. Voss testified that she did not have any knowledge of babies being sexually abused (4 RR 262: 8-10), or any evidence of boys being physically abused (4 RR 262: 5-7; 4 RR 279: 4-6; 4 RR 297: 12-19). She specifically testified that she had no knowledge of any males who had conceived a child before the age of 17 or who had had sexual relations with a girl younger than 17. 4 RR 297: 12-19. Moreover, the testimony at trial as well as the CPS investigation summaries reflect repeatedly that the children as a whole were "healthy" (4 RR 292: 14-17), "well-bonded with their mothers" (4 RR 292: 18-22), and shown "adequate love and affection" by their mothers (4 RR 382: 22-25). Ms. Voss admitted that she had not observed any inappropriate behavior between mother and child. 4 RR 286: 16-21.

Based on the evidence presented at the adversary hearing, the trial court could have come to only one reasonable conclusion: that the Department failed to prove that

⁵ While Exhibit 26 refers to two women who became sexually active at age 13 and 14, that conduct occurred eight or nine years prior, and is therefore not evidence of *current* conditions or danger to the children. *See Cochran*, 151 S.W.3d at 280.

the acts of the parents posed a danger to the physical health or safety of any male children or of any female children under the age of 15 years of age. TEX. FAM. CODE § 262.201(b)(1); see *In re Cochran*, 151 S.W.3d 275, 280 (Tex.App.—Texarkana 2004, no pet.) (finding insufficient evidence in the record to support the trial court’s finding of danger to the child under section 262.201(b)(1)). The trial court’s temporary orders granting the Department temporary managing conservatorship with respect to all of Relators’ children within those categories should be vacated.

2. The Department introduced no evidence of an urgent need for protection that required immediate removal of the children, and no evidence of reasonable efforts made to prevent removal of the children.

Under Family Code § 262.201(b)(2), the Department must show that the alleged physical danger posed to the child constitutes an “urgent need for protection” necessitating “immediate removal.” The Department, through Ms. Voss’s testimony, conceded that the danger it was concerned about was not an immediate one, but rather the danger of “continu[ing] to grow up in an environment where it will be accepted that there will be young girls having sex with older men” and that it was the Department’s “supposition” that this would happen in the future that necessitated removal of over 400 children. 4 RR 283: 10-19.⁶ An “environment” that does not pose a risk of physical

⁶ Ms. Voss also testified that after removing the initial set of girls, she removed the second set of children due to the presence of a tank and law enforcement officers. 4 RR 218: 10-14. There was no evidence in the record that the residents of the YFZ ranch were armed or carrying guns. 4 RR 284: 13-16.

injury and, at most, only future speculative risk does not constitute the “urgent need for protection” contemplated by the Legislature in drafting this statute.⁷

In addition, the Department put forth no evidence as to any reasonable efforts that were made to prevent removal from the home. Ms. Voss was cross-examined about a number of efforts that might have been reasonable to avoid removal, including removing the men from the ranch (5 RR 13: 6-14; 4 RR 14: 6-20). Her only explanation for why she did not seek removal of the men was that she would not know how to secure the ranch. 5 RR 13: 15-20. However, presumably it would be law enforcement, and not Child Protective Services, that would be responsible for such security. Moreover, a restraining order against an alleged perpetrator is a remedy specifically provided for by the Family Code as being an alternative to removal. TEX. FAM. CODE § 262.1015. The Department cannot dispute that removing fewer men from the premises is more reasonable and less destructive than removing hundreds children from their homes and separating all of them from their mothers.

The Department’s failure to consider reasonable efforts is evidenced by Ms. Voss’s response when asked whether she would consider allowing mothers to stay with children if they agreed to leave the ranch. She responded that this would not be acceptable unless they disavowed their beliefs. 4 RR 260: 5-10. However, the

⁷ Indeed, Child Protective Services’s internal guidelines provide that in evaluating “present danger,” the caseworker must find an existing threat, “actively in progress” with “immediate consequences now or in the next few days.” Child Protective Services Handbook section 2234.22 (“Identifying a Present Danger of Serious Harm”) (<http://www.dfps.state.tx.us/Handbooks/CPS/default.asp>).

Department had already permitted children to remain with their mothers following the initial removal and 14-day hearing, suggesting that there are reasonable precautions that might be considered for mothers to remain with their children. 4 RR 319: 12-13.

Further, under the Child Protective Services' own internal guidelines, there are a host of remedies available to the Department to deal with concerns about improper parenting skills and beliefs.⁸ The Department did not put forth any evidence as to why these remedies were not considered or used in this case.

The Department provided no explanation for why any of the efforts contemplated by statute or CPS guidelines would not have been reasonable under the circumstances, especially considering the fact that the sole allegation of physical danger came from men. While the trial court does have discretion in determining what efforts would be reasonable in a given case, *see Cochran*, 151 S.W.3d at 279, a trial court does not have discretion to make a finding unsupported by any evidence.

The requirement that the Department consider reasonable efforts to avoid removal is not an empty one. The Department's own expert witness testified that in his opinion it

⁸ According to the Department's own policies, there were a variety of actions that the Department could have taken, but did not, in a reasonable effort to prevent the necessity of removing the children from their homes or to return them once they had been removed. The Department offered no explanation or testimony as to why they did not make these efforts. The Department could have offered In-home Services (CPS Handbook 3301), Family-Based Safety Services (CPS Handbook 3310, 3320, and 3330), or could have referred the family to community services (CPS Handbook 2236). The Department's policies require that it first attempt to control safety threats before removal by offering services such as sexual-abuse exams, evaluation and treatment services, and protective day care and former CPS child day care. (CPS Handbook 2234.31). Finally, the Department could have requested the court to order the children's "parents or other household members to comply with service plans, without requesting conservatorship of the child." (CPS Handbook 3173). Such safety plans could have allowed mothers to keep possession of their children while imposing protective conditions, such as requiring them to move away from the ranch or forbidding them from seeing or contacting the men from the ranch.

was more detrimental to the children under the age of five years old to be removed from their parents than to be exposed to their parents' lifestyle. 5 RR 156: 10-20. He also testified that the trauma of removal from parents would be magnified for children suffering from developmental disabilities. 5 RR 163: 6-20. Given this testimony, it was especially incumbent upon the Department to show that there was no other option other than removal of all children.

In sum, the Department failed to produce any evidence that reasonable efforts had been made to prevent the removal of all the children. Because the Department failed to produce evidence to meet this second prong, the trial court's entry of temporary orders depriving mothers of possession of their children was a clear abuse of discretion.

3. The Department produced no evidence that it had made reasonable efforts to enable the individual children to return home, but that return was impossible because there was a substantial risk of continuing danger to the children.

In considering the third prong of Section 262.201(b), the trial court asked at the hearing:

The issue before the Court is: Can I give the [children] back to the parents? And you-all can continue to spend time focusing on what happened, or you can focus on providing the Court with the tools and the justifications that would allow the Court to consider returning the children.

5 RR 44: 23-25; 5 RR 45: 1-2.

After this plain invitation, the Department failed to introduce evidence that it had made any effort to enable the children to return home after the initial removal. In order to

fulfill the third requirement of this statute, the Department must have made reasonable efforts to enable the children to go home. TEX. FAM. CODE § 262.201(b)(3). As discussed above, the Department wholly failed to consider any reasonable efforts to return these children to their homes.

Instead, the Department glossed over the statutory text and continued to emphasize the alleged risk -- if there were concerns about one child being abused in a household, it would be concerned about all the others in the household. 4 RR 258: 2-11; 4 RR 304: 7-11. However, the Department defined the household as the entire 19-building ranch containing everyone. 4 RR 270: 10-12.

Such an expansive definition of “household” defies common sense and is legally problematic. Once again, the Department ignored the plain text of the statute: section 262.201(b)(3) uses the term “home.” While a child’s home could be a individual dwelling, or a community, neighborhood, city, state, or country, depending on the context, there is little doubt that home in this context refers to the individual dwelling area of the child’s parents – a child’s home is where his or her parents are. *See also* TEX. FAM. CODE § 71.005 (Vernon 2002) (defining “household” as a unit composed of persons living in the same *dwelling*). The Department removed these children from their homes, where they lived in individual buildings and rooms within them. To expand the definition of home beyond the walls of the dwelling ignores the text and plain meaning of the statute.

The Department's entire case that there is a continuing danger to the children if they are returned to their mothers is based on the supposition that every member of the community believes or soon will believe that all girls should be impregnated regardless of their age. The Department's sole fact witness candidly states:

I believe it is not safe for any child to return to the ranch, because the adults that I have spoken with who live on the ranch have expressed to me their belief that they aren't doing anything harmful to their children, that – that this practice of children being united and having children is part of their overall culture or belief system.

Testimony of Angie Voss, 4 RR 260:5-10.

As discussed above, Relators dispute that evidence of "beliefs" can constitute the type of physical danger contemplated by § 262.201. However, even if such beliefs (or conduct evidencing such beliefs) did satisfy the "high statutory requirements" § 262.201, the Department has no evidence that Relator mothers made those statements or have adopted those statements as their beliefs. The Department implies without competent evidence that these statements of a few are the adopted beliefs of all families living in the community. Indeed, throughout the adversary hearing, the Department sought to rely on the actions and beliefs of a small percentage of individuals in order to implicate all the mothers' beliefs as a whole. Of the approximate 416 children in the community, the Department's fact witness talked to "just a few" children about their beliefs and other

investigators visited with “several others.” 4 RR 294: 3-8; 4 RR 276: 5-6.⁹ Of the approximate 150 adults in the community, the Department spoke with “fifteen or twenty” adults about their beliefs. 4 RR 293:15-22. Moreover, the interviews did not show consistent beliefs but a variety of responses. 4 RR 204:14-24. Not all women were similarly situated. Some of the women had lived in the community for years, and some for a few months (4 RR 232:17-19), which could undoubtedly lead to different circumstances, beliefs and practices.

For example, Relators Lori Jessop is 25 years old and married to Joseph Steed Jessop who is 27 years old. 5 RR 270: 5-14; 6 RR Ex. 4, p. 23. They were married when she was 18 and now they have three children, ages 4, 2, and 1. 6 RR Ex. 4, p. 23. Joseph has no other “wives” and there are no other persons living in the dwelling where Joseph and Lori live with their children. 6 RR Ex. 4, p. 23. They do not share living space with any other person. 5 RR 271: 8-9. Lori Jessop went to college for EMT training. 5 RR 272:2-8. At first she stayed home to take care of her children, but over the objections of her husband, she completed her training and is a certified EMT assigned to provide ambulance services to the public. 5 RR 272: 10-25. According to records introduced at trial, there are approximately 11 other families living in the community that have one

⁹ Further, the Department also seems to rely on “experts” for the beliefs the mothers – Bruce Perry and Becky Musser. 4 RR 260:25-261:3, 4 RR 279:7-12, 4 RR 294:5-8. In anticipation of litigation, Bruce Perry formed his opinion on the beliefs of the parents based upon ten to fifteen minute interviews with three current members of the community; one to two hour interviews with two former members of the community; and review of press reports regarding the community. 5 RR 63: 12-18; 5 RR 102: 1-9. The Department provided no evidence as to Ms. Musser’s authority for knowing the personal beliefs of every adult mother who lived at the YFZ ranch.

adult wife and one adult husband. 6 RR Ex. 4 (*passim*). Moreover, the majority of those households do not reflect the presence of an underage wife. 6 RR Ex. 4 (*passim*). The individual facts and circumstances of Lori Jessop's home and the other households presented into evidence call into question the global statements and assumptions made by the Department about every person living in their community and the danger they ostensibly pose to their children.

Rather than requiring the Department to produce evidence concerning each individual household, the trial court erroneously placed the burden on the mothers to disprove that they did not share the entire beliefs of the community and thus, that they would not pose a continuing danger to their children. 5 RR 31: 14-25; 5 RR 32:1; 5 RR 33: 8-14. Due process requires that Relators receive an individualized determination of whether their actions or failures to act authorize the State to remove their children. *See Stanley v. Illinois*, 405 U.S. 645, 654 (1971) (unwed fathers entitled to individualized determination of whether they should have custody of their children). In this case, the Department was permitted to make "global" allegations as to all persons living at the YFZ ranch, without consideration of each individual parent's situation. Because no individual evidence was presented that returning to the mothers would pose a continuing danger to the children, the orders removing the children from the possession of their mothers were a clear abuse of discretion.

C. Alternatively, he trial court clearly abused its discretion in entering orders restricting Relators' access and possession without making findings that such access would endanger the children.

The Temporary Orders entered by the trial court contain a finding that parents shall be denied access to and possession of their children except as “mutually agreed to by the Department.” Even if someone other than a parent is appointed temporary managing conservator of a child, Family Code § 153.191 requires the trial court to appoint the parent as possessory conservator unless the court finds that such appointment is not in the child's best interest, “and that parental possession or access would endanger the physical or emotional welfare of the child.” TEX. FAM. CODE § 153.191. The Family Code also mandates that the terms of an order denying a parent possession of a child or imposing restrictions or limitations on a parent's right to “possession of or access to” a child may not exceed those required to protect the best interest of the child. TEX. FAM. CODE § 153.193. An order for possession that allows the managing conservator to determine time and access to possession is tantamount to a total denial of access. *Roosth v. Roosth*, 889 S.W.2d 445, 450 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

There is no evidence in the record that access to or visitation with the children would endanger their welfare. Indeed, the Department and the trial court allowed the parents to remain with children under the age of five years up until the time orders were entered. 5 RR 316: 2-5. Where the evidence fails to show that the parent's possession or access would endanger the child's physical or emotional welfare, an order denying

access and possession must be reversed. *See In re H.K.A.*, 2007 Tex. App. LEXIS 4535, *6 (Amarillo, June 8, 2007) (mem. op.) (reversing a trial court's order denying a father's access to his children in a suit brought by the Department). Accordingly, the temporary orders should be reversed to the extent that they do not appoint the mothers possessory conservator and to the extent that they deny or restrict all access or possession except in the discretion of the Department.

VII. PRAYER

Relators pray that the Court grant them the following relief:

- A. Order Respondent to vacate the Temporary Orders naming the Department temporary sole managing conservator of Relators' children and ordering the trial court to order the Department to return the children to their mother, subject to any reasonable restrictions to protect the health and safety of the children;
- B. In the alternative, order Respondent to vacate the Temporary Orders which deny Relators access to or possession of the children subject to the mutual agreement of the Department, and enter Temporary Orders that provide for standard possession under the Family Code; and
- C. award all other relief as the Court deems just and proper.

Respectfully submitted,



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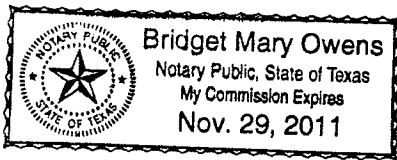
VIII. VERIFICATION

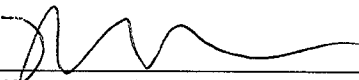
STATE OF TEXAS


COUNTY OF TRAVIS

Before me, came Julie M. Balovich, who being a person known to me stated that she has read the foregoing amended petition and the facts stated within that are not verified by the record are true and correct to the best of her knowledge, and the exhibits filed separately in an appendix to this amended petition are true and correct copies of the original documents.

SWORN TO BEFORE ME ON THIS 30th day of April, 2008.






Julie M. Balovich


NOTARY PUBLIC, STATE OF TEXAS

IX. CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the foregoing was served on counsel for the Department via facsimile and U.S. mail on April 30, 2008.



Julie M. Balovich