No. _____

In the

Supreme Court of Texas

IN RE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, RELATOR

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

MOTION FOR EMERGENCY RELIEF

To The Honorable Justices of the Supreme Court:

In accordance with Rules 10.3(a)(3) and 52.10(a) of the TEXAS RULES OF APPELLATE PROCEDURE, Relator, the Texas Department of Family and Protective Services, files this Motion for Emergency Relief, and shows as grounds:

PARTIES

1. The Department is Relator.

2. The Third Court of Appeals is Respondent.

3. Carey D. Cockerell, Commissioner of the Department, is a Real Party in Interest.

4. The Honorable Barbara L. Walther, Presiding Judge of the 51st Judicial District Court of Schleicher County, Texas, is a Real Party in Interest.

5. Sara Steed, *et al.*, Relators in the underlying mandamus before the Third Court of Appeals at Austin, are Real Parties in Interest. Their identities are set forth on page two of the Relators' "Amended Motion for Petition for Writ of Mandamus" in Cause No. 03-08-00235-CV.

INTRODUCTION

6. Relator files this Motion for Emergency Relief concurrently with its Petition for Writ of Mandamus on May 23, 2008.

7. Relator attaches a certificate of compliance certifying that on May 23, 2008, it notified Respondent and all Real Parties in Interest by facsimile transmission that a motion for emergency relief would be filed.

8. On May 22, 2008, the Third Court of Appeals issued a memorandum opinion which directed the Honorable Barbara L. Walther, Judge of the 51st Judicial District Court of Schleicher County, Texas, to vacate the temporary orders relative to Sara Steed *et al.*, and their alleged children in the underlying child protection cases in the 51st Judicial District Court. This memorandum opinion is attached to the Department's Petition for Writ of Mandamus as APPENDIX 1. The underlying Relators' Petition for Writ of Mandamus was granted.

9. The effect of this mandamus, if allowed to stand, is that the Department will be compelled to return approximately one hundred twenty-four (124) children from YFZ Ranch to approximately thirty-four alleged mothers. The Department is not in a position to properly identify the correct mothers or fathers at this time, because maternity and paternity testing ordered by Judge Walther, has not been completed. Of the approximately one hundred twenty-four (124) subject children, the only testimony regarding maternity involved two alleged mothers, Lori Jessop and Lucille Nielsen, and four children. This means that approximately one hundred twenty subject children would be returned to alleged mothers under the bare assertion set forth in a spread sheet which was attached to the alleged mothers' reply in the underlying mandamus action. This unsubstantiated spread sheet was not put into evidence before the trial court at the adversary hearing on April 17-18, 2008. This self-serving document, because it was never put into evidence, is not part of the record. Accordingly, it is not evidence, and was not properly before the court of appeals. The court of appeals erred in considering the document as evidence establishing familial relationships between the Relators and any of the children named in the document. As set forth in the Department's Petition for Writ of Mandamus, the alleged mothers, specifically including Relator Lucille Nielsen in the underlying mandamus action, thwarted the Department's attempts to identify alleged parents and children so that familial relationships could be established. The establishment of familial relationships was critical so the Department could assess the risk of sexual predation of the subject

children if they were either allowed to remain in the "home" or be, at some point returned to the "home." In addition, the children have a constitutional best interest right to know with absolute certainty who their parents are. Due to the orchestrated conspiracy of silence, neither the Department nor the trial court was able to match alleged parents with the children. The Family Code mandates that biological parents be given priority, if possible, in the placement of their children. This could not occur in the instant case. These factors were taken into consideration by the trial court in determining that the children could not be placed "home." Given the evidence before the trial court at the adversary hearing, the trial court had no other option than to appoint the Department as temporary managing conservator of the children.

10. Further, the effect of this mandamus is to compel the Department to return the subject children to persons and an environment where two days of testimony in the adversary hearing in which the underlying Relators actively participated, clearly established that the practice of forcing underage girls into marriages and resulting sexual relationships with adult males with older male adults was an institutional practice, a practice which was supported by the alleged mothers. This would subject the children to continuing sexual and emotional abuse.

11. Were this erroneous decision granting mandamus allowed to stand, it would open the floodgates to allow disgruntled litigants in all cases to circumvent the normal appellate process by availing themselves of the patently overbroad construction used by the Third Court in granting the underlying mandamus.

12. This clear example of the appellate court substituting its judgment for that of the trial court's discretion, both threatens the structure of Texas Jurisprudence and undermines the ability of trial courts to do their job.

13. Finally, this opinion will affect, irreparably, the outcome of the collateral cases involving hundreds of other children. As this request is being written, there are two habeas corpus proceedings underway in the 57th and 225th Judicial District Courts of Bexar County, where, as a result of this underlying mandamus, the Department will be compelled to return seven children to alleged mothers. Two of those children are the subject of this mandamus, five children are not.

ARGUMENT AND AUTHORITIES

14. The Court may grant temporary relief pending its determination of an original proceeding. TEX. R. APP. P. 52.10(b) (Lexis 2007).

15. This emergency stay is necessary to maintain the status quo of the parties and to preserve the Court's jurisdiction to consider the merits of the original proceeding. *In re Reed*, 901 S.W.2d 604, 609 (Tex. App.-San Antonio 1995, orig. proceeding).

16. Not only will Relator suffer irreparable harm if this mandamus is allowed to stand, but the subject children will be at risk of sexual and emotional abuse. This, certainly, is not in the children's best interest.

PRAYER

For these reasons, Relator prays that this Court grant temporary relief by immediately ordering a stay prohibiting the Third Court of Appeals from enforcing its mandamus until this Court has the opportunity to review the Relator's PETITION FOR WRIT OF MANDAMUS. Relator further requests all relief to which it may be entitled.

Respectfully submitted,

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THE STATE OF TEXAS §

VERIFICATION

Before me, the undersigned authority, on this day personally appeared Duke Hooten, 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 the Petition for Writ of Mandamus 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.

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Notary Public, State of Texas

CERTIFICATE OF CONFERENCE

I hereby certify that on May 23, 2008, Relator made a diligent effort to notify all parties by expedited means that a Motion for Emergency Relief will be filed and that Relator has complied with Texas Rule of Appellate Procedure 52(a).

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DUKE HOOTEN

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2008, I made a diligent effort to notify all parties and attorneys of record by expedited means that a Motion for Emergency Relief will be filed and that Relator has complied with Texas Rule of Appellate Procedure 52(a). Additionally, I conveyed an email copy of this Motion together with a copy of Relator's Petition for Writ of Mandamus to Robert Doggett, attorney for Relators in the underlying cause. I also mailed a copy of this Motion, by certified mail, return receipt requested, to the following parties and attorneys of record:

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