No. 08-0391

IN THE SUPREME COURT OF TEXAS

IN RE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

Relator

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

SUR-REPLY IN OPPOSITION TO STAY MOTION

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Real Parties in Interest file this sur-reply in order to correct certain inaccuracies in the Department's reply pertaining to a proceeding in Bexar County in which twelve YFZ children were reunited with their parents.

First, the Department states that "courts released the children." Reply, ¶ 9. That is incorrect. The Department **agreed** to send twelve YFZ children back to their parents pending a reset of the hearings in two habeas corpus proceedings in Bexar County. All twelve of these children belong to mothers who are Real Parties in Interest in this case. No hearing on the merits even occurred in the Bexar County proceedings. Rather, the parties entered into a Rule 11 agreement pursuant to which the children were reunited with their parents subject to certain conditions. One condition of this agreement, desired by the Department, was that it not be filed in any court. Thus, Real Parties in Interest are precluded from filing the Rule 11 agreement itself, absent an order from this Court. However, attached is a statement from one of the attorneys present at the hearing describing what occurred and pointing out the inaccuracies in the Department's reply.

The Department's agreement to reunite some children with their parents undermines the reasons it has articulated for the stay. First, it undermines the Department's insistence that every single child is in imminent danger of abuse because of the parents' beliefs. It also, as long as the agreement is in force, moots the request for stay with regard to those children. Second, the agreement contradicts the Department's claim that, absent DNA test results, it cannot match any children with their parents. The

Department agreed to return the twelve children without any DNA results. The Department's rationale for a stay was weak to begin with, but now it has completely unraveled.

Second, the Department's reply supporting the stay motion focused almost entirely on the evidentiary worth of Appendix 1, which is all but irrelevant. Inability to match parents with children was not an issue in the trial court; the Department never raised it. Thus, the mothers had no reason, nor any burden, to present evidence that the children taken from them were indeed theirs.

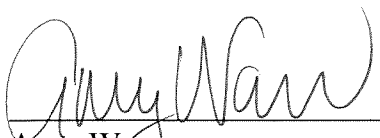
Notably, in its reply, the Department did not even address the fact that it has been treating parents and children as identifiable family units since the beginning of the case, allowing—and even requiring—visitation, and presenting the parents with family service plans describing the Department's requirements for reunification. The Department's ongoing treatment of these families as identifiable units undermines its position in this mandamus proceeding. The Department does not attempt to explain away this inconsistency. In fact, the Department chooses to ignore it. This Court should not. The Department is capable of reuniting children and parents, as demonstrated by its conduct all along and by its agreement to return the twelve children in the Bexar County case.

Finally, the Department's stated concern that the denial of a stay will jeopardize the conditions pursuant to which the twelve children were returned is unfounded because, as Real Parties in Interest pointed out in their response, the trial court in this case retains

authority to impose appropriate conditions on the return of *any* child pursuant to the Family Code.

The Court should deny the Department's request for a stay of the court of appeals' order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Sur-reply in Opposition to Stay Motion was served upon the following counsel of record via the method indicated below, on this the 27th day of May, 2008.

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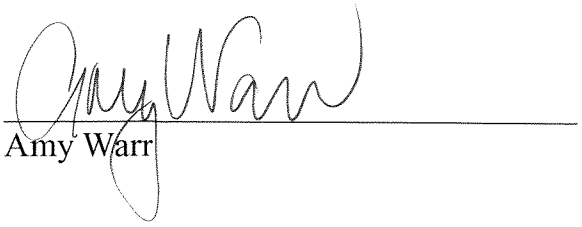

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May 27, 2008

VIA HAND DELIVERY
Supreme Court Clerk
Supreme Court Building
201 West 14th Street
Austin, TX 78701

Re: No. 08-0391; 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

Dear Clerk:

I am Attorney Ad Litem for Ephraim, Britton, and Jamison Keate, three sons of Lorene Keate. Lorene Keate is one of the mothers who is a real party in interest in this mandamus action. This morning, I read the Texas Department of Family and Protective Services' Reply Brief. I write to correct some misstatements contained in paragraph 9 of the Department's brief.

Paragraph 9 of the Department's brief incorrectly states that last Friday, May 23, the Bexar County District Court held hearings on two petitions for writs of habeas corpus and that the courts, subject to restrictions, released children to their parents because of the Austin Court of Appeals' ruling. This is inaccurate. I appeared at the docket call on these hearings before the Honorable Judge Martha Tanner. After the parties announced ready for the habeas corpus proceedings, but before opening statement, the parties reached an agreement. The Court did not conduct hearings on the merits of the petitions, and no court ordered the release of any of the children.

Instead, the Department voluntarily agreed to release the six children who were subject of the two habeas corpus proceedings. Further, the Department agreed to release the six siblings of the children who were parties. For example, although only my clients Britton, Jamison and their sister Natalie were parties to the habeas proceedings, the Department agreed to release to their parents brothers Rulon, Ryley, and Ephraim as well. Altogether, the Department agreed to allow twelve children to be reunited with their mothers and fathers, subject to visitation by CPS caseworkers and other restrictions. All twelve are children of the real parties in interest in this mandamus proceeding.

The Department released these twelve children based in part on the fathers' representations that they were each monogamous and that each family member had provided DNA samples. As far as I know, the Department did not have any results from the parents' DNA testing, and the Department was not even sure whether my clients or their parents had given DNA samples.

The agreement between the Department and the fathers was reduced to a written Rule 11 agreement. At the Department's insistence, the Rule 11 agreement contains a confidentiality clause which prohibits me from filing the agreement in court, except in an action to enforce its terms. Upon this Court's order, I stand ready to produce under seal a copy of the Rule 11 agreement.

Respectfully submitted,

Steven J. Wingard

SJW:mif

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