

ANATOMY OF A 262 HEARING

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Presented by:

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I. Introduction

A fundamental precept of jurisprudence in the United States is that no one can be deprived of their life, liberty or property without due process of law **U.S. Const. Amend. IV, XIV; Tex. Const. Art 1, Sec. 19**. As a matter of course, as citizens, we convey to our state and federal government the ability in some ways to compromise our individual liberties so that we can live in a safer, more orderly society where certain behaviors are acceptable and others are not. For years we have elected both legislators and jurists who have enacted and enforced laws that protected children from abuse and neglect. We have laws compelling the reporting and investigation of abuse and neglect allegations. There are penalties for false reports, frivolous claims against persons reporting and for failing to report. See **§261.001, et. seq.**

The Texas Legislature has enacted legislation under Chapter 262 of the Texas Family Code that outlines procedures which should be followed in a suit brought by the Department of Family and Protective Services (“**DFPS**”). Frequently, these suits put into conflict the rights and liberties of parents against the rights and liberties of children. The parent-child relationship is a constitutionally protected relationship. **Santosky v. Kramer**, 455 U.S. 745 (1982). In any action to terminate the parent-child relationship, the state must meet a clear and convincing evidence burden. **Santosky at 71, In the Interest of G.M., 596 S.W.2d 846 (Tex. 1980); §161.001**. In 1997, congress enacted the Adoption and Safe Families Act (“**ASFA**”). Amongst other changes, ASFA took the case flow direction away from long term foster care and family rehabilitation and made an emphasis on the health and safety of the child. **42 U.S.C.A. 678, et seq. See also §262.001**.

At the same time, the Texas Legislature mandated time lines for DFPS suits. In Texas, a suit brought by DFPS must be resolved within one (1) year with one possible extension of up to six (6) months. **§263.401**. This means that both the state and the other parties to the litigation must be diligent in the preparation of their respective positions.

II. The Emergency Hearing

An Emergency Hearing is frequently conducted by affidavit and without citation, notice and opportunity to be heard. **§262.100**. There are additional statutory standards for each specific type of court hearing outlining the basis upon which the Court is authorized to act. These include an Emergency Order Authorizing DFPS to take possession of a child (**§262.102**); Standards for Decision at Initial Hearing After Taking Possession of a Child Without a Court Order in Emergency (**§262.170**); Full Adversary Hearing (**§262.201**); and Hearing When Child is Not in Possession of Governmental Entity (**§262.205**). If a child is not returned to a parent or guardian at the Emergency Hearing, the court is required to hold a Full Adversary Hearing. **§262.201(a)**.

III. Child Placement Resources Form

Prior to the Adversary Hearing, DFPS shall, as soon as possible after investigating and determining that removal of a child may be warranted, provide a parent or other person having legal custody of a child the **Proposed Child Placement Resources Form §262.114(a) (Appendix “A”) (Slides 2-4)**. The Family Code requires that after DFPS provides the form, the parent or other person having legal custody has the opportunity to identify in the form three (3) individuals who could be either relative or designated caregivers (**§264.751 (Slide 5)**) and return the form to the DFPS representative **§261.307(2) (Slide 6)**.

Before the Full Adversary Hearing under **§262.201**, DFPS must:

1. Perform a background check and a criminal history check of each of the relatives or designated caregivers;
2. Shall evaluate each person listed on the form to determine the relative or other designated individual who would be the most appropriate substitute caregiver for the child;
3. Must complete a home study of the most appropriate substitute caregiver, if any; and
4. Until DFPS identifies a relative or other designated caregiver to be a substitute caregiver, it must continue to explore substitute caregiver options. **§262.114(a) (Slide 7)**.

At the Full Adversary Hearing (after redacting social security numbers), **DFPS shall file with the court:**

1. A copy of each proposed placement resources form completed by the parent or other person having legal custody of the child;
2. A copy of the completed homestudy; and
3. The name of the relative or other designated caregiver, if any, with whom the child has been placed. **262.114 (a-1) (Slide 7)**.

If DFPS does not place with a relative or other designated caregiver by the time of the Adversary Hearing, DFPS shall file with the Court a statement that explains:

1. The reasons why DFPS has not placed the child with a relative or other designated caregiver listed on the proposed child placement resources form; and

2. The actions DFPS is taking, if any, to place the child with a relative or other designated caregiver. **§262.114(a-2) (Slide 7)**.

DFPS may place a child with a relative or other designated caregiver if DFPS determines it is in the best interest of the child. DFPS may do this before conducting the background and criminal history check or home study. **§262.114(b) (Slide 8)**.

At the Adversary Hearing, the Court **shall require**:

1. Each parent, alleged father or relative of the child **before the court** to complete the proposed child placement resources form;
2. **file the form with the court** (if not previously filed by DFPS); and
3. Provide DFPS with information necessary to locate any other absent parent, alleged father or relative of the child. **§262.201(c) (Slide 10)**.

The Family Code gives DFPS full authority to make placement with or without the homestudy and background and criminal history checks. Up to the Full Adversary Hearing, none of the statutes controlling a DFPS proceeding appear to give the court any authority over placement other than to Order the removal; deny the removal; sustain the removal of the child from the parent, managing conservator, possessory conservator, guardian, caretaker, or caretaker who is presently entitled to possession of the child; or Order the return of the child to parent or person entitled to possession. **§262.107 (Slide 12)**.

Then again, a District Court Judge has a lot of power and it may be within the generic powers of a District Court Judge under the “best interest of the child standards” to enter no movement orders prior to the Adversary Hearing. **§153.002 (Slide 13)**. This statute instructs the Court to consider best interest of the child in determining the issues of conservatorship and possession, and access to the child. The Family Code does allow the Court to determine initial conservatorship without notice or an adversary hearing, if the order is an emergency order sought by DFPS. **§105.001 (Slides 15-16)**. Accordingly, absent a bona fide emergency, supported by an Affidavit, the Court should not enter any restrictive orders and should not appoint DFPS as Temporary Managing Conservator.

If the Courts would force DFPS to follow the mandates of **§262.114**, we would have fewer children in foster care, we would appropriately shift the burden of responsibility to the parents to name their proposed placements, in writing, and we could significantly reduce the number of media cases in which some relative comes in and claims that either DFPS or the Court did not evaluate their home as a placement.

Because DFPS has an ongoing statutory duty to continue to explore relative or designated caregiver options until they find one under **§262.114(a)**, there might still be media or politically based cases, but the numbers should be relatively few.

Why would any lawyer, ad litem or the Court proceed with a **§262.201** Adversary Hearing until DFPS had complied with **§262.114**? A Motion for Continuance of Adversary Hearing is attached to this paper as **Appendix B**. The unambiguous legislative intent is the reduction in foster care placements and the increase in relative and designated caregiver placements.

To support the ongoing duty imposed upon DFPS in **§262.114**, the Court is required, at the Adversary Hearing, to provide the form to each parent, alleged father or relative of the child before the Court to complete and file the Proposed Child Placement Resources Form **§262.201(c)**. This ensures that DFPS searches in both sides of the family for placement. **(Slide 10)**

IV. The Adversary Hearing (§262.201)

The right to an Adversary or Show Cause Hearing derives from legislative enactments from the Texas Family Code and by the United States Supreme Court which held that each parent or alleged parent is entitled to a hearing when the government has taken custody of a child. At such hearing or hearings (if other parent enters the case after it has started), the government has the burden of establishing its right to assume control over the children. **Stanley v. Illinois, 405 U.S. 645 (1972)**.

Additionally, **§262** outlines both the burdens placed on DFPS but also the requested findings of the Court. Until recently, there was little case law on the subject because parties do not generally have the right of appeal on Temporary Orders. Two cases were decided in 2008 that significantly altered the perspective on a **§262** Adversary Hearing.

The decision of the Austin Court of Appeals in the **FLDS** case, and the **Gates** decision by the 5th Circuit Court of Appeals, there are many times when a successful challenge to the DFPS plan at the Adversary Hearing will alter the court and direction of the entire case. **In re Steed, 03-08-00235-CV, 2008 WL 2132014 (Tex.App.-Austin May 22, 2008, orig.proceeding)(memo.op.)** (No. 03-08-00235-CV), **mandamus denied, In re DFPS, 255 S.W. 3rd 613 613 (Tex.2008)**. **Gates v. Texas Dep't of Protective and Regulatory Servs., 537 F.3d. 404 (5th Cir. 2008)**. An essential practice standard is familiarity with **§262.201 (Adversary Hearing)** the **Steed** case, and the **Gates** case. These cases principally stand for the proposition that DFPS should not be allowed to remove children from parents **unless that home or those parents present an imminent risk of physical harm to the children**. **(Slides 13 & 14)**. Additionally, the **Texas Family Code** requires that at the conclusion of the Adversary Hearing, the Court shall place the children with the custodial parent, the non-custodial parent or a relative unless the Court finds that it is not in the best interest of the child. **§262.201(e) (Slide 11)**

The constitutionally protected parent-child relationship dictates a legal presumption of both parental placement and a limited right of the government to interfere in the parent-child relationship. **Santosky v. Kramer, 455 U.S. 745 (1982)**; **In the Interest of G.M., 596 S.W.2d 846 (Tex. 1980)**. Our statutes make the same presumption by requiring an elevated burden of

proof and a family placement presumption. It would be foolish not to recognize risks inherent in this process. The children have the same constitutional rights as parents to the preservation of the parent-child relationship. Advocacy sometimes guides lawyers, judges and volunteers around basic statutory and constitutional problems. Yet, there is nothing in the case law or in the Texas Statutes that lowers or diminishes the standards and burden of proof which is on DFPS at the Adversary Hearing. **§262.201. (Slides 9-11)**

In order to keep a child from being wrongfully withheld from his/her parents or relatives, DFPS must prove that such a placement is not in the best interest of the child. Separate statutes require DFPS to have done a criminal and DFPS background check on the relatives or other designated individuals identified as a **potential** care givers prior to the Adversary Hearing. **§262.114.** Whether DFPS is seeking conservatorship or termination, most of the time current practice seems to reflect that compliance with the requirements of **§262.114** has not been accomplished before the Adversary Hearing. The Judge is then left with the task of either returning the children (with a perception that a problem or imminent danger might exist but it has not been proven) or keeping the children in DFPS custody and making findings that are usually based upon suspicion rather than factually based evidence. DFPS usually argues that it needs more time to do full home studies on possible placements. These placements also appear to be driven by the mother and her family rather than both the mother's family and the father's family.

There is no place under Texas Law that permits the Agency to keep possession of the children and to not meet their burden of proof at the Adversary Hearing. The parent does not have to prove that parental or other placement is in the best interest of the children. DFPS has to prove that it is not in their best interest. **§262.201. (Slides 9-11).** In other words, if DFPS rests without having met the burden of proof, the law requires the Court to place with parents or relatives. No one wants to see a child injured or killed. Judges frequently say that they **“are going to err on the side of caution”** (slide 16). There is also nothing that prevents the court from continuing the hearing in order for additional information to be acquired. In one case, the Texarkana Court of Appeals maintained there was not proof of endangerment even though Mother has lost her rights by termination to nine (9) prior children. **In re Cochran, 151 S.W. 3d 275 (Tex. App. - Texarkana 2004, original proceeding).**

The only acceptable solution to this is to make sure the children are protected and that the law is followed. Sometimes, it may not be possible to do both. Sometimes, Courts “shall” make the placement, return the child or deny the agency's petition. Since pick ups are not allowed based upon risk, placements should not be denied to parents or relatives based either upon perceived risk or because the burden of proof was not met by the government. In the **Steed** case the Third Court of Appeals did not dismiss the litigation. However, it did order the return of the children to the parents. This means there was enough evidence for DFPS to go forward with the litigation but not enough to maintain possession. There is no reason that the law in West Texas should be different than the law or practice on the Gulf Coast, East Texas, or North Texas. If this were put into practice it would be the burden equivalent of a judicial monitoring of an FBSS type of case. This type of arrangement would work well in some cases and probably not so well in

others. It **would** require a paradigm shift. It **would** require the persons in charge of decision making to presume that the significant disruption of a parent-child relationship:

1. is harmful to the child;
2. damaging to need of the parent and child to bond;
3. places children at risk of abuse and neglect in the foster care system; and
4. disproportionately affects the relationship between the non abusive or non negligent parent and the child.

At the heart of the Adversary Hearing, the Court is required by law to make the following findings:

- (a) Unless the child has already been returned to the parent, managing conservator, possessory conservator, guardian, caretaker or custodian entitled to possession and the Temporary Order, if any, has been dissolved, a full adversary hearing shall be held not later than the 14th day after the date the child was taken into possession by the governmental entity.
- (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 the child to return home, but there is a substantial risk of a continuing danger if the child is returned home. (Slide 9)**
- (c) If the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that there is a continuing danger to the physical health or safety of the child and for the child to remain in the home is contrary to the welfare of the child, the court shall issue an appropriate temporary order under Chapter 105. **The court shall require each parent, alleged father, or relative of the child before the court to complete the proposed child placement resources form provided under Section 261.307, and file the form with the court; if the form has not been previously provided, and provide the Department of Family and Protective Services with information necessary to locate any other absent parent, alleged father, or relative of the child.** The court shall inform each parent, alleged father, or relative of the child before the court

that the person's failure to submit the proposed child placement resources form will not delay any court proceedings relating to the child. The court shall inform each parent in open court that parental and custodial rights and duties may be subject to restriction or to termination unless the parent or parents are willing and able to provide the child with a safe environment. If the court finds that the child requires protection from family violence by a member of the child's family or household, the court shall render a protective order under Title 4 for the child. In this subsection, "family violence" has the meaning assigned by Section 71.004.

- (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: (1) has abused or neglected another child in a manner that caused serious injury to or the death of the other child; or (2) has sexually abused another child. **(Slide 11)**
- (e) **The court shall place a child removed from the child's custodial parent with the child's noncustodial parent or with a relative of the child if placement with the noncustodial parent is inappropriate, unless placement with the noncustodial parent or a relative is not in the best interest of the child. §262.201(e) (Slide 11)**

In cases upon which DFPS subsequently tries to seek termination because a parent failed to follow the Family Service Plan (i.e. **§161.001(1)(O)**), the burden of proof changes to clear and convincing and one (1) element is the child must have been removed from the parent for the parent's abuse or neglect of the child. In Houston, depending upon the Court of Appeals that is drawn, this finding can be made relative to "abuse or neglect" of the child by that parent (**1st Court of Appeals; In the Interest of A.A.A., 265 S.W.3rd 507 (Tex. App.–Houston [1st Dist.] pet. denied)**) or "abuse or neglect of a child (**14th Court of Appeals; In the Interest of S.N., 287 S.W. 3rd 183 (Tex. App. - Houston [14th Dist.] pet. denied)**). Obviously, when the case proceeds to trial, the existence of a prior finding in the Temporary Order from the Emergency Hearing or Adversary Hearing could prove both problematic and essential. In short, zealous representation from the point of the Adversary Hearing is very important and could have a dramatic influence on the outcome of the case. In the absence of proof at trial that the child was removed from **the** parent for abuse or neglect of **the** child by **that** parent, zealous advocates should argue that termination under **§161.001(1)(O)** should not be available.

Short of trial, this is the most important hearing in the case. From it derives the course and flow of the litigation. This is where the fight should be. If counsel for a parent is appointed or hired in sufficient time to prepare for an adversary hearing, it is critically important that challenges be made under both constitutional, statutory and common law grounds. If there is not enough time to prepare or if DFPS has not strictly followed **§262.114**, then request a continuance and request DFPS be ordered to comply with the statutes by a date and time certain. Ad Litem

for the children and the courts should be insisting on this compliance as well. If there has not been compliance or there has not been enough time to prepare for request for the Adversary Hearing continuance (**Appendix “B”**). If the continuance request is denied or if DFPS fails to meet its burden of proof, request dismissal and alternatively immediate return or placement of the child. (**Appendix “C”**).

V. Conclusion

The Constitution of the United States and Texas, the Texas Family Code and the common law all favor family control, preservation of familial rights, and a preference for family relative or designated placement. Presumptively best interest favors family placement. In practice, we seem to have reversed these presumptions either out of fear or convenience. We should not let this continue. There is not a single place in the Texas Family Code that suggests DFPS conservatorship and placement is a preferred category. The law actually says the opposite. If DFPS does not do its job, then the Court is obligated to return the child. If more time is needed, then the Court should grant the parties the time needed. It is time that advocates insist that the laws be followed and that someone, preferably parents’ attorneys, attorneys ad litem, guardians ad litem, the courts and anyone else involved, push for accountability measures if DFPS fails to do its job.

APPENDICES

- A. Child Caregiver Resources Form
- B. Motion for Continuance of Adversary Hearing
- C. Motion to Dismiss

Child Caregiver Resource Form

Case Name: _____

Case ID: _____

Please fill out this form to give us names and locating information for relatives or close family friends who may want to take care of your children or support them until you get them back. Try to list the people you know your child would feel happiest with. Child Protective Services (CPS) will make contact with them and ask them how they want to help. We will decide if it is safe for your child to be with them. We will also decide if they can safely be with and support your child. CPS will tell them about your case. If we think they can provide a safe place for your child, CPS will do a background and criminal history check. We will do this check within 2 business days of getting this completed form back. If the check is OK, we will assess them and their home. Most of the time, children are not placed until CPS knows how the assessment turns out. The final decision about placing your children will be made by the judge for your child(ren)'s case. If the person tells us they do not want the children placed with them but instead wants to provide support and have unsupervised visits, CPS will have to do a background and criminal history check first.

On this page, you must provide the names of the first three persons you think may be able to care for your child. On the following pages you can list their names and locating information in the boxes provided. The first three persons can be adult relatives (including grandparents) and/or close family friends.

On the following pages, you must also list the names and locating information for **ALL THE GRANDPARENTS** for each of the children removed. This includes the grandmothers and grandfathers for each child. (The mother's parents and the father's parents). Please list other adult relatives besides the grandparents. You can send this form to CPS:

In person at: _____

By e-mail at: _____

@dfps.state.tx.us

By fax: _____

The selection of a placement (and other legal issues) may be impacted if the Indian Child Welfare Act applies. Please indicate whether you, another parent or any of your child(ren) is of Native American or Alaskan Native descent/heritage.

- I have no information that this child(ren) has any Native American or Alaskan Native descent/heritage.
- I believe this child(ren) may of be Native American or Alaskan Native descent/heritage. The person with tribal affiliation is _____ and the tribe is _____.

Your signature below indicates that you were provided the opportunity to list possible caregivers for you child(ren).

SIGNATURE OF PARENT OR GUARDIAN

DATE

CASEWORKER NAME

PHONE NUMBER

Here are the names of three relatives or close family friends who may be able to care for my child(ren). I will provide their contact information on the following page(s).

1. _____

2. _____

3. _____

Information provided in this form is in response to the following Legal Requirements:

State: Designation of relatives or close family friends to care for the child
Texas Family Code: Chapter 261.307(a)(2)

Federal: Department's efforts to obtain information about maternal and paternal relatives and other adult relatives
Public Law (P.L.) 110-351 (Sec. 103)

Date Information Received by CPS: _____

Child Caregiver Resource Form

Contact Information

1. Name of Caregiver (including all names used) <input type="checkbox"/> Placement Resource <input type="checkbox"/> Support Resource		<input type="checkbox"/> Maternal Grandparent <input type="checkbox"/> Paternal Grandparent <input type="checkbox"/> Other	Age/Date of Birth	Ethnicity
Street Address	City/State	Zip Code	Phone number with Area code	
What is this person's relationship to your child?	Have they lived out-of-state during the past 3 years? Where?	Please provide any other information to help us locate this person		

2. Name of Caregiver (including all names used) <input type="checkbox"/> Placement Resource <input type="checkbox"/> Support Resource		<input type="checkbox"/> Maternal Grandparent <input type="checkbox"/> Paternal Grandparent <input type="checkbox"/> Other	Age/Date of Birth	Ethnicity
Street Address	City/State	Zip Code	Phone number with Area code	
What is this person's relationship to your child?	Have they lived out-of-state during the past 3 years? Where?	Please provide any other information to help us locate this person		

3. Name of Caregiver (including all names used) <input type="checkbox"/> Placement Resource <input type="checkbox"/> Support Resource		<input type="checkbox"/> Maternal Grandparent <input type="checkbox"/> Paternal Grandparent <input type="checkbox"/> Other	Age/Date of Birth	Ethnicity
Street Address	City/State	Zip Code	Phone number with Area code	
What is this person's relationship to your child?	Have they lived out-of-state during the past 3 years? Where?	Please provide any other information to help us locate this person		

4. Name of Caregiver (including all names used) <input type="checkbox"/> Placement Resource <input type="checkbox"/> Support Resource		<input type="checkbox"/> Maternal Grandparent <input type="checkbox"/> Paternal Grandparent <input type="checkbox"/> Other	Age/Date of Birth	Ethnicity
Street Address	City/State	Zip Code	Phone number with Area code	
What is this person's relationship to your child?	Have they lived out-of-state during the past 3 years? Where?	Please provide any other information to help us locate this person		

Child Caregiver Resource Form

5. Name of Caregiver (including all names used) <input type="checkbox"/> Placement Resource <input type="checkbox"/> Support Resource		<input type="checkbox"/> Maternal Grandparent <input type="checkbox"/> Paternal Grandparent <input type="checkbox"/> Other	Age/Date of Birth	Ethnicity
Street Address	City/State	Zip Code	Phone number with Area code	
What is this person's relationship to your child?	Have they lived out-of-state during the past 3 years? Where?	Please provide any other information to help us locate this person		

6. Name of Caregiver (including all names used) <input type="checkbox"/> Placement Resource <input type="checkbox"/> Support Resource		<input type="checkbox"/> Maternal Grandparent <input type="checkbox"/> Paternal Grandparent <input type="checkbox"/> Other	Age/Date of Birth	Ethnicity
Street Address	City/State	Zip Code	Phone number with Area code	
What is this person's relationship to your child?	Have they lived out-of-state during the past 3 years? Where?	Please provide any other information to help us locate this person		

7. Name of Caregiver (including all names used) <input type="checkbox"/> Placement Resource <input type="checkbox"/> Support Resource		<input type="checkbox"/> Maternal Grandparent <input type="checkbox"/> Paternal Grandparent <input type="checkbox"/> Other	Age/Date of Birth	Ethnicity
Street Address	City/State	Zip Code	Phone number with Area code	
What is this person's relationship to your child?	Have they lived out-of-state during the past 3 years? Where?	Please provide any other information to help us locate this person		

Please use the back of this form or additional pieces of paper to provide the names and contact information of any other relatives or close friends who may wish to be involved in the case.

Date Information Received by CPS: _____

CAUSE NO. _____

IN THE INTEREST OF

JOHN DOE

A CHILD(REN)

§
§
§
§
§

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

____TH JUDICIAL DISTRICT

MOTION FOR CONTINUANCE OF ADVERSARY HEARING

COMES NOW, JANE DOE Respondent (“Respondent”) and files this his/her Motion for Continuance of Adversary Hearing and as grounds therefore would respectfully show the Court the following:

I.
FACTS

On February 2, 2010, DFPS removed JOHN DOE, a child, from the home of Respondent alleging abuse and neglect. On February 15, the parties are to appear for an Adversary Hearing. Prior to the commencement of the hearing, Respondent’s counsel ascertained that DFPS has failed to comply with **§262.114** of the Texas Family Code in at least the following respects:

1. Failed to provide Respondent with the Proposed Parent Resources Form;
2. Failed to perform a background and criminal history check of the relative or other designated caregiver as provided by the parent;
3. Failed to evaluate the persons designated on the form;
4. Failed to perform a homestudy on the most appropriate caregiver designated by the parent; and
5. Has failed to file with the Court the Proposed Child Placement Resources Form, the completed homestudy reports; and the name of the relative or other designated caregiver; or
6. Has failed to file with the Court a written statement that explains the reasons why DFPS has not placed the child with a relative or other designated caregiver listed on the Proposed Child Placement Resources Form; and the actions DFPS is taking, if any, to place the child with a relative or other designated caregiver.

II.
RELIEF SOUGHT

Respondent requests a continuance in order to adequately prepare for the Adversary Hearing and in order for the Court to have sufficient information to comply with §262.201(e). Respondent requests the Court to Order DFPS to comply with §262.114 by a date and time certain.

Respondent prays for general relief.

Respectfully submitted,

ATTORNEY
State Bar No. _____
Address
Telephone No.
Fax No.
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion for Continuance of Adversary Hearing was forwarded to:

on this the ____ day of _____, 2011.

Attorney

CAUSE NO. _____

IN THE INTEREST OF	§	IN THE DISTRICT COURT OF
	§	
<u>JOHN DOE</u>	§	HARRIS COUNTY, TEXAS
	§	
A CHILD(REN)	§	____ TH JUDICIAL DISTRICT

MOTION TO DISMISS OR ALTERNATIVE MOTION FOR IMMEDIATE RETURN OR PLACEMENT

This Motion is brought by JANE DOE, Mother (“Movant”), and in support thereof would respectfully show the Court the following:

I.
FAILURE TO MEET BURDEN OF PROOF

DFPS has failed to meet its burden of proof as required by §262.201 of the Texas Family Code and the case decision requirements of. In re Steed, 03-08-00235-CV, 2008 WL 2132014 (Tex.App.-Austin May 22, 2008, orig.proceeding)(memo.op.) (No. 03-08-00235-CV), mandamus denied, In re DFPS, 255 S.W. 3rd 613 613 (Tex.2008). Gates v. Texas Dep’t of Protective and Regulatory Servs., 537 F.3d. 404 (5th Cir. 2008). In this regard, Movant would show that DFPS failed to provide evidence of the following:

1. The existence of an immediate danger to the physical safety of the child;
2. An act or failure of the Movant that endangered the physical health or safety of the child;
3. For the child to remain in the home is contrary to the welfare of the child;
4. Reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child’s removal from the home;
5. Reasonable efforts have been made to enable the child to return home;
6. A substantial risk of a continuing danger exists if the child is returned home;

7. Other temporary orders, short of removal of the child from the child's home, would not be satisfactory; or
8. Placement of the child with the custodial parent, non-custodial parent, or a relative is not in the best interest of the child.

In the absence of such proof, the law requires that the case be dismissed. In the alternative, Movant would show that the law requires immediate return and or placement of the child.

II.
RELIEF SOUGHT

WHEREFORE, PREMISES CONSIDERED, Movant prays that this case be dismissed. Alternatively, Movant prays that the Court order immediate return of the child or placement of the child in one of the placements designated by Movant.

Respectfully submitted,

ATTORNEY
State Bar No. _____
Address
Telephone No.
Fax No.
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion for Continuance of Adversary Hearing was forwarded to:

_____, Attorney for DFPS
_____, Attorney Ad Litem for the Child
_____, Guardian Ad Litem for the Child

on this the ____ day of _____, 2011.

Attorney

§262.114. Evaluation of Identified Relatives and other Designated Individuals; Placement

(a) Before a full adversary hearing under Subchapter C, the Department of Family and Protective Services must perform a background and criminal history check of the relatives or other designated individuals identified as a potential relative or designated caregiver, as defined by Section 264.751, on the proposed child placement resources form provided under Section 261.307.

The department shall evaluate each person listed on the form to determine the relative or other designated individual who would be the most appropriate substitute caregiver for the child and must complete a home study of the most appropriate substitute caregiver, if any, before the full adversary hearing.

Until the department identifies a relative or other designated individual qualified to be a substitute caregiver, the department must continue to explore substitute caregiver options. The time frames in this subsection do not apply to a relative or other designated individual located in another state.

(a-1) At the full adversary hearing under Section 262.201, the department shall, after redacting any social security numbers, file with the court:

- (1) a copy of each proposed child placement resources form completed by the parent or other person having legal custody of the child;
- (2) a copy of any completed home study performed under Subsection (a); and
- (3) the name of the relative or other designated caregiver, if any, with whom the child has been placed.

(a-2) If the child has not been placed with a relative or other designated caregiver by the time of the full adversary hearing under Section 262.201, the department shall file with the court a statement that explains:

- (1) the reasons why the department has not placed the child with a relative or other designated caregiver listed on the proposed child placement resources form; and
- (2) the actions the department is taking, if any, to place the child with a relative or other designated caregiver.

7

§262.114(b)

(b) The department may place a child with a relative or other designated individual identified on the proposed child placement resources form if the department determines that the placement is in the best interest of the child. The department may place the child with the relative or designated individual before conducting the background and criminal history check or home study required under Subsection (a). The department shall provide a copy of an informational manual required under Section 261.3071 to the relative or other designated caregiver at the time of the child's placement.

8

§262.201 ADVERSARY HEARING

At the heart of the Adversary Hearing, the Court is required to make the following findings:

(a) Unless the child has already been returned to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession and the temporary order, if any, has been dissolved, a full adversary hearing shall be held not later than the 14th day after the date the child was taken into possession by the governmental entity.

(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 the child to return home, but there is a substantial risk of a continuing danger if the child is returned home.

9

Adversary Hearing §262.201 (con'd)

(c) If the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that there is a continuing danger to the physical health or safety of the child and for the child to remain in the home is contrary to the welfare of the child, the court shall issue an appropriate temporary order under Chapter 105. The court shall require each parent, alleged father, or relative of the child before the court to complete the proposed child placement resources form provided under Section 261.307, and file the form with the court, if the form has not been previously provided, and provide the Department of Family and Protective Services with information necessary to locate any other absent parent, alleged father, or relative of the child. The court shall inform each parent, alleged father, or relative of the child before the court that the person's failure to submit the proposed child placement resources form will not delay any court proceedings relating to the child. The court shall inform each parent in open court that parental and custodial rights and duties may be subject to restriction or to termination unless the parent or parents are willing and able to provide the child with a safe environment. If the court finds that the child requires protection from family violence by a member of the child's family or household, the court shall render a protective order under Title 4 for the child. In this subsection, "family violence" has the meaning assigned by Section 71.004.

(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: (1) has abused or neglected another child in a manner that caused serious injury to or the death of the other child; or (2) has sexually abused another child.

(e) The court shall place a child removed from the child's custodial parent with the child's noncustodial parent or with a relative of the child if placement with the noncustodial parent is inappropriate, unless placement with the noncustodial parent or a relative is not in the best interest of the child. §262.201(e)

§ 262.107. Standard For Decision at Initial Hearing After Taking Possession of Child Without a Court Order in Emergency.

(a) The court shall order the return of the child at the initial hearing regarding a child taken in possession without a court order by a governmental entity unless the court is satisfied that:

(1) there is a continuing danger to the physical health or safety of the child if the child is returned to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian who is presently entitled to possession of the child or the evidence shows that the child has been the victim of sexual abuse on one or more occasions and that there is a substantial risk that the child will be the victim of sexual abuse in the future;

(2) continuation of the child in the home would be contrary to the child's welfare; and

(3) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child.

(b) In determining whether there is a continuing danger to the physical health or safety of a child, the court may consider whether the household to which the child would be returned includes a person who has:

(1) abused or neglected another child in a manner that caused serious injury to or the death of the other child; or

(2) sexually abused another child.

§153.002. Best Interest of Child.

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.

In re Steed, 2008 WL 2132014 ___ S.W.3d ___ (Tex. App.–Austin 2008, May 22, 2008, orig. proceeding) (No. 03-08-00235-CV), mandamus denied, In re DFPS, 255 S.W. 3rd 613 (Tex. 2008).

Removing children from their homes and their parents on an emergency basis before fully litigating the issue of whether the parents should continue to have custody of the children is an extreme measure. It is, unfortunately, sometimes necessary for the protection of the children involved. **However, it is a step that the legislature has provided may be taken only when the circumstances indicate a danger to the physical health and welfare of the children need for protection of the children is so urgent that immediate removal of the children from the home is necessary (OP1) §262.201(b).** DFPS did not present any evidence of danger to the physical health or safety of any male children or female children who had not reached puberty. Even if one views the FLDS belief system as creating a danger of sexual abuse by grooming boys to be perpetrators of sexual abuse and raising girls to be sexual victims, **there is no evidence that the danger is “immediate” or “urgent” as contemplated by §262.201 with respect to every child in the community.**

13

Gates v. TDPRS, 537 F.3d 404, (5th Cir.2008)

Before DFPS removes children, without a prior order, they must have **consent or “exigent circumstances”**. The court defined exigent circumstances as follows:

“based on the totality of circumstances, there is **reasonable cause** to believe that the child is in **imminent danger of physical or sexual abuse if he remains in his home**”.

The court set forth factors which have to be **weighed for each child** prior to removal:

1. Was there time to obtain a court order;
2. The nature of the abuse (severity, duration, and frequency);
3. The strength of the evidence supporting the allegations of abuse;
4. The risk that the parent will flee with the child;
5. The possibility of less extreme solutions to the problem; and
6. Any harm to the child that might result from the removal.

14

§105.001. Temporary Orders Before Final Order.

(a) In a suit, the court may make a temporary order, including the modification of a prior temporary order, for the safety and welfare of the child, including an order:

- (1) for the temporary conservatorship of the child;
- (2) for the temporary support of the child;
- (3) restraining a party from disturbing the peace of the child or another party;
- (4) prohibiting a person from removing the child beyond a geographical area identified by the court; or
- (5) for payment of reasonable attorney’s fees and expenses.

(b) Except as provided by Subsection (c), temporary restraining orders and temporary injunctions under this section shall be granted without the necessity of an affidavit or verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result before notice can be served and a hearing can be held. Except as provided by Subsection (h), an order may not be rendered under Subsection (a)(1), (2), or (5) except after notice and a hearing. A temporary restraining order or temporary injunction granted under this section need not:

- (1) define the injury or state why it is irreparable;
- (2) state why the order was granted without notice; or
- (3) include an order setting the cause for trial on the merits with respect to the ultimate relief requested.

15

§105.001. Temporary Orders Before Final Order (con'd)

(c) Except on a verified pleading or an affidavit in accordance with the Texas Rules of Civil Procedure, an order may not be rendered:

- (1) attaching the body of the child;
- (2) taking the child into the possession of the court or of a person designated by the court; or
- (3) excluding a parent from possession of or access to a child.

(d) In a suit, the court may dispense with the necessity of a bond in connection with temporary orders on behalf of the child.

(e) Temporary orders rendered under this section are not subject to interlocutory appeal.

(f) The violation of a temporary restraining order, temporary injunction, or other temporary order rendered under this section is punishable by contempt and the order is subject to and enforceable under Chapter 157.

(g) 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.

(h) An order under Subsection (a)(1) may be rendered without notice and an adversary hearing if the order is an emergency order sought by a governmental entity under Chapter 262.
