

# THE TEXAS MIS-STEP: WHY THE LARGEST CHILD REMOVAL IN MODERN U.S. HISTORY FAILED

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This Article sets forth the historical and legal reasons as to how the State of Texas botched the removal of 439 children from the Fundamentalist Church of Jesus Christ of Latter-Day Saints parents residing in Eldorado, Texas. The Department of Family and Protective Services in Texas overreached its authority by treating this case like a class-action removal based on an impermissible legal argument, rather than focusing on the facts and circumstances that could have been substantiated for a select group of children at risk. This impermissible legal argument regarding the “pervasive belief system” of a polygamist sect that allowed minor females to spiritually marry older adult males sparked questions as to how far the Free Exercise Clause of the First Amendment and the Fourteenth Amendment go in protecting religious freedom and parental rights. Ultimately, there was a failure on both sides of the case — harm caused by the unnecessary removal of hundreds of children who were not in immediate danger of abuse and harm caused by the return of teenage girls who were at risk for sexual abuse on the Yearning for Zion Ranch. The Article concludes by discussing key factors that would have made a difference in the outcome of the case and the impact of this decision on the interrelationship between parents, the state, and the child.

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## INTRODUCTION

The legal case of the Texas Department of Family and Protective Services (DFPS) versus the parents of the children at the Yearning for Zion Ranch (YFZ Ranch) in Eldorado, Texas has been one of the most complex child welfare cases in modern times. On display before the entire country, hundreds of children of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) were removed from their parents amidst local law enforcement and SWAT teams, juxtaposing Texas Ranger-style military force against genteel, pioneer-styled clans from two centuries ago.<sup>1</sup> The removal stemmed from an investigation begun by DFPS when a local family shelter received several calls from a sixteen-year-old pregnant mother who was reportedly physically and sexually abused by her “spiritual” husband over thirty years her senior.<sup>2</sup> Though this pregnant teen, Sarah Jessop, also known as Sarah Barlow, was never found on the YFZ Ranch

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1. Miguel Bustillo & Nicholas Riccardi, *Texas Vows New Tack Against Sect*, L.A. TIMES, May 31, 2008, at 1; Michelle Roberts, *Sweep of Polygamists' Kids Raises Legal Alarm*, J. GAZETTE (Fort Wayne), Apr. 26, 2008, at 7C.

2. Affidavit in Support of Original Petition for Protection of Children in an Emergency and for Conservatorship in Suit Affecting the Parent-Child Relationship at 2-3, *In re A Child*, No. 2902 (51st Dist. Ct., Schleicher County, Tex. Apr. 7, 2008) [hereinafter *Affidavit in Support of Petition*].

during the investigation, DFPS workers did see many other pregnant teens with children, many of whom appeared to be underage.<sup>3</sup> Investigators reasonably thought that the young girl who identified herself as Sarah Jessop was among several young pregnant teenagers they saw during the FLDS raid.<sup>4</sup> From the outset of the investigation, however, DFPS stated that it “was thwarted due to misinformation about the identities of the girls.”<sup>5</sup> At the end of the two week investigation, this youth had still not been found, leading some to believe that a hoax call prompted the entire situation.<sup>6</sup>

Although the physical and sexual abuse allegations made by Sarah Jessop could not be substantiated, DFPS investigators saw twenty teenagers with children, some of whom had become pregnant between the ages of thirteen and seventeen.<sup>7</sup> There were five pregnant minors on the ranch who had become pregnant between the ages of fifteen and seventeen.<sup>8</sup> Based on their interviews, DFPS found that there was “a pattern of girls reporting that there was no age too young for girls to be ‘spiritually married.’”<sup>9</sup> The common belief among the FLDS was that plural or “celestial” marriage was the only way men and women could reach the highest kingdom of God.<sup>10</sup> The purpose of the plural marriage was to procreate in order to ensure an “eternal increase.”<sup>11</sup> DFPS deemed this belief system to be pervasive, and

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3. *Id.* at 5; Brooke Adams, *FLDS Shun Texas Officials Twice at Ranch*, SALT LAKE TRIB., May 22, 2008, available at 2008 WLNR 9670236.

4. While searching for Sarah Jessop at the YFZ Ranch, investigators observed that there were multiple apparently pregnant teens or teenage mothers, several of whom did not provide identifying information. Affidavit in Support of Petition, *supra* note 2, at 5. The difficulty in identifying Sarah Jessop during the search was exacerbated because the caller who identified herself as such had concluded her final telephone conversation with authorities by suddenly insisting that she was fine, did not want to get into trouble, and wanted authorities to forget everything she had said to them. *Id.* at 4.

5. Petition for Writ of Mandamus at 2, *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008) (No. 03-08-00235-CV).

6. *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613, 614 (Tex. 2008) (per curiam); see *Hoaxer’s Phone Linked to Sect Abuse Calls*, CBS NEWS, Apr. 24, 2008, <http://cbs3.com/national/rozita.swinton.polygamist.2.707266.html> (speculating that the call was a hoax).

7. Petition for Writ of Mandamus, *supra* note 5, at 3-4.

8. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*1-\*2 (Tex. App. May 22, 2008) (mem.).

9. Petition for Writ of Mandamus, *supra* note 5, at 3.

10. IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* 26 (1996) (“Another justification for plural marriage was that women needed to be married or sealed to ‘worthy’ or ‘righteous’ men in order to gain a proper place in heaven.”); MARTHA SONNTAG BRADLEY, *KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS 2* (1993).

11. BRADLEY, *supra* note 10, at 3; see also ALTMAN & GINAT, *supra* note 10, at 27 (noting that Joseph Smith, the founder of the Mormon faith, purportedly had a revelation about plural marriage that “emphasized that a righteous man was one who would have many children and would thereby achieve a godlike status in the hereafter”).

concluded that all children were at risk of sexual abuse in the household.<sup>12</sup> The YFZ Ranch community was presented to the court as “essentially one household comprised of extended family subgroups.”<sup>13</sup> The DFPS lead investigator further testified that due to this pervasive belief system, the male children are groomed to be perpetrators of sexual abuse and the girls are raised to be victims of sexual abuse.<sup>14</sup> The investigation ultimately led to a finding by a local district court judge that there was a danger to the physical health or safety of the children caused by their caregivers, and an urgent need for protection of the children required their immediate removal.<sup>15</sup> The court also found that reasonable efforts were made to eliminate or prevent the children’s removal, but there was a substantial risk of continuing danger if the children were returned to the ranch.<sup>16</sup> The three-part emergency removal standard set forth in the Texas Family Code was satisfied according to District Court Judge Barbara Walther, and the State of Texas was given temporary managing conservatorship of 468 children,<sup>17</sup> the largest number of children to enter any state’s care at one time through one removal.<sup>18</sup>

The district court ruling was appealed to the Texas Court of Appeals through a writ of mandamus by thirty-eight mothers (Relators) whose children were mostly below the age of thirteen.<sup>19</sup> The age of the children removed from the ranch ranged from one month to seventeen years, and there were some adults removed who

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12. Affidavit in Support of Petition, *supra* note 2, at 5; Petition for Writ of Mandamus, *supra* note 5, at 3-4.

13. *In re Steed*, 2008 WL 2132014, at \*2.

14. Petition for Writ of Mandamus, *supra* note 5, at 3.

15. See 5 Reporter’s Record at 340, *In re A Child*, Nos. 2779-2903 (51st Dist. Ct., Schleicher County, Tex. Apr. 17-18, 2008) (finding that the elements of section 262 of the Texas Family Code had been met); accord TEX. FAM. CODE ANN. § 262.201(b) (Vernon Supp. 2009) (delineating that the court, prior to issuing an order for conservatorship, must “find[] sufficient evidence to satisfy a person of ordinary prudence and caution that:” the child’s physical health or safety is endangered; removal is warranted because of an urgent need for protection; and the state has made reasonable efforts to return the child).

16. See sources cited *supra* note 15 and accompanying text (discussing the court’s finding that the evidence satisfied the requirements of section 262.201).

17. 5 Reporter’s Record, *supra* note 15, at 340. DFPS removed some adults who initially appeared to be under seventeen, but later were shown to be of majority age. TEX. DEPT OF FAMILY & PROTECTIVE SERVS., ELDORADO INVESTIGATION: A REPORT FROM THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES 13 (2008), available at [http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22\\_Eldorado.pdf](http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22_Eldorado.pdf) [hereinafter ELDORADO INVESTIGATION]. The total number of children removed was 439. *Id.* The originally stated number of 468 will be used throughout this Article notwithstanding the later clarification by the State of Texas.

18. *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613, 614 (Tex. 2008) (per curiam).

19. *Id.* at 615.

were thought to be minors because of their youthful appearance.<sup>20</sup> Because the primary reason for removal involved the alleged sexual abuse of the five pregnant female minors ages thirteen to sixteen, the Relators asserted that their female and male children were not in immediate danger when they were removed from the YFZ Ranch due to the fact that they had not reached puberty.<sup>21</sup> The Relators also asserted that none of the five pregnant female minors lived in the same household as their children.<sup>22</sup>

In considering the evidence presented, the appellate court held that DFPS did not show that the Relators' children were in any physical danger, stating that "[t]he existence of the FLDS belief system . . . by itself[] does not put children of FLDS parents in physical danger. It is the imposition of certain alleged tenets of that system on specific individuals that may put them in physical danger."<sup>23</sup> The court of appeals further found that "[e]vidence that children raised in [the FLDS] environment may someday have their physical health and safety threatened is not evidence that the danger is imminent enough to warrant invoking the extreme measure of immediate removal."<sup>24</sup> The court also found that there was no evidence presented that demonstrated any reasonable efforts were made by DFPS "to eliminate or prevent the removal of [these] children."<sup>25</sup> The appellate court vacated the temporary orders, finding that DFPS failed to carry its burden of proof under the Texas Family Code and abused its discretion in refusing to return the children to their mothers.<sup>26</sup> DFPS petitioned the Texas Supreme Court, which affirmed the appellate court decision, stating that removal of the children was not warranted.<sup>27</sup>

In response to the argument by DFPS that the court of appeals decision rendered it unable to ensure the children's safety, the Texas Supreme Court stated that the Texas Family Code provided the district court with "broad authority to protect children short of separating them from their parents and placing them in foster care."<sup>28</sup> The

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20. See CPS Investigator's Chart, Petitioner's Exhibit 26, 7 Reporter's Record, *supra* note 15 (noting that one of the children was born in early March 2008, less than one month before the raid, and one born in 1991, seventeen years before the raid) [hereinafter CPS Investigator's Chart]; ELDORADO INVESTIGATION, *supra* note 17, at 13 (implying that the twenty-six adults were taken because of their youthful appearance).

21. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (mem.).

22. *Id.* at \*3.

23. *Id.*

24. *Id.*

25. *Id.* at \*4.

26. *Id.*

27. *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008) (per curiam).

28. *Id.*

court then gave a list of temporary orders that could have been entered to preserve the safety and welfare of the children, including orders to restrain “a party from removing the child beyond a [specific] geographical area,” remove “an alleged perpetrator from the child’s home,” and “assist [DFPS] in its investigation.”<sup>29</sup> The court made clear that the order to vacate the temporary custody orders did not conclude the Suit Affecting Parent-Child Relationship (SAPCR) proceedings.<sup>30</sup> The DFPS case would continue after the children had been returned to their parents, although the reality of the situation was that the power of the state to safeguard the children was significantly diminished<sup>31</sup> because the parents had regained physical custody of the children and authority over their care and upbringing.

The failure of the State of Texas in the FLDS case occurred because it overreached its authority by removing all 468 children rather than focusing on the facts and circumstances that could have been substantiated through the removal standard for a select group of children on the YFZ Ranch.<sup>32</sup> Thus, there was a failure on both sides of the case — harm caused by the unnecessary removal of hundreds of children who were not in immediate danger of abuse and harm caused by the return of teenage girls who were at risk for sexual abuse on the ranch. Much speculation was made in the media about whether the state could have handled the case differently.<sup>33</sup> After analyzing the facts of the case and the Texas legal standard for emergency removal of children, many specific issues surface as to why the DFPS failed to retain temporary custody of the children who were at risk of abuse.

In failing to review the precedent established by the Short Creek Raid in Arizona, DFPS repeated many of the mistakes that the state agency made in that case.<sup>34</sup> The legal arguments of the State of Texas were flawed in that they centered on the religious belief system of the FLDS rather than the actual harm to the children who were believed

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29. *Id.*

30. *Id.*

31. *See, e.g.*, *Gates v. Tex. Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 427-29 (5th Cir. 2008) (describing the state’s ability to remove a child from the home as “paramount” to protecting the child from harm and abuse).

32. *See* Michelle Roberts, *Texas Seeks Custody of Teen Jeffs Allegedly Wed*, DALLAS MORNING NEWS, Aug. 19, 2008, available at <http://www.dallasnews.com/sharedcontent/APStories/stories/D92L1LE06.html#> (discussing the Texas Supreme Court’s opinion stating that the evidence showed abuse of only a “handful” of the FLDS girls who were seized).

33. *E.g.*, Bustillo & Riccardi, *supra* note 1, at 1; John Derbyshire, *April Diary: Atrocity of the Month*, NAT’L REV. ONLINE, May 1, 2008, <http://www.nationalreview.com> (search “Search NRO” for “Atrocity of the Month”; then follow “April Diary by John Derbyshire” hyperlink).

34. Bustillo & Riccardi, *supra* note 1, at 1.

to have been sexually abused.<sup>35</sup> DFPS mistakenly argued that the families on the YFZ Ranch were all part of one household when, in fact, the evidence supported that there were many different households amongst the nineteen residences on the ranch.<sup>36</sup> This flawed argument led to another mistake — failure to provide each set of parents an individualized due process hearing. Rather than treating this case like a “class-action removal,”<sup>37</sup> DFPS should have evaluated the parents living in different physical dwellings on their own merits in regards to whether they abused or neglected their children or any of the children in their direct care and custody.

With regard to the evidence presented by the state, it is unclear but suspected that there was more evidence available to show instances of abuse and neglect than could be admitted in district court.<sup>38</sup> Based on what was presented however, the state proffered no evidence of the child victim from the initial DFPS referral.<sup>39</sup> The evidence that was presented regarding the alleged sexual abuse victims, the pregnant minors, and the minors who already had children on the ranch, arguably satisfied the low burden set forth for removal in the Texas Family Code,<sup>40</sup> but it was very poorly laid out. Neither the pregnant minors nor the minors with children located on the YFZ Ranch made an outcry of sexual abuse.<sup>41</sup> Because the established methods of interviewing child victims and witnesses of child abuse or neglect did not work with this population of children, the state caseworkers and interviewers had a difficult task in developing trust with a group of children who were taught to fear and avoid “evil”

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35. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (mem.).

36. *Id.* at \*2, \*3 n.10.

37. Roberts, *supra* note 1, at 7C.

38. See *Lead Texas CPS Attorneys Resign: Disagreement on Handling FLDS Cases*, POLYGAMY: NEWS & VIEWS FROM THE CHILD PROTECTION PROJECT, June 2009, at 1, 3 (reporting that two CPS attorneys felt that the YFZ cases were being dropped too fast, in contravention of typical CPS procedure); Jordan Smith, *More FLDS Woes for CPS*, AUSTIN CHRON., Oct. 31, 2008, available at <http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid:696857> (noting that Gary Banks, lead counsel for CPS, and Charles Childress, head of the agency’s San Angelo legal team, resigned from their jobs with CPS, “prompting speculation that Childress might not be pleased with the way things have gone”).

39. *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613, 613-14 (Tex. 2008) (per curiam).

40. See TEX. FAM. CODE ANN. § 262.201(b) (Vernon Supp. 2009) (stating that the court need not order the return of a child removed from his or her parents if it “finds sufficient evidence to satisfy a person of ordinary prudence and caution that . . . there was a danger to [the child’s] physical health or safety”).

41. See 4 Reporter’s Record, *supra* note 15, at 275-77 (suggesting that Ms. Voss, the testifying witness, could not identify a time when any minor made an allegation of sexual abuse).

outsiders.<sup>42</sup> The pregnant teens also may have been afraid that their spiritual husbands would be arrested if they identified them.<sup>43</sup> Therefore, there was no sexual abuse outcry by a child implicating an adult as the perpetrator. Texas had to connect the dots to determine which teenage mothers were spiritually married to which spiritual husbands and, in some cases, even which children belonged to these mothers.<sup>44</sup>

The Texas Family Code and child welfare policy are inadequate to protect all abused children. Part of the reason that the state could not meet its burden of proof was because the state law only provides for removal when children face “a danger to the[ir] physical health or safety.”<sup>45</sup> Children who are alleged to have been “conditioned” or psychologically maltreated are not protected by the current state removal standard.<sup>46</sup> This is the case for approximately half the states in the country.<sup>47</sup> The impact of psychological abuse and its inclusion in emergency child removal statutes is an important revelation of the Texas FLDS case.

Since the decision of the Texas Supreme Court in May 2008, all of the children have been returned to their mothers.<sup>48</sup> The media coverage has been less than neutral throughout the ongoing case, ranging from condemnation of child brides and sexual abuse to defense of the outlier group to maintain their polygamous lifestyle.<sup>49</sup>

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42. Terri Langford, *Sect Youths Conditioned to Deceive Outsiders*, HOUSTON CHRON., Apr. 10, 2008, available at <http://www.chron.com/dispatch/story.mpl/front/5688909.html>.

43. See *infra* text accompanying notes 50-52 (discussing the criminal cases that followed the child welfare cases).

44. See, e.g., CPS Investigation Summary: Rachel Keate, Petitioner's Exhibit 4, 6 Reporter's Record, *supra* note 15 (illustrating the fact that Rachel Keate was evasive as to whether and to whom she was spiritually married and also denied being the mother of her child); CPS Investigation Summary: Marilyn Keate, Petitioner's Exhibit 18, 7 Reporter's Record, *supra* note 15 (showing that Marilyn Keate refused to identify her children for the investigator).

45. TEX. FAM. CODE ANN. § 262.201(b)(1) (Vernon Supp. 2009).

46. See *id.* § 262.201(b)(1), (d) (providing that the court considers only the physical health or safety and not the psychological health or safety of the child when deciding whether removal is warranted).

47. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS 3 (2007), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/define.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf); see also Celia Doyle, *Emotional Abuse of Children: Issues for Intervention*, 6 CHILD ABUSE REV. 330, 330-31 (1997) (noting the various terms used to describe the emotional abuse of children).

48. Ben Winslow, *All FLDS Children Returned to Parents*, DESERET NEWS, June 5, 2008, at A08.

49. See, e.g., Ben Winslow, *FLDS, Pro-polygamy Group Meet*, DESERET NEWS, June 25, 2008, at A10 (interviewing a strongly supportive member of a pro-polygamy group); Marci A. Hamilton, *Taking Stock of the 2008 Intervention at the Texas Fundamentalist Latter-Day Saints Compound on its One-Year Anniversary: The Lessons We Must Learn to Effectively Protect Children in the Future*, FINDLAW, Apr. 16, 2009, <http://writ.news.findlaw.com/hamilton/20090416.html> (using vivid language to depict the leader of the ranch as a child molester).



The Attorney General of Texas has now turned to the criminal courts to deal with the abuses of children revealed in the Texas raid.<sup>50</sup> The state has indicted twelve men on charges related to underage marriages at the YFZ Ranch, including sexual assault of a child, conducting an unlawful marriage ceremony involving a minor, bigamy, and failure to report child abuse.<sup>51</sup> The trials began in the fall of 2009 before the same judge that ruled on the DFPS case, and the first FLDS sect member has been convicted of sexual assault of a child and sentenced to ten years in prison and an \$8000 fine.<sup>52</sup> In addition, the Texas Legislature has attempted to pass some new laws that are related to the FLDS case and the procedural quandary in which the court found itself.<sup>53</sup> While the states of Utah and Arizona have attempted to work cooperatively with their respective FLDS communities,<sup>54</sup> Texas is in “Don’t Mess with Texas” mode.<sup>55</sup> With recent stiffer sentencing guidelines for child sex abusers in Texas,<sup>56</sup> it may be wise for the FLDS to watch their feet.

Part I of this Article sets forth the specific facts of the Texas FLDS case, the fourteen-day hearing, and the Texas appellate and supreme court review of the lower court decision. Part II provides a historical background of the Short Creek Raid of 1953, a state investigation which involved the removal of 263 children from an FLDS

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50. Brian West, *Texas City Awaiting Next Phase of Case*, DESERET NEWS, June 8, 2008, at A02.

51. Michelle Roberts, *Texas Attorney General Attends Polygamy Trial*, DESERET NEWS, Dec. 9, 2009, at A07; News Release, Greg Abbott, Statement by Texas Attorney General Greg Abbott (Nov. 12, 2008), available at <http://www.oag.stat.tx.us/oagNews/release.php?print=1&id=2569>.

52. Michelle Roberts, *Polygamist Guilty of Sexual Assault*, HOUSTON CHRON., Nov. 6, 2009, at A1; *Texas Polygamist Sect Member Sentenced to 10 Years in Prison for Sexual Assault of a Child*, HAMILTON SPECTATOR (Ontario), Nov. 10, 2009, at 61; see also Brooke Adams, *Second Trial Begins for Polygamist Charged with Sexual Assault of a Child*, SALT LAKE TRIB., Dec. 8, 2009, available at 2009 WLNR 24726377 (noting that the second man to be tried in a case deriving from the raid is, like Raymond M. Jessop, being tried before Judge Walther).

53. Nathan Bernier, *Lawmakers Investigating Past CPS Actions*, KUTNEWS, Mar. 11, 2009, [http://www.publicbroadcasting.net/kera/news.newsmain?action=article&ARTICLE\\_ID=1479830&sectionID=1](http://www.publicbroadcasting.net/kera/news.newsmain?action=article&ARTICLE_ID=1479830&sectionID=1).

54. See Faye Bowers, *States Divided on Approach to Polygamous Sect*, CHRISTIAN SCI. MONITOR, May 5, 2008, available at <http://www.csmonitor.com/layout/set/print/content/view/print/226828v> (describing a 2003 “summit” between the Utah and Arizona attorneys general and the FLDS communities in the border region). Utah has gone as far as to issue a so-called “polygamy primer . . . as part of its outreach to polygamous groups.” Brooke Adams, *Tip Sheet on Sect Raises Ire: FLDS Attorney Cites Bias, Stereotypes*, SALT LAKE TRIB., Apr. 23, 2008, available at <http://www.reporternews.com/news/2008/apr/23/tip-sheet-on-sect-raises-ire/?print=1>.

55. See, e.g., Bowers, *supra* note 54 (describing “the more interventionist approach of Texas in cracking down on the breakaway Mormon sect”).

56. TEX. PENAL CODE ANN. § 22.021(f) (Vernon Supp. 2009).

remote enclave in Arizona.<sup>57</sup> Part III of this Article presents a case analysis of the Texas legal standard for emergency child removals, the due process hearing, and the subsequent appellate process. Part III also identifies the primary reason for the failure of the Child Protective Services (CPS) emergency child removal and divides this reason into four sub-parts. Part IV contemplates some additional factors that may have made a difference in the outcome of the case. The Conclusion describes how the case has proceeded since the children were returned to their parents and provides final thoughts on the efficacy of the case as a whole.

## I. CASE BACKGROUND AND ANALYSIS

### A. *Facts of Case*

On March 29, 2008, a referral was called in to the DFPS CPS hotline by staff members at a local family violence shelter, stating that a sixteen-year-old pregnant mother sought to leave the YFZ Ranch because she was being hit and raped by her forty-nine-year-old spiritual husband.<sup>58</sup> She advised that she was “brought to the YFZ Ranch by her parents three years ago,” and two years after her arrival, “she was spiritually married to an adult male member of the church.”<sup>59</sup> The teenager reported that her husband would beat her when he was angry, including “hitting her in the chest and choking her.”<sup>60</sup> The last time she was beaten was on Easter Sunday 2008.<sup>61</sup> The caller also stated that during a previous altercation, her husband had beaten her with such severity that he had broken several of her ribs, resulting in a visit to the hospital.<sup>62</sup> “She reported that the doctor wrapped her torso in an ace bandage and told her to ‘take it easy for a few days.’”<sup>63</sup> The caller further stated that her husband would harm her by “forc[ing] himself on her sexually.”<sup>64</sup> This young woman had called the shelter several times that day requesting assistance for her and her eight-month-old daughter to leave their current living situation.<sup>65</sup> She advised that “she was not allowed to leave the YFZ Ranch, unless it was to receive medical care,” and even then she

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57. See discussion *infra* Part I.

58. Affidavit in Support of Petition, *supra* note 2, at 2-3.

59. *Id.* at 3.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 2-3.

would be accompanied by other members of the ranch.<sup>66</sup> She indicated that the man to whom she was spiritually married was also married to several other women, and she was his seventh wife.<sup>67</sup> The caller “stated that her parents [did] not live on the YFZ Ranch and that she [had] not had any contact with them to explain that she [did] not want to continue to be on the ranch.”<sup>68</sup>

On March 30, 2008, the teenaged mother contacted the shelter again, stating that she was “married in a spiritual union” to a man who had three other wives residing on the YFZ Ranch.<sup>69</sup> She reported that her husband had “gone away for a while to the ‘outsider’s world,’ but she said she did not know why he left the ranch.”<sup>70</sup> During this conversation, the young woman “indicated that she was being held against her will at the YFZ Ranch and church members had told her that if she tried to leave, she [would] be found and locked up.”<sup>71</sup> Church members also informed her that if she left YFZ Ranch, “outsiders [would] hurt her, force her to cut her hair, to wear make up [sic] and clothes[,] and to have sex with lots of men.”<sup>72</sup> She further stated “that her parents, who had returned to their hometown outside the State, were preparing to send her [fifteen] year old sister to live at the YFZ Ranch.”<sup>73</sup> At the end of the conversation, the caller “began crying and . . . stated that she [was] happy and fine[,] and [did] not want to get into trouble.”<sup>74</sup> She concluded by stating that “everything she had previously said should be forgotten.”<sup>75</sup>

DFPS determined that these facts warranted an investigation to locate the teenager and her infant child.<sup>76</sup> Any referral regarding sexual abuse of a child is a “priority one” call for DFPS, requiring investigators and police to respond within twenty-four hours.<sup>77</sup> Since

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66. *Id.* at 3.

67. *Id.*

68. *Id.*

69. *Id.* at 3-4.

70. *Id.* at 4.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. See TEX. FAM. CODE ANN. § 261.301(d)(2) (Vernon 2008) (requiring DFPS to “assign priorities and prescribe investigative procedures for investigations based on the severity and immediacy of the alleged harm to the child”); Tex. Dep’t of Family & Protective Servs., Child Protective Services, Investigations, [http://www.dfps.state.tx.us/Child\\_Protection/About\\_Child\\_Protective\\_Services/investigation.asp#priorities](http://www.dfps.state.tx.us/Child_Protection/About_Child_Protective_Services/investigation.asp#priorities) (last visited Feb. 7, 2010) [hereinafter DFPS Investigations] (explaining that “[p]riority [one] reports include all reports of children who appear to face an immediate risk of abuse or neglect that could result in death or serious harm,” and that “[i]nvestigations of these reports must be initiated within [twenty-four] hours of receiving the call report”).

the state of Texas conducts joint investigations of child abuse and neglect pursuant to the Texas Family Code, both DFPS and law enforcement collaborated in order to conduct an effective investigation on the YFZ Ranch.<sup>78</sup> On Thursday, April 3, 2008, DFPS filed a Petition for Orders in Aid of Investigation of a Report of Child Abuse or Neglect with the 51st District Court, and Judge Barbara Walther issued an Order allowing DFPS on the property of the YFZ Ranch.<sup>79</sup> The order also allowed for the transporting and interviewing of children at the YFZ Ranch.<sup>80</sup> Law enforcement entered the ranch on April 3 and secured the ranch so that DFPS investigators could begin interviewing residents and children.<sup>81</sup>

The first interviews with underage girls at the ranch revealed a pattern of underage girls being “spiritually united” with adult men and having children with the men.<sup>82</sup> Numerous girls had small children, and girls told investigators that marriages could occur at any age.<sup>83</sup> Investigators also observed a pattern of deceit in the first interviews, including “children [being] moved from location to location in an apparent attempt to prevent investigators from talking to them.”<sup>84</sup> “Women and children [also] frequently said they could not answer questions about the ages of girls or family relationships.”<sup>85</sup> “When an investigator asked one girl how old she was, she looked at her husband,” who said, “[y]ou’re [eighteen].”<sup>86</sup> The girl then informed investigators that she was eighteen years old.<sup>87</sup> “Other school-aged children and teens would provide only first names and said they [did not] know their birthdates[,] or had been told by their parents not to answer questions.”<sup>88</sup>

DFPS investigators identified twenty-seven girls who stated that they were fourteen to seventeen years old.<sup>89</sup> Some of the teenage girls

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78. TEX. FAM. CODE ANN. § 261.3011 (Vernon 2008); Affidavit in Support of Petition, *supra* note 2, at 4-5.

79. Order for Investigation of Child Abuse, *In re* S.J., No. 2778 (51st Dist. Ct., Schleicher County, Tex. Apr. 3, 2008); Petition for Orders in Aid of Investigation of a Report of Child Abuse or Neglect, *In re* S.J., No. 2778 (51st Dist. Ct., Schleicher County, Tex. Apr. 3, 2008) [hereinafter Petition for Orders in Aid of Investigation].

80. Order for Investigation of Child Abuse, *supra* note 79, at 1-2.

81. Affidavit in Support of Petition, *supra* note 2, at 4-5.

82. ELDORADO INVESTIGATION, *supra* note 17, at 3, 6.

83. *Id.*

84. *Id.*

85. *Id.*

86. Tex. Dep’t of Family & Protective Servs., DFPS Provides Senate Committee with Eldorado Update, [http://www.dfps.state.tx.us/About/News/2008/2008-04-30\\_Eldorado\\_Senate.asp](http://www.dfps.state.tx.us/About/News/2008/2008-04-30_Eldorado_Senate.asp) (last visited Feb. 9, 2010) [hereinafter Eldorado Update to Senate].

87. *Id.*

88. *Id.*

89. *Id.*

stated that they knew a sixteen-year-old Sarah Jessop who had a child, but did not know where she was located.<sup>90</sup> Furthermore:

There [were] an additional [twenty-six] girls who . . . provided conflicting information about their ages, at some points indicating they [were] minors and at other times saying they [were] adults. Of these [fifty-three] girls, more than [thirty] [had] children, [were] pregnant, or both. Six of these girls [had] two children, and two [had] three children.<sup>91</sup>

In addition to the suspected sexual abuse of girls on the ranch, DFPS investigated the possible sexual abuse of some young boys “[b]ased on interviews with the children and journal entries found at the ranch.”<sup>92</sup> Finally, DFPS found “[m]edical exams and reports by the children [that] indicated that at least [forty-one] children . . . had broken bones in the past.”<sup>93</sup> Although DFPS did not have complete medical information on many children or x-rays, this was “cause for concern and something [it wanted to] continue to examine.”<sup>94</sup>

On Friday, April 4, 2008, DFPS “took temporary legal custody of [eighteen] girls (ages [six] months to [seventeen] years) after investigators concluded they had been abused or were in imminent risk of future abuse.”<sup>95</sup> Subsequently, thirty-four other girls were taken to an Eldorado civic center “for further questioning to determine if they had been abused or were at risk of abuse,” and another eighty-five children were later transported to the civic center for questioning.<sup>96</sup> On Saturday, April 5, 2008, DFPS “continued interviewing the children at the civic center and the ranch,” calling in additional “special investigators from around the state to assist.”<sup>97</sup> By Sunday, April 6, 2008, there were 246 children and 93 women in DFPS care, and DFPS “continued to work with law enforcement to locate children at the ranch and bring them to the shelters in San Angelo.”<sup>98</sup> A centralized

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90. 4 Reporter’s Record, *supra* note 15, at 177-78. According to the Bishop’s Family Record, there were two teenagers between sixteen and seventeen named Sarah Jessop, but they were not married to anyone named Dan Barlow who was middle-aged. Bishop’s Record, Petitioner’s Exhibit 4, 6 Reporter’s Record, *supra* note 15 [hereinafter Bishop’s Record].

91. Eldorado Update to Senate, *supra* note 86.

92. *Id.*

93. *Id.*

94. *Id.*

95. Tex. Dep’t of Family & Protective Servs., Overview of the Investigation — Eldorado, Texas, As of April 28, 2008, Chronology and Status Report, [http://www.dfps.state.tx.us/About/News/2008/2008-04-28\\_chronology.asp](http://www.dfps.state.tx.us/About/News/2008/2008-04-28_chronology.asp) (last visited Feb. 9, 2010) [hereinafter Chronology and Status Report].

96. *Id.*

97. *Id.*

98. *Id.*

shelter was established at the Fort Concho complex after the Governor's Division of Emergency Management activated a mass care plan.<sup>99</sup> It was not until Monday, April 7, 2008, that DFPS filed its Original Petition for Protection of Children in an Emergency and for Conservatorship in Suit Affecting the Parent-Child Relationship.<sup>100</sup>

On the same day that the Original Petition was filed, "Judge Barbara Walthers [sic] granted DFPS temporary legal custody of all 401 children in the shelter in San Angelo" after determining that "some of the[] children had been sexually and physically abused and the rest [of the children were] at risk of abuse" if they returned to their homes.<sup>101</sup> "[Fifteen] more children were transported to the shelter [on April 7, 2008], bringing the total number of children in state custody to 416."<sup>102</sup> The fourteen-day adversarial hearing was set for April 17, 2008, to determine if the children should remain in state care.<sup>103</sup> Judge Walther issued several orders prior to the hearing on April 17, including an order for DFPS to keep all the removed children in the San Angelo area and outside the foster care system until the fourteen-day hearing, and an order for DFPS "to confiscate the cell phones of the 139 women [in the shelter] to prevent witnesses [sic] tampering and interference with the legal process."<sup>104</sup>

On Monday, April 14, 2008, DFPS decided to separate the children from the mothers who were in the shelter.<sup>105</sup> "Adult women with very young children were provided the opportunity to remain at the shelter. The other women were given the choice to return to the YFZ Ranch or to a safe place. . . . [A]ttorneys of the children, mental health professionals[,] and others" weighed in on DFPS's decision to partially separate the mothers from their children, and Judge Walther concurred.<sup>106</sup> On April 16, several hundred attorneys ad litem for the children and women were given the opportunity to meet with their clients in the San Angelo Coliseum.<sup>107</sup> The fourteen-day hearing began at 9:00 A.M. on Thursday, April 17, 2008, with Judge Walther presiding, and concluded that night at 9:00 P.M.<sup>108</sup> The next morning, the fourteen-day hearing resumed at 9:30 A.M., and concluded by the

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99. *Id.*

100. Original Petition for Protection of Children in an Emergency and for Conservatorship in Suit Affecting the Parent-Child Relationship, *In re* 330 Children from the YFZ Ranch, No. 2902 (51st Dist. Ct., Schleicher County, Tex. Apr. 7, 2008).

101. Chronology and Status Report, *supra* note 95.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

end of the day with a decision in favor of DFPS to retain temporary custody of all of the children.<sup>109</sup>

### *B. Child Removal Standard*

Texas law allows the state to exercise its rights under the *parens patriae* doctrine with or without a court order, depending on the circumstances of the children at risk.<sup>110</sup> When DFPS files an initial suit requesting permission from the court to take possession of a child without prior notice to the parents and an evidentiary hearing, its burden of proof is low. The facts must be “sufficient to satisfy a person of ordinary prudence and caution,”<sup>111</sup> which is a lower burden than preponderance of the evidence. The state must show through a sworn affidavit by a person with personal knowledge that:

- (1) there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child’s welfare;
- (2) there is no time, consistent with the physical health or safety of the child, for a full adversary hearing . . . ; *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 the removal of the child.<sup>112</sup>

Section 262.101 of the Texas Family Code applies when there is time to file a petition and affidavit before taking actual possession of the child.<sup>113</sup> This section did not apply to the circumstances presented at the YFZ Ranch. The call that came into the CPS Hotline was a “priority one” referral,<sup>114</sup> which meant that CPS was required to respond within twenty-four hours of the referral.<sup>115</sup> After the call

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109. *Id.*

110. See TEX. FAM. CODE ANN. § 262.001(a) (Vernon 2008) (stating that when the government has an interest in the child, it may file suit to take possession of the child or take the child without an order, as long as the taking is done in accordance with the Code); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) (“[P]arens patriae is inherent in the supreme power of every State . . . for the prevention of injury to those who cannot protect themselves.”); see also BLACK’S LAW DICTIONARY 1221 (9th ed. 2009) (defining *parens patriae* as the capacity of a state to provide protection to those who cannot protect themselves).

111. § 262.101.

112. *Id.* (emphasis added).

113. *Id.*

114. See *supra* note 77 and accompanying text (discussing the requirements for a priority one referral).

115. § 261.301(d)(2); see also ELDORADO INVESTIGATION, *supra* note 17, at 6 (explaining that the call received on the DFPS hotline alleged physical and sexual abuse, and that

came in on March 29, 2008, the joint investigation between the sheriff's office and the Department of Public Safety (DPS) began its attempt to locate Sarah Barlow, also known as Sarah Jessop, the caller to the local family violence shelter.<sup>116</sup> Within five days, CPS determined that some of the teenage girls had been sexually abused or were in imminent risk of future sexual abuse.<sup>117</sup> These children were taken into custody without court order on Friday, April 4, 2008, while CPS continued its investigation.<sup>118</sup>

The section that CPS turned to in order to take emergency possession of the first set of children without a court order was Texas Family Code section 262.104.<sup>119</sup> This section provides that DFPS, "a

Texas law requires DFPS to investigate in that situation); DFPS Investigations, *supra* note 77 (stating that reports of an immediate risk of physical or sexual abuse qualify as priority one reports).

116. ELDORADO INVESTIGATION, *supra* note 17, at 6; *see also* Petition for Orders in Aid of Investigation, *supra* note 79, at 1 (disclosing that the caller was Sarah Jessop, also known as Sarah Barlow).

117. ELDORADO INVESTIGATION, *supra* note 17, at 6.

118. *In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613, 613-14 (Tex. 2008) (per curiam); *see also* ELDORADO INVESTIGATION, *supra* note 17, at 6 (discussing the removal without a court order of eighteen girls on Apr. 4, 2008).

119. § 262.104. The six conditions set forth in this section to justify removing a child without a court order are:

(1) on personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child;

(2) on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child;

(3) on personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse;

(4) on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse; *or*

(5) on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that the parent or person who has possession of the child is currently using a controlled substance as defined by Chapter 481, Health and Safety Code, and the use constitutes an immediate danger to the physical health and safety of the child.

*Id.* § 262.104(a) (emphasis added).

A sixth condition is set forth in subsection (b) that pertains to:

personal knowledge or information furnished by another, that has been corroborated by personal knowledge, that would lead a person of ordinary prudence and caution to believe that the parent or person who has possession of the child has permitted the child to remain on premises used for the manufacture of methamphetamine.

*Id.* § 262.104(b).



law enforcement officer, or a juvenile probation officer may take possession of a child without a court order,” if “there is no time to obtain a temporary restraining order or attachment before taking possession of a child consistent with the health and safety of that child.”<sup>120</sup> The difference between this section and section 262.201 is that DFPS does not have to prove three elements prior to taking temporary possession of the child.<sup>121</sup> Under section 262.104, DFPS only has to show that one out of six conditions exists in order to prove that emergency possession is warranted.<sup>122</sup> Texas was able to show that condition four<sup>123</sup> existed because the investigators had witnessed what they thought were over thirty female minors with children and/or expecting children,<sup>124</sup> collected family information from the Bishop’s Record,<sup>125</sup> and interviewed the teenage girls with children as well as the pregnant teenagers.<sup>126</sup> The information furnished by the children along with their own personal knowledge led them to believe several of the female children had been victims of sexual abuse.<sup>127</sup>

Since the legal standard under section 262.104 is much lower than the legal standard established for the required initial hearing to be held the next business day after the removal and the fourteen-day hearing,<sup>128</sup> DFPS knew it eventually would have to meet a higher legal standard. The subtle differences in the statutes governing removal of children should not be overlooked: they illustrate why CPS was able to push forward with the allegations of abuse and subsequent

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120. *Id.* § 262.104(a).

121. *Compare id.* § 262.104(a) with § 262.201(b) (Vernon Supp. 2009) (requiring DFPS to prove that the child’s health or safety is in danger, immediate removal is warranted, and that reasonable efforts to return the child have been made in order to keep the child after the fourteen-day adversarial hearing).

122. § 262.104.

123. *See* § 262.104(a)(4) (allowing DFPS to take possession of a child “on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse”).

124. *See* Chronology and Status Report, *supra* note 95 (noting that DFPS took over thirty girls that investigators thought had been abused or were in imminent danger of being abused).

125. Tex. Dep’t of Family & Protective Servs., Statement on Third Court of Appeals Ruling, [http://www.dfps.state.tx.us/about/news/2008/eldorado/2008-05-22\\_statement.asp](http://www.dfps.state.tx.us/about/news/2008/eldorado/2008-05-22_statement.asp) (last visited Jan. 22, 2010).

126. Affidavit in Support of Petition, *supra* note 2, at 5 (noting that investigators found many teenagers who were pregnant or already had children during the course of the investigation, and believed from interviews with the children that there was a pervasive practice of young women having sexual relations with older men on the ranch).

127. *See id.* (noting that the investigators interviewed children and took note of the pregnant minors and minors with children in making their determination that the children on the ranch should be removed).

128. *See supra* text accompanying notes 119-27 (discussing the differences between §§ 262.104 and 262.201).

investigative findings, despite how sparse the evidence presented at the fourteen-day hearing appeared. CPS, knowing it would need more evidence for subsequent hearings, first filed a petition with the court to obtain an order that would aid in its investigation of the report of child abuse or neglect.<sup>129</sup> The court order on April 3, 2008, granted DFPS the right to search the YFZ Ranch prior to filing its emergency removal petition,<sup>130</sup> and gave DFPS access to records it hoped would suffice as proof of underage spiritual marriages between older men and minor girls.

The state must still go before the district court to obtain an order after it has taken possession of children without a court order.<sup>131</sup> The hearing is typically *ex parte* and must be held "on or before the first working day after the date the child is taken into possession."<sup>132</sup> This hearing took place on Monday, April 7, 2008.<sup>133</sup> The legal standard at this hearing is very similar to the three-pronged standard set forth in section 262.101,<sup>134</sup> except that there is more of an emphasis placed on the issue of sexual abuse. Pursuant to Texas Family Code section 262.107, the court shall order the return of the child at the initial hearing 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.<sup>135</sup>

Section 262.107 contains a subsection (b) which addresses what the court can consider in determining whether there is a continuing

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129. Petition for Orders in Aid of Investigation, *supra* note 79, at 1-3.

130. Order for Investigation of Child Abuse, *supra* note 79, at 1; Petition for Orders in Aid of Investigation, *supra* note 79, at 1-3.

131. TEX. FAM. CODE ANN. § 262.107 (Vernon 2008).

132. *Id.* § 262.106 (a)-(b).

133. Chronology and Status Report, *supra* note 95.

134. See § 262.101 (requiring the government to prove that the child's health or safety is in immediate danger, that there is no time for a full adversarial hearing, and that the government has made reasonable efforts to prevent or eliminate the need to remove the child).

135. *Id.* § 262.107(a).

danger to the physical health or safety of a child.<sup>136</sup> Subsection (b) provides that “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.”<sup>137</sup>

It is important to understand the burden that DFPS had to meet in order to initially take the children into state custody, and how the affidavit provided with the original petition<sup>138</sup> was the only evidence the judge had to consider regarding the emergency possession of children.<sup>139</sup> The phrasing of the affidavit of CPS supervisor Lynn McFadden enabled the fact finder (Judge Walther) to determine that a person of ordinary prudence and caution would find that the some of the children on the ranch had been the victim of sexual abuse *and* that these children were at substantial risk of being sexual abuse victims in the future.<sup>140</sup> CPS combined three sets of facts together to establish the “continuing danger to the physical health or safety of the child[ren].”<sup>141</sup>

The first fact was the referral from a pregnant sixteen-year-old mother of an eight-month-old who had made very serious allegations of physical and sexual abuse by her forty-nine-year-old spiritual husband.<sup>142</sup> Based on the ages given by Sarah at the time of her call to the shelter — that she was sixteen years old and her child was eight months old — she could have been “spiritually” married and conceived her child at the age of fourteen, depending on her date of birth.<sup>143</sup> The facts given by Sarah indicated that (a) she was the victim of domestic violence and sexual assault, and (b) her parents had abandoned her or left her in an environment that endangered her physical safety and well-being (both grounds for termination of parental rights in the Texas Family Code).<sup>144</sup> Although CPS was unable to locate Sarah

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136. *Id.* § 262.107(b).

137. *Id.*

138. Affidavit in Support of Petition, *supra* note 2.

139. *See* § 262.101 (requiring only an affidavit when the government files a petition before taking possession of a child).

140. *See* Affidavit in Support of Petition, *supra* note 2, at 5-6 (describing the numerous teenage mothers and pregnant teenagers on the ranch).

141. § 262.107; Affidavit in Support of Petition, *supra* note 2, at 2-6.

142. Affidavit in Support of Petition, *supra* note 2, at 2-3.

143. This suggestion assumes a normal nine month gestation period, plus the age of the child, which equals seventeen months. If Sarah had only recently turned sixteen years old at the time of her call to the shelter, seventeen months earlier she would have been only fourteen years old. *But see* Affidavit in Support of Petition, *supra* note 2, at 3 (estimating that Sarah Jessop was fifteen years old at the time of her spiritual marriage to her husband, notwithstanding her stated age of sixteen years and her child’s age of eight months).

144. § 161.001(1)(D)-(E); *see* Affidavit in Support of Petition, *supra* note 2, at 3 (indicating that the caller was being beaten and raped by her husband, and that her parents had left her at the ranch at the age of thirteen and had not been in touch with her since).

Jessop, also known as Sarah Barlow, or her baby, its investigators were able to see firsthand very young pregnant teenagers as well as very young girls who already had children.<sup>145</sup> This fact, combined with testimony that many of the young girls admitted to knowing a sixteen-year-old Sarah Jessop who had a baby,<sup>146</sup> gave rise to suspicions about whether Sarah was being hidden and protected, or perhaps just providing a different name to investigators so that she could not be identified.

The second fact that CPS established was that there were a number of young teenaged girls who appeared to be pregnant as well as several teenaged girls who reported to the Department that they had already given birth and had infant children.<sup>147</sup> This fact was shown through the CPS investigators seeing young girls with children and assessing their approximate ages and physical condition of pregnancy through interviews.<sup>148</sup> The third fact set forth by CPS was the cultural and moral climate on the YFZ Ranch whereby underage girls were conditioned to anticipate and acquiesce to spiritual marriage and sexual activity with adult men on the ranch.<sup>149</sup> This third fact gave rise to the possible abusive and criminal nature of the second fact, and CPS drew the causal connection at the fourteen-day hearing that the teenage girls were spiritually married to older men who had sexually abused them, proof of which were the children born of their unions and the children yet to be born.<sup>150</sup>

Without the names of husbands, dates of births, and dates of marriages, however, no corroboration of this causal connection could be verified by CPS investigators until later in the investigation process.<sup>151</sup> Rather than focus on the polygamist aspect of the FLDS lifestyle like the State of Arizona did in the 1953 Short Creek Raid,<sup>152</sup> the State of Texas aimed to address the reason that the investigation began in the first place — child sexual abuse. In applying the burden of proof required for these cases at this stage, CPS was able to meet the requirements for a person of ordinary prudence and caution at

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145. Affidavit in Support of Petition, *supra* note 2, at 5; Ben Winslow, *FLDS Are Still Feeling Effects One Year Later*, DESERET NEWS, Mar. 29, 2009, at A01.

146. 4 Reporter's Record, *supra* note 15, at 178.

147. *Id.* at 192, 201; Affidavit in Support of Petition, *supra* note 2, at 5.

148. See Affidavit in Support of Petition, *supra* note 2, at 5 (noting that the investigators thought the girls "appeared" pregnant).

149. Petition for Orders in Aid of Investigation, *supra* note 79, at 1.

150. 4 Reporter's Record, *supra* note 15, at 192, 201, 204-06.

151. See ELDORADO INVESTIGATION, *supra* note 17, at 7 (discussing the difficulty in verifying the ages and relationships of the girls and men at the ranch).

152. See *infra* text accompanying notes 295-331 (discussing the Short Creek Raid in depth).

the trial level, but the appellate and supreme courts did not view the facts in the same light.<sup>153</sup>

Hundreds of other children on the YFZ Ranch who were not part of this group of teenage mothers were also removed from the ranch.<sup>154</sup> In a case where siblings of an alleged victim of sexual abuse reside in the same household as the victim, the Texas Family Code allows the court to consider this sexual abuse when determining whether there is an immediate danger to the physical health and safety of the siblings.<sup>155</sup> If DFPS could establish that every child on the ranch had a sister who was an underage pregnant teen or teenage mother (and therefore a victim of sexual abuse), this statute could justify their removal as well.<sup>156</sup> Herein lays the rationale behind claiming that all the children were part of one household — tying them together would link the immediate danger for some of the children to all of the children. It is a well-established principle in child abuse scholarship that in families where one child bears the brunt of the parent's abuse, the other children are at risk of abuse and are considered collateral victims.<sup>157</sup> Also, since DFPS claimed that it was difficult to determine who lived in what building, the theory that all of the children were part of one household initially worked in its favor to obtain authorization from the court for temporary possession of all 468 children.<sup>158</sup>

### C. Due Process Hearing

The fourteen-day due process hearing began on April 17 and lasted only two days.<sup>159</sup> Texas Family Code section 262.201 provides that “a full adversarial hearing shall be held not later than the [fourteenth] day after the date the child [is] taken into possession by the governmental entity.”<sup>160</sup> Prior to the hearing, the coordinating

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153. ELDORADO INVESTIGATION, *supra* note 17, at 8-9.

154. *Id.* at 3; Chronology and Status Report, *supra* note 95.

155. See TEX. FAM. CODE ANN. § 262.102(b)(2) (Vernon 2008) (“In determining whether there is an immediate danger to the physical health or safety of a child, the court may consider whether the child’s household includes a person who has . . . sexually abused another child.”).

156. *Id.*

157. Elizabeth A.W. Seagull, *Family Assessment*, in THE BATTERED CHILD 150, 154 (Mary Edna Helfer, Ruth S. Kempe & Richard D. Krugman eds., 5th ed. 1997); see also Heather Forkey et al., *After the Call: Children and the Child Welfare System*, in RECOGNITION OF CHILD ABUSE FOR THE MANDATED REPORTER 351, 356 (Angelo P. Giardino & Eileen R. Giardino eds., 3d ed. 2002) (noting that if one child is believed to be in immediate danger, usually all children are removed).

158. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*1-\*4 (Tex. App. May 22, 2008) (mem.).

159. 4-5 Reporter’s Record, *supra* note 15.

160. § 262.201(a).

attorneys ad litem assigned the children's attorneys to color coded groups for the children according to "commonalit[ies] of issues and interests."<sup>161</sup> It was very clear that this hearing was going to be "en masse" in that the pleadings and testimony of CPS applied to all the children and parents that resided on the YFZ Ranch.<sup>162</sup> Several of the children's attorneys objected as to the format of the hearing and asserted constitutional due process and statutory violations because each child was not being provided a full adversarial hearing where they were given the opportunity to present evidence on their own behalf.<sup>163</sup> Judge Walther declared that these objections were premature and that it was the court's intention to allow the attorneys the opportunity to call witnesses and present evidence.<sup>164</sup> The court repeatedly set forth that the state statute required that the hearing must be held within fourteen days of the children's removal.<sup>165</sup>

CPS had the burden of proving three elements under Texas Family Code section 262.201(b) with "sufficient evidence to satisfy a person of ordinary prudence and caution."<sup>166</sup> The State of Texas had to show that there was: (1) a danger to the physical health or safety of the children; (2) an urgent need for immediate removal of the children and a reasonable effort made to prevent the removal of the children; and (3) a reasonable effort made to enable the child to return home.<sup>167</sup>

CPS put on its case in chief with four witnesses: Marc Allen Connelly, the Deputy General Counsel for the Texas Department of State Health Services; Danny Crawford, a sergeant with the Motor Vehicle Theft Service for the Department of Public Safety; Angie Voss, a CPS Investigative Supervisor; and Dr. Bruce Perry, a child psychiatrist, licensed physician, and nationally known expert in child maltreatment and child development.<sup>168</sup> The Respondent parents on the

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161. 5 Reporter's Record, *supra* note 15, at 109.

162. 4 Reporter's Record, *supra* note 15, at 15.

163. *Id.* at 12-13, 16.

164. *Id.* at 14.

165. *See, e.g., id.* at 15 (pointing out that the Texas Family Code requires a hearing to be held within fourteen days); 5 Reporter's Record, *supra* note 15, at 337 (same); *see also* § 262.201 (Vernon Supp. 2009) (requiring an adversarial hearing within fourteen days after the state removes a child).

166. *See* § 262.201(b) (requiring that the court order the return of the child to his or her parents unless evidence is presented that is sufficient to satisfy a person of ordinary prudence and caution that removal is the best option).

167. *Id.*

168. 4 Reporter's Record, *supra* note 15, at 24, 48, 147; 5 Reporter's Record, *supra* note 15, at 57-58. The court reporter spelled Marc Connelly's name incorrectly in the court transcript. 4 Reporter's Record, *supra* note 15, at 24. The text of this Article utilizes the correct spelling.

YFZ Ranch offered testimony through four mothers and an expert witness in the Mormon and FLDS religions, Dr. William John Walsh.<sup>169</sup>

Dr. Perry testified that the pregnancy of the underage children on the YFZ Ranch was the result of sexual abuse because children of the age of fourteen, fifteen, or sixteen are not sufficiently emotionally mature to enter a healthy consensual sexual relationship or marriage.<sup>170</sup> When questioned by the children's attorney of the pink group, who represented girls under the age of five, Dr. Perry admitted that it was probably healthier for children in that age group to be removed from a parent than be exposed to the FLDS lifestyle.<sup>171</sup> Dr. Walsh confirmed that the FLDS accepts the age of first menstruation as the age of eligibility for marriage and that there was no sex outside of marriage within the FLDS.<sup>172</sup>

The twenty-five exhibits that were filed to support the case against the FLDS parents by the State of Texas included state health records for three teenage mothers, the Bishop's Record, CPS investigation summaries for nineteen women, and the CPS Investigator's Chart.<sup>173</sup> The health records were entered to show that there were three teenagers who had given birth before the age of eighteen, and at least one of these young women likely was pregnant at the age of fifteen.<sup>174</sup> The evidence presented through the exhibits was just as important for what it did not show. The health records of the teenage girls did not reflect who the fathers of their children were or if the girls had made an outcry of sexual assault or abuse prior to giving birth.<sup>175</sup> The Bishop's Record did not state the age of the wives at the time of marriage, and in most cases, it did not reflect which child

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169. 5 Reporter's Record, *supra* note 15, at 167-68, 247-49, 270, 285, 297-98.

170. *Id.* at 72-73.

171. *Id.* at 156.

172. *Id.* at 174, 183, 200-01.

173. 6 Reporter's Record, *supra* note 15, at 2-3. The Reporter's Record lists twenty-six exhibits; however, there is no ninth exhibit listed. *Id.* at 2. The total number of petitioner's exhibits is therefore twenty-five.

174. See 4 Reporter's Record, *supra* note 15, at 205-06 (discussing the fact that during the initial investigation, DFPS found about three or four minors who were pregnant or had children); *id.* at 28 (admitting Petitioner's Exhibits 1, 2, and 3); Tex. Dep't of Health Servs. Record: Rebecca Keate, Petitioner's Exhibit 1, 6 Reporter's Record, *supra* note 15 (noting that she was born on August 9, 1990, and her son was born on April 27, 2007, potentially making her fifteen when she conceived); Tex. Dep't of Health Servs. Record: Rachel Keate, Petitioner's Exhibit 2, 6 Reporter's Record, *supra* note 15 (noting that her date of birth was August 27, 1990, making her eighteen years of age at the time of the raid); Tex. Dep't of Health Servs. Record: Sarah Johnson, Petitioner's Exhibit 3, 6 Reporter's Record, *supra* note 15 (noting that her date of birth was November 28, 1989, meaning that she must have been impregnated before the age of eighteen).

175. See sources cited *supra* note 174 (illustrating that the health records contain no information about the fathers); see also 4 Reporter's Record, *supra* note 15, at 206-07 (noting that the teenage girls refused to discuss the fathers of their children).

belonged to which wife.<sup>176</sup> What it did show was the age difference between many of the men and their wives, and it established the frequency of older men marrying wives fifteen to forty years their junior.<sup>177</sup>

The Bishop's Record was located on the YFZ Ranch and was the "Father's Family Information Sheet" that identified the names, ages, and residences of all of the family members on the ranch and their relationship to one another.<sup>178</sup> The general pattern of some of the Bishop's Record reflected that the children of each wife were listed directly below the wives' names, but this was not always the case.<sup>179</sup> The residence "R17" was the YFZ Ranch in general — there was no further breakdown regarding which buildings or separate homes within the buildings in which each family lived.<sup>180</sup> Other residences included: Short Creek, Arizona; Hildale, Utah; Colorado City; and Idaho.<sup>181</sup> The Bishop's Record indicated that at least two wives resided in "hiding" and several children resided "elsewhere."<sup>182</sup> This record revealed that there were at least ten young women between the ages of sixteen and seventeen who were married to older men, and an unknown number of these women were impregnated between the ages of fifteen and seventeen as well.<sup>183</sup>

The investigation summaries documented that there were young mothers who had given birth as teenagers.<sup>184</sup> Most of these young women refused to state if they were married, their spouse's name, or the names of any of the persons that lived in their homes.<sup>185</sup> The last

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176. See, e.g., Bishop's Record, *supra* note 90 (failing to give information about the ages of the wives at the time of their marriages, and failing to state which children belonged to which mothers).

177. See, e.g., *id.* (indicating that one fifty-four-year-old man was married to six women, the youngest of whom was seventeen years old, and a sixty-seven-year-old man was married to a twenty-four-year-old woman).

178. 4 Reporter's Record, *supra* note 15, at 48, 50; see also Bishop's Record, *supra* note 90 (listing the names of each husband, his wives and children, and their residences).

179. See, e.g., Bishop's Record, *supra* note 90 (showing some records in which the children of each wife were listed under her name, and some in which there was no way to tell which children belonged to which wife).

180. See, e.g., *id.* (showing that every man who lived on the YFZ Ranch put "R17" for his residence).

181. *Id.*

182. *Id.*

183. *Id.*; 4 Reporter's Record, *supra* note 15, at 201, 290-91, 294.

184. Petitioner's Exhibits 5-16, 6 Reporter's Record, *supra* note 15; Petitioner's Exhibits 17-25, 7 Reporter's Record, *supra* note 15.

185. See, e.g., CPS Investigation Summary: Rachel Keate, Petitioner's Exhibit 5, 6 Reporter's Record, *supra* note 15 (noting Rachel Keate's marital status as unknown); CPS Investigation Summary: Sally Jeffs, Petitioner's Exhibit 6, 6 Reporter's Record, *supra* note 15 (noting Sally Jeffs's marital status as unknown) [hereinafter Sally Jeffs CPS Summary].



exhibit of DFPS was a chart compiled by CPS investigative supervisor Angie Voss that documented the name and date of birth of twenty-one young mothers, their current age, their age at conception, their child's date of birth or age, and the source of information for these statistics.<sup>186</sup> These women were no longer minors according to their dates of birth, so their information was only used to establish what DFPS referred to as the pattern of underage girls spiritually marrying older men.<sup>187</sup> The age of the children was used to confirm the fact that the young women were spiritually married at least nine months before the birth of their first child.<sup>188</sup> In reviewing the status of teenage girls removed from the YFZ Ranch, it appeared as if more than half of these girls had children before the age of seventeen or were pregnant by this age.<sup>189</sup>

The three legal elements that DFPS had to show at the fourteen-day hearing in order to maintain temporary possession of the children from the YFZ Ranch after they were initially removed were essentially the same elements as under section 262.107, and section 262.201(d) is virtually identical to subsection (b) in section 262.107.<sup>190</sup> There are some subtle differences worth mentioning. First, at the fourteen-day hearing, the state has to show that the parent or person entitled to possession of the children either did or failed to do something which caused a danger to the children's physical health or safety.<sup>191</sup> In order to prove this at the fourteen-day hearing, CPS would have needed some type of admission from a child fifteen years or younger that her parent allowed her to spiritually marry an older man, or failed to do anything to stop the marriage or sexual abuse.<sup>192</sup> An admission from a fifteen-year-old that she was impregnated by a thirty-two-year-old man, without more, is not enough to prove the first element regarding parental neglect. Many teenagers in Texas and

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186. CPS Investigator's Chart, *supra* note 20; 4 Reporter's Record, *supra* note 15, at 243.

187. CPS Investigator's Chart, *supra* note 20; *see also* 4 Reporter's Record, *supra* note 15, at 241-42 (stating that the investigator believed that everyone on the ranch shared the belief that no age was too young for the girls to get married).

188. 4 Reporter's Record, *supra* note 15, at 243, 253-54 (detailing the ages at which the underage mothers conceived their children); *see also* 5 Reporter's Record, *supra* note 15, at 174, 200 (revealing that FLDS members who engaged in extra-marital sex would be excommunicated).

189. Michelle Roberts, *Many Girls in Sect Pregnant or Had Baby*, SEATTLE TIMES, Apr. 29, 2008, at A5.

190. Compare TEX. FAM. CODE ANN. § 262.201(d) (Vernon Supp. 2009) with § 262.107(b) (Vernon 2008) (using the same language to determine whether there is a continuing danger to the child's health or safety).

191. § 262.201(b)(1) (Vernon Supp. 2009).

192. *See* § 2.102(a) (permitting a minor to marry with parental consent as long as the minor is between sixteen and eighteen years of age, but not allowing marriage at any younger age).

around the nation have been impregnated by older men,<sup>193</sup> and it cannot be assumed in every instance that the parents are abusive or neglectful. There must be some proof that the parent either neglected to protect the daughter or actively promoted the illegal activity.<sup>194</sup> In the FLDS cases, CPS had neither an admission from a child nor proof of any action or inaction by a parent that showed causation of danger to the physical health or safety of the child.<sup>195</sup>

Second, CPS had to show that there was an urgent need for protection of the children that required immediate removal.<sup>196</sup> The risk of harm to the child if she remained in the home would have to outweigh the risk of trauma the child might experience if removed from the home.<sup>197</sup> At the YFZ Ranch, not all of the children were at risk for sexual abuse.<sup>198</sup> Any pre-pubescent child or male child would not fall into the risk category substantiated by the facts of the case.<sup>199</sup> If a child were to live in the same home as a sexually abused pregnant minor or a minor with children, the state could remove that child based on its policy that where one child is at risk for abuse and neglect in a home, all other children in that home are also at risk and can be removed.<sup>200</sup> Because CPS claimed that all of the children were part of one household, the court was able to impute risk of harm to the pre-pubescent male and female children as well as the male teens.<sup>201</sup>

Third, CPS had to show that reasonable efforts were made to enable the children to return home.<sup>202</sup> Although the appellate court and the Texas Supreme Court did not address the third element,<sup>203</sup>

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193. See Carol J. De Vita, *The United States at Mid-Decade*, 50 POPULATION BULL., March 1996, at 35 box 5 (“Two-thirds of the fathers of . . . babies born to teenage mothers . . . were age [twenty] or older.”); see also *Advance Report of Final Natality Statistics*, 42 MONTHLY VITAL STAT. REP., 1991, at 26 tbl.11 (Supp. Sept. 9, 1993) (displaying the ages of mothers and fathers in the United States in 1991).

194. See § 262.201(b)(1) (requiring evidence of danger to the child’s health or safety due to the parent’s action or failure to act).

195. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*3 (Tex. App. May 22, 2008) (mem.).

196. § 262.201(b)(2).

197. See *id.* (noting that, even in urgent circumstances, the state should make “reasonable efforts, consistent with the circumstances and providing for the safety of the child,” to avoid removal).

198. *In re Steed*, 2008 WL 2132014, at \*2.

199. *Id.* at \*3.

200. See 4 Reporter’s Record, *supra* note 15, at 257-58 (stating that when one child in a home has been abused, the witness believes the other children in the same home are at risk).

201. See 5 Reporter’s Record, *supra* note 15, at 340 (finding that for every child seized off the ranch, the requirements of section 262.201 had been met).

202. § 262.201(b)(3).

203. See *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008) (per curiam) (denying DFPS’s petition without discussing any of the elements in detail); *In re Steed*, 2008 WL 2132014, at \*3-\*4 (discussing the failure to prove the danger

there was little to no evidence presented at the fourteen-day hearing to show what CPS did to try to return the children to their homes, or to show that there was a substantial risk of continuing danger if they were returned.<sup>204</sup> The testimony provided stated there was a risk of danger due to the fact that it grew dark and DFPS workers did not feel safe enough on the ranch to continue the investigation.<sup>205</sup> The testimony did not answer the question of whether all of the 468 children, no matter what age and gender, were at risk for sexual abuse. Given the fact that only females were spiritually married at young ages, the male children were arguably not at risk for any type of sexual abuse. Even if the boys arguably were at risk of becoming sexual predators, only a few boys were even close to reaching majority, when they could be considered for marriage.<sup>206</sup>

The parents' attorneys presented a number of mothers to testify about their lifestyle on the YFZ Ranch.<sup>207</sup> While it seemed that more mothers and fathers were scheduled to testify at the hearing, many backed out after others testified,<sup>208</sup> arguably for fear of revealing facts that would later be used for criminal prosecution of bigamy. The court initially had a list of sixty-five mothers who were to testify, and the actual number of mothers that served as witnesses was four.<sup>209</sup> The mothers who testified identified their husbands, stated that they had married of their own free will as adult women and admitted to having several sister-wives.<sup>210</sup> Marilyn Jeffs admitted to having two teenage sisters with children who were married before they conceived.<sup>211</sup> By providing estimates of her sisters' ages and the ages of their children, Marilyn Jeffs's testimony revealed that the two sisters had to have married before the age of eighteen.<sup>212</sup> Further testimony revealed that some women on the YFZ Ranch would not allow their daughters to marry until they were at least eighteen.<sup>213</sup> An older woman testified that she was divorced with adult children who had chosen a different

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to boys and pubescent girls, urgent need for removal, and lack of evidence that DFPS tried to avoid removing the children, but not efforts of DFPS to return the children once they had been removed).

204. 4 Reporter's Record, *supra* note 15, at 323-24, 326.

205. *Id.* at 221-22.

206. *See, e.g., In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d at 615 (discussing the fact that of the 126 children at issue in the suit, two of the boys were thirteen and seventeen years old, and the ages of the others were unknown).

207. *E.g.*, 5 Reporter's Record, *supra* note 15, at 3, 270-71, 294-95, 302-03.

208. *See, e.g., id.* at 324-26 (illustrating a time during the fourteen-day hearing when a witness refused to testify).

209. *Id.* at 3, 245.

210. *Id.* at 251, 270, 290, 300-01, 305-06.

211. *Id.* at 261-64.

212. *Id.*

213. *Id.* at 254, 264-65.

way of life.<sup>214</sup> Her children who were married had married after the age of eighteen, and she stated that she was willing to leave the YFZ Ranch in order for her youngest child to be returned to her.<sup>215</sup> None of the women testified that they had witnessed or knew of any women on the YFZ Ranch being married at ages fourteen, fifteen, or sixteen years old.<sup>216</sup>

The Texas Family Code provides that “[t]he 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.”<sup>217</sup> In addition, the Supreme Court has held that “there is a presumption that fit parents act in the best interests of their children.”<sup>218</sup> The Texas Supreme Court in *Holley v. Adams* set forth nine factors to be considered in the best interest determination, but explicitly stated that these factors are not exhaustive.<sup>219</sup> The *Holley* factors include:

- (A) the desires of the child;
- (B) the emotional and physical needs of the child now and in the future;
- (C) the emotional and physical danger to the child now and in the future;
- (D) the parental abilities of the individuals seeking custody;
- (E) the programs available to assist these individuals to promote the best interest of the child;
- (F) the plans for the child by these individuals or by the agency seeking custody;
- (G) the stability of the home or proposed placement;
- (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
- (i) any excuse for the acts or omissions of the parent.<sup>220</sup>

The court is given wide latitude to determine the best interests of a child.<sup>221</sup>

Texas and federal law mandate that any child who has been removed from his or her parent will be appointed a guardian ad litem (GAL), an advocate trained in the area of child protection who is charged with presenting to the court a recommendation for the

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214. *Id.* at 286-88 (testimony of Linda Musser).

215. *Id.* at 289-90.

216. *Id.* at 264, 279, 292, 308-09.

217. TEX. FAM. CODE ANN. § 153.002 (Vernon 2008).

218. *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

219. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

220. *Id.* (citations omitted).

221. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982).

action that is in the best interest of the child.<sup>222</sup> Texas law also mandates the appointment of an attorney ad litem (AAL) for the child so that every child would have an opportunity through counsel to express his or her wishes.<sup>223</sup> The children in the FLDS case were provided with Texas Court Appointed Special Advocates (CASA) to serve as their GALs, and AALs to represent their expressed wishes.<sup>224</sup> The intent of Texas Family Code chapter 107 is to ensure that each child involved in a suit filed by a governmental entity has the opportunity to have his or her voice heard in court.<sup>225</sup>

At the end of the hearing, the executive director of the Children's Advocacy Center gave CASA's recommendation that all of the children remain in state care because of the suspected child sexual abuse and the ongoing investigation.<sup>226</sup> CASA assessed that there was "a multi-generational history of young girls being married off and having babies very early, [with] young boys and girls being groomed to perpetrate this practice."<sup>227</sup> CASA was unable to interview all of its clients prior to the hearing, and was unsure of the biological mothers and fathers of the 300-plus children that were interviewed.<sup>228</sup> The executive director stated that CASA was waiting for "pregnancy testing and the results."<sup>229</sup> She further stated that CASA "need[ed] the opportunity to speak with the[] children again without them being coached."<sup>230</sup>

The AALs represented for the most part that the children wanted to return home to their parents.<sup>231</sup> The majority of the attorneys who substituted their judgment for the children because of their young age were not of the opinion that the state had carried its burden of proof with regard to the immediate danger to the physical health and

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222. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006); TEX. FAM. CODE ANN. §§ 107.002(e), .011(a) (Vernon 2008).

223. See §§ 107.003(1)(b), .004(a)(2) (requiring attorneys ad litem to represent the child's expressed objectives).

224. See *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008) (per curiam) (describing the presence of the court-appointed representatives for the children at the fourteen-day hearing); Terri Langford, *Documents Could Play Role in Criminal Probe of FLDS Sect*, HOUSTON CHRON., July 18, 2008, available at 2008 WLNR 13480615 ("CASA is one of the many court-appointed guardians shepherding the best interests of the . . . children taken from the sect's ranch in April in the San Angelo court.").

225. See, e.g., § 107.004(a)(2) (requiring the AAL to represent the child's wishes to the court); see also Linda Elrod et al., *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 20 FAM. L.Q. 375, 376 (1995) (noting that the AAL must help the child articulate his or her interests).

226. 5 Reporter's Record, *supra* note 15, at 328.

227. *Id.* at 328-29.

228. *Id.* at 329.

229. *Id.* at 328.

230. *Id.* at 329.

231. *E.g., id.* at 331.

safety to their clients.<sup>232</sup> Several attorneys objected to the format of the hearing because each child did not get his or her individual hearing.<sup>233</sup> Some asserted rights of their clients to communicate and visit with their parents and for increased privacy.<sup>234</sup> These attorneys also requested that rules be put into place such that they would receive notice before anyone spoke to or interviewed their clients and that they would receive copies of documents regarding their clients.<sup>235</sup> Throughout the case, many AALs lodged objections on various questions, most of which were overruled or not ruled upon at all by the court.<sup>236</sup> When the AALs were given the opportunity to ask questions, Judge Walther requested that the chosen representatives for the various age groups of children be the spokesperson for that particular group of attorneys in order to be more efficient.<sup>237</sup> In fact, at one point during the examination period, she requested that the AALs ask, "in a controlled fashion," just "a few questions" of the witnesses.<sup>238</sup>

During the second day of the hearing, Judge Walther asked the AALs if they could fathom a better way in which to conduct the fourteen-day hearing, given the massive number of parents and children involved in the case.<sup>239</sup> No attorney volunteered another method, and Judge Walther proceeded with the hearing en masse.<sup>240</sup> At the end of the day on Friday, the judge essentially made the closing statements for the all of the parties in one or two sentences, giving them the opportunity to add more to her statements if they wished.<sup>241</sup> It appeared the court had reached the point where it had heard enough to make a decision on the matter, so the rest of the hearing was largely perfunctory. The court found that there was "sufficient evidence . . . to satisfy a person of ordinary prudence and caution that the requirements of sections [sic] 262 of the [Texas] Family Code [had] been met as to each and every element to require . . . the Court . . . [to] continue the appointment of [DFPS] as the temporary managing conservator of all children."<sup>242</sup>

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232. See, e.g., *id.* at 338-39 (illustrating one attorney speaking for two two-and-a-half-year-old boys and denying that the state had met its burden of proof).

233. *Id.* at 333-34; 4 Reporter's Record, *supra* note 15, at 12-13.

234. 5 Reporter's Record, *supra* note 15, at 333-34.

235. *Id.* at 334.

236. See, e.g., *id.* at 177-78, 196 (illustrating instances of the court failing to rule or overruling on an objection by the AALs).

237. 4 Reporter's Record, *supra* note 15, at 29, 188.

238. 5 Reporter's Record, *supra* note 15, at 110.

239. *Id.* at 334.

240. See *id.* at 334-35 (noting that no one had made any suggestions for how to run the hearing aside from the method adopted by the court).

241. *Id.* at 329-31.

242. *Id.* at 340.

*D. Appellate and Supreme Court Review*

The Third District Court of Appeals at Austin concluded that DFPS failed to meet its burden of proof under Texas Family Code section 262.201 and directed the district court to vacate its temporary orders granting the state custody of the 126 children covered under the mandamus.<sup>243</sup> There were thirty-eight mothers who filed the appeal, and the court noted that the appeal did not involve parents of all of the children removed.<sup>244</sup> The group of parents who filed the writ of mandamus to reverse the district court's decision consisted of mothers with pubescent and pre-pubescent children.<sup>245</sup> Because there was no direct evidence to show that the Relators' children were in immediate danger of physical harm, and because DFPS had painted the entire case with such a broad stroke, the appeal was successful.<sup>246</sup>

The court of appeals reviewed the three-pronged legal standard for removal of children in Texas and set forth that, "[u]nless there is sufficient evidence to demonstrate the existence of each of the requirements of section 262.201(b), the court is required to return the children to the custody of their parents."<sup>247</sup> The appellate court described the evidence that the district court relied upon to satisfy the requirements of section 262.201(b), mostly focusing on: the specific number of young female teenagers who became pregnant and had children as minors; the fact that all 468 children were part of a "household" on the YFZ Ranch where a child had been sexually abused; and the "'pervasive belief system' among the residents of the ranch that it is acceptable for girls to marry, engage in sex, and bear children as soon as they reach puberty."<sup>248</sup>

The court further emphasized the portions of the district court record that contained facts undisputed by DFPS.<sup>249</sup> The facts cited pointed to the lack of evidence presented by the State of Texas that male children and pre-pubescent female children were victims or were in danger of being victims of sexual or physical abuse and the lack of evidence connecting the young female teenagers who had borne

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243. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*4 (Tex. App. May 22, 2008) (mem.).

244. *Id.* at \*1 & n.1.

245. *See id.* at \*3 (noting the children at issue in the Relators' appeal included males, pre-pubescent females, and pubescent females, and finding that DFPS failed to provide "evidence of danger to the physical health or safety of any male children or any female children who had not reached puberty," and also failed to provide "evidence that any of the pubescent female children of the Relators were in such physical danger").

246. *Id.* at \*3-\*4.

247. *Id.* at \*1.

248. *Id.* at \*1-\*2.

249. *Id.* at \*2.

children to sexual or physical abuse.<sup>250</sup> The court further noted that none of the Relators filing the appeal were mothers to the five female children identified by DFPS as pregnant minors.<sup>251</sup> The “pervasive belief system” of the FLDS was the only danger to the male children or pre-pubescent female children.<sup>252</sup>

The Texas Supreme Court issued its opinion per curiam on May 29, 2008.<sup>253</sup> It denied DFPS’s petition for mandamus, declining to disturb the decision made by the Third Court of Appeals.<sup>254</sup> The court stated that the removal of the children was not warranted based on its review of the lower court record.<sup>255</sup> The court went further to provide that, although “the district court must vacate the . . . temporary custody orders as directed by the court of appeals,” it could still “grant[] other appropriate relief to protect the children” as set forth in the Texas Family Code.<sup>256</sup>

Not all of the justices of the Texas Supreme Court agreed with the majority’s assessment of the evidence presented by DFPS. Justice O’Neill filed an opinion concurring in part and dissenting in part, and Justices Johnson and Willett joined her.<sup>257</sup> Justice O’Neill did not agree with the court that the trial court abused its discretion in permitting DFPS to keep temporary custody of the teenaged girls until “a permanency plan [was] designed to ensure each girl’s physical health and safety.”<sup>258</sup> The crux of Justice O’Neill’s opinion was that DFPS did meet its burden of proof as to pubescent girls on the YFZ Ranch, but not as to boys and pre-pubescent girls.<sup>259</sup> Justice O’Neill recounted the facts which supported the trial court’s findings, including the Bishop’s Records which reflected five underage wives who were pregnant and/or had given birth to a child as a minor, and the testimony of child psychologist Dr. Bruce Perry.<sup>260</sup> Dr. Perry had testified that “the pregnancy of the underage children on the Ranch was the result of sexual abuse because children [aged sixteen and younger] are not sufficiently mature to enter a healthy consensual sexual relationship or a ‘marriage.’”<sup>261</sup> Justice O’Neill determined

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250. *Id.*

251. *Id.*

252. *Id.*

253. *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008) (per curiam).

254. *Id.* at 615.

255. *Id.*

256. *Id.*

257. *Id.* at 616 (O’Neill, J., concurring in part, dissenting in part).

258. *Id.*

259. *Id.* at 618.

260. *Id.* at 616.

261. *Id.*



that the State of Texas had met the low burden of proof, “sufficient evidence to satisfy a person of ordinary prudence and caution,”<sup>262</sup> as it pertained to the pubescent girls on the YFZ Ranch.<sup>263</sup>

There were several amicus briefs filed with the Texas Supreme Court in the FLDS case. The American Civil Liberties Union (ACLU) filed a brief in opposition to the State of Texas,<sup>264</sup> and Barbara Elias-Perciful, director of Texas Lawyers for Children and chair of the Texas State Bar Committee on Child Abuse and Neglect, filed a brief in her individual capacity supporting DFPS.<sup>265</sup> The ACLU argued that the evidence presented by DFPS was insufficient to justify removal of the children, and amounted to a parent-child separation based on the parents’ beliefs and associations.<sup>266</sup> The third prong of the ACLU brief specifically argued that the state may not separate parents and their children based solely on thoughts and beliefs.<sup>267</sup>

## II. THE SHORT CREEK RAID OF 1953

### A. *History and Facts of Case*

Short Creek was a remote pioneer town on the Utah-Arizona border established in the 1930s by a small minority of Latter-Day Saints who did not want to accept The Manifesto, the Mormon Church’s declaration that polygamous marriage, among other practices that offended mainstream America, would no longer be permitted in the religion.<sup>268</sup> It was considered a safe haven for men and their families who were excommunicated by the Mormon Church over polygamy.<sup>269</sup> In 1935, the Utah legislature amended section 103-51-2 of the Revised Statutes of Utah to make polygamy, or unlawful cohabitation, a felony.<sup>270</sup> Fundamentalists, a name accepted by those who believed in

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262. TEX. FAM. CODE ANN. § 262.201(b) (Vernon Supp. 2009).

263. *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d at 616-18 (O’Neill, J., concurring in part, dissenting in part).

264. Brief of Amici Curiae, American Civil Liberties Union et al., In Opposition to Relator’s Petition for Mandamus, *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613 (No. 08-0391) [hereinafter ACLU Brief].

265. Brief for Barbara J. Elias-Perciful, as Amicus Curiae Supporting Petitioner, *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613 (No. 08-0391) [hereinafter Elias-Perciful Brief].

266. ACLU Brief, *supra* note 264, at 2, 10-12.

267. *Id.* at 12-13.

268. Ken Driggs, “*This Will Someday Be the Head and Not the Tail of the Church*”: A History of the Mormon Fundamentalists at Short Creek, 43 J. CHURCH & ST. 49, 49-51 (2001).

269. *Id.* at 58-59.

270. Act of Mar. 21, 1935, ch. 112, 1935 Utah Laws 220.

plural marriage and United Order,<sup>271</sup> were turned over to the authorities by the LDS after they were excommunicated.<sup>272</sup> In Arizona, when eight individuals were charged with polygamy, news reports speculated that the action was triggered by government welfare investigations and LDS Church pressure.<sup>273</sup> Only two men were brought to trial, and both claimed First Amendment protection as a defense.<sup>274</sup> They were sentenced to eighteen months in the Arizona Penitentiary and after release returned to Short Creek.<sup>275</sup>

In 1944, "[a] multi-state raid by federal and state authorities rounded up forty-six Fundamentalist men and women on a variety of charges, including virtually the entire leadership."<sup>276</sup> The State of Utah charged the Fundamentalists with unlawful cohabitation and criminal conspiracy.<sup>277</sup> "The federal government charged some members . . . with mailing obscene literature," kidnapping, and violating the Mann Act.<sup>278</sup> Some of the charges were dropped a year later, but a total of four cases reached the United States Supreme Court.<sup>279</sup>

The first case before the federal court<sup>280</sup> charged the Fundamentalists with mailing obscene literature for distributing *Truth* magazine, a publication dedicated to the perpetuation of plural marriage.<sup>281</sup> The district court held that there was nothing obscene or lewd about the editorials in *Truth* and dismissed the indictment.<sup>282</sup> Later, the United States Supreme Court dismissed the case pursuant to Rule 35.<sup>283</sup> In *Chatwin v. United States*, the United States Supreme Court reversed the defendants' conviction under the Federal Kidnapping Act,<sup>284</sup> holding that there was no ransom sought by the defendants

271. RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* iii-iv (1986). The United Order was the Mormon principle of stewardship whereby members of the group "were directed to deed all personal property to the bishop of the church" to unify the group. *Id.* at 2-3. It was intended to be "a pattern of social and economic reorganization for all mankind." *Id.*

272. Driggs, *supra* note 268, at 62.

273. *Id.* at 61-62.

274. *Id.* at 61.

275. *Id.* at 61-62.

276. *Id.* at 65.

277. BRADLEY, *supra* note 10, at 72.

278. *Id.* at 72-73.

279. *Musser v. Utah*, 333 U.S. 95 (1948); *Cleveland v. United States*, 329 U.S. 14 (1946); *Chatwin v. United States*, 326 U.S. 455 (1946); *United States v. Barlow (Barlow I)*, 323 U.S. 805 (1944); see Driggs, *supra* note 268, at 66 (recognizing that only four cases reached the U.S. Supreme Court).

280. *United States v. Barlow (Barlow I)*, 56 F. Supp. 795 (D. Utah 1944).

281. *Id.* at 795-96; see also BRADLEY, *supra* note 10, at 37, 72-73 (discussing the founding of *Truth* magazine and the prosecution of the Fundamentalists for mailing obscene literature).

282. *Barlow I*, 56 F. Supp. at 797-98.

283. *Barlow II*, 323 U.S. 805.

284. 18 U.S.C. §§ 408a, 408c (1940) (current version at 18 U.S.C. § 1201 (2006)).

and there was no evidence that the alleged victim, a fifteen-year-old girl, was held against her will.<sup>285</sup> In *Cleveland v. United States*, the United States Supreme Court affirmed the Fundamentalists' convictions under the Mann Act<sup>286</sup> for transporting women or girls in interstate commerce for immoral purposes.<sup>287</sup> The Court held the fact that polygamy was supported by the Fundamentalists' religious creed was "no defense in a prosecution for bigamy."<sup>288</sup> The Court stated that it was not "the accused's concepts of morality," but rather the standard articulated by Congress within the meaning of the statute that applied.<sup>289</sup> Finally, in *Musser v. Utah*, the defendants argued that their conviction for conspiracy to "commit acts injurious to public morals" under Utah Code Ann. Section 103-11-1 (1943) violated the Fourteenth Amendment.<sup>290</sup> The United States Supreme Court vacated the conviction and remanded the case for the Supreme Court of Utah to interpret its own statute.<sup>291</sup>

Eventually, "thirty-one men were sentenced to local jail terms of up to one year;" fifteen men were sentenced to Utah State Prison terms of up to five years, and a few more were subjected to federal sentences.<sup>292</sup> Nine of the fifteen in state prison were paroled after serving six and a half months when they pledged to "refrain . . . from advocating, teaching, or countenancing the practice of plural marriage."<sup>293</sup> Despite their pledges, the Fundamentalists returned home and resumed the Fundamentalist lifestyle.<sup>294</sup>

The Short Creek raid began in 1951 when a local judge instigated a secret investigation of Short Creek.<sup>295</sup> The State of Arizona, through Governor Howard Pyle and the Arizona legislature, allocated \$50,000 from the governor's emergency fund to finance the raid.<sup>296</sup> A Los Angeles detective agency went into the community under the pretense that they were Hollywood agents looking for a movie location.<sup>297</sup> The agency was hired by Arizona Governor Howard Pyle.<sup>298</sup> As the investigation continued, the detectives obtained "a map of the town

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285. *Chatwin v. United States*, 326 U.S. 455, 460 (1946).

286. 18 U.S.C. §§ 397, 398, 401, 404 (1940) (current version at 18 U.S.C. §§ 2421-2424 (2006)).

287. *Cleveland v. United States*, 329 U.S. 14, 20 (1946).

288. *Id.*

289. *Id.*

290. *Musser v. Utah*, 333 U.S. 95, 95-96 (1948).

291. *Id.* at 98.

292. *Driggs*, *supra* note 268, at 66.

293. *BRADLEY*, *supra* note 10, at 89.

294. *Id.* at 90.

295. *Driggs*, *supra* note 268, at 68.

296. *Id.* at 68-69.

297. *BRADLEY*, *supra* note 10, at 119.

298. *Id.*

identifying the occupants of each home”<sup>299</sup> in order to execute “the great Love-nest raid.”<sup>300</sup>

On July 25, 1953, while the people at Short Creek were preparing for festivities in celebration of Mormon Pioneer Day, government forces met in a high school auditorium 125 miles south of Short Creek to discuss the impending raid.<sup>301</sup> Roadblocks would be set up and two separate groups of forces would arrive at the same time, one from the east and the other from the west.<sup>302</sup> “Each patrolman received a map with a red circle around the house of the family for which he would be responsible.”<sup>303</sup>

A caravan of cars set out for Short Creek in late afternoon and arrived around 4:00 A.M. with lights flashing and sirens wailing.<sup>304</sup> The caravan, consisting of “heavily armed law enforcement officers . . . national guardsmen, the Arizona Attorney General, superior and juvenile court judges, policewomen, nurses, doctors, twenty-five carloads of newspapermen, and twelve liquor control agents,” expected the community to be asleep.<sup>305</sup> Instead, they found men, women, and children, “dressed and well groomed,” standing around the schoolhouse singing “America.”<sup>306</sup>

Carolyn Jessop recalls her grandmother repeatedly telling her the story about the raid at Short Creek on July 26, 1953, stating “[t]he raid is a key focal point of FLDS history.”<sup>307</sup>

Grandma said rumors were rampant that a raid was coming. . . .

A lookout was posted on the only road coming into town. The young man was supposed to warn the community if he saw the authorities coming by exploding several sticks of dynamite. The blast came . . . [and] the lookout ran into town and fell at the feet of Uncle Roy, shouting, “They are coming; they’re coming, and there are hundreds of them!”<sup>308</sup>

299. Driggs, *supra* note 268, at 68.

300. *Arizona: The Great Love-Nest Raid*, TIME, Aug., 3, 1953, available at <http://www.time.com/time/magazine/article/0,9171,822887,00.html>.

301. BRADLEY, *supra* note 10, at 127-28.

302. *Id.* at 128.

303. *Id.*

304. *Id.* at 129-30.

305. ALTMAN & GINAT, *supra* note 10, at 49; see also B. CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE 344 (1992) (listing the actors involved in the raid on Short Creek).

306. ALTMAN & GINAT, *supra* note 10, at 49; see also HARDY, *supra* note 305, at 344 (describing the inhabitants’ peaceful early morning assembly).

307. CAROLYN JESSOP WITH LAURA PALMER, ESCAPE 20 (2007).

308. *Id.* at 20. The man referred to as “Uncle Roy” was Short Creek leader Leroy Johnson. Driggs, *supra* note 268, at 69.

The Arizona National Guard, police, and other local officials “moved into Short Creek and began arresting men and women who practiced polygamy.”<sup>309</sup> Grandpa Joseph Jessop, the patriarch of the community at the time, stepped forward and asked, “What is it that you want? What have you come for? If it is blood you want, take mine, I’m ready.”<sup>310</sup> Laura Palmer, Carolyn Jessop’s grandmother, recalled that troops attempted to take wailing children away from their screaming mothers.<sup>311</sup> Photos taken of these “terrible images” appeared the next day in newspapers and “turned public opinion in favor of the polygamists.”<sup>312</sup> One hundred and twenty-two women and men were arrested and 263 children were identified for seizure by the time the raid was finished.<sup>313</sup> The state’s plan was to remove the children, “make them wards of the state[,] and adopt them out to nonpolygamist families.”<sup>314</sup>

Within a week of the raid the mothers and children were bused to Phoenix where they were housed in a crowded rest home.<sup>315</sup> Governor Pyle defended the raid, calling it a “‘momentous police action against insurrection within [Arizona’s] own borders.’”<sup>316</sup> He asserted that Short Creek was “a community entirely dedicated to the warped philosophy that a small handful of greedy and licentious men should have the right and the power to control the destiny of every human soul in the community.”<sup>317</sup> He further stated that the women and the men were “unalterably dedicated to the wicked theory that every maturing girl child should be forced into the bondage of multiple wifeness with men of all ages for the sole purpose of producing more children to be reared to become more chattels of this totally lawless enterprise.”<sup>318</sup>

### *B. Due Process Hearings and Subsequent Cases*

The hearings and trials regarding the criminal and child welfare cases in Arizona went on for two years.<sup>319</sup> The Fundamentalists were

309. JESSOP WITH PALMER, *supra* note 307, at 20-21.

310. *Id.* at 21.

311. *Id.*

312. *Id.*; see also Gary Tuchman & Amanda Townsend, *A Dark History Repeats for Religious Sect*, CNN.COM, Apr. 11, 2008, <http://www.cnn.com/2008/CRIME/04/10/polygamist.towns.index.html> (“It was a public relations nightmare from the start. Crying children . . . were yanked from their parents in the dark of a July night.”).

313. JESSOP WITH PALMER, *supra* note 307, at 21.

314. *Id.*

315. Billie Stanton, *Most County Residents Know Little About the Area that Lies North of the Grand Canyon*, KINGMAN DAILY MIRROR, Aug. 2, 1981, at 19.

316. JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 16 (2003).

317. *Id.* at 17.

318. *Id.*

319. BRADLEY, *supra* note 10, at 154, 156.

charged with "rape, statutory rape, carnal knowledge, polygamous living, cohabitation, bigamy, adultery, and misappropriation of school funds."<sup>320</sup> Certain members were accused of having "encouraged, advised, counseled and induced their minor, female children under eighteen years of age to actively participate in [the] unlawful conduct."<sup>321</sup> Arizona Superior Court Judge Robert Tuller gave one-year suspended sentences to twenty-six men as part of a plea bargain that dropped charges against all of the women and a few other men.<sup>322</sup> Instead of imprisoning the parents, authorities focused on taking away the Fundamentalists' children.<sup>323</sup>

The removal of many children from Short Creek during the raid of 1953 meant that the State of Arizona declared these children to be dependent and neglected.<sup>324</sup> The physical state of the homes in Short Creek was reported to be dirty, ramshackle, without window or door screens, and without plumbing, where families faced crowded sleeping conditions and inadequate food.<sup>325</sup> The Superior Court of Mohave County ordered the children be placed in the custody of the Arizona State Department of Public Welfare.<sup>326</sup> In October 1953, the Mohave County Superior Court ruled that the mothers could retain custody of their children under four conditions: (1) the court disallowed the mothers from returning to Short Creek; (2) the mothers had to "refrain from teaching their children to violate the laws of Arizona"; (3) the mothers could not associate with the children's fathers; and (4) Arizona's Department of Public Welfare would supervise the mothers and children.<sup>327</sup> The main issue at each hearing was whether the children were "neglected, dependent, or delinquent."<sup>328</sup> The court eventually held that there was insufficient evidence to justify removing the children from their parents' custody.<sup>329</sup> The court returned the children to their parents, finding that the parents "were denied the active participation of their attorneys in the juvenile hearings."<sup>330</sup> The Supreme Court of Arizona affirmed.<sup>331</sup>

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320. *Id.* at 131.

321. *Id.*

322. Driggs, *supra* note 268, at 69-70.

323. *Id.* at 70.

324. *Ariz. State Dep't of Pub. Welfare v. Barlow*, 296 P.2d 298, 299 (Ariz. 1956).

325. BRADLEY, *supra* note 10, at 133.

326. *Barlow*, 296 P.2d at 299.

327. BRADLEY, *supra* note 10, at 154-55.

328. *Id.* at 156.

329. *Id.* at 157. "Social service workers, matrons, and other interested officers were present at the [Edson and Alyne] Jessop [and other family] hearings[,] but all declined to comment." *Id.* at 156-57.

330. *See Barlow*, 296 P.2d at 299 (referring to the decision of the Superior Court of Maricopa County).

331. *Id.* at 301.

*C. Supreme Court Review*

There were two trial court cases that proceeded to state supreme courts from the 1953 raid, one in Utah and one in Arizona.<sup>332</sup> Daniel and Elnora Barlow sought to secure custody of their seventeen children from the Arizona State Department of Public Welfare.<sup>333</sup> The superior court declared that the detention of the children by the state was illegal and ordered the children's release to their parents.<sup>334</sup> Arizona appealed this decision to the supreme court, which affirmed the decision that the parents were denied active participation of their attorneys, thus making the hearing void because of denial of due process of law.<sup>335</sup> The supreme court also affirmed the finding that there was no proof that the parents' custody was not in the best interest of the children.<sup>336</sup>

*In re Black*<sup>337</sup> was the most well known court case that came out of the Short Creek raid. This case involved Leonard Black, his three wives, and twenty-six children.<sup>338</sup> His legal wife, Verna, and her eleven children lived a block away from Mr. Black's third wife, Lorna Johnson, and her seven children in Short Creek, Arizona.<sup>339</sup> Mr. Black's second wife, Vera Johnson, and her eight children lived about a mile away in Utah.<sup>340</sup> Because she resided in Utah, Vera Johnson was not arrested in the Short Creek raid.<sup>341</sup> Vera's situation, however, "provided a test case for Utah officials who proposed to separate children from parents who would not sign an affidavit promising neither to teach nor practice polygamy."<sup>342</sup> When her children were removed in 1954, Vera demanded to ride with them until she was evicted from the automobile by a judge's order.<sup>343</sup> The order of separation was subsequently overturned by an appellate judge, and the children were returned to their mother.<sup>344</sup>

In 1956, Utah again attempted to separate Vera from her children and persuade her to renounce polygamy in order to retain custody of them.<sup>345</sup> Vera refused, and the children were ordered into

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332. *Barlow*, 296 P.2d 298; *In re Black*, 283 P.2d 887 (Utah 1955).

333. *Barlow*, 296 P.2d at 299.

334. *Id.* at 301.

335. *Id.* at 299, 301.

336. *Id.* at 301.

337. 283 P.2d 887 (Utah 1955).

338. *Id.* at 888.

339. *Id.*

340. *Id.*

341. LEVI S. PETERSON, JUANITA BROOKS: MORMON WOMAN HISTORIAN 246 (1988).

342. *Id.* at 246-47.

343. *Id.* at 247.

344. *Id.*

345. *Id.*

foster care and instructed "to have no communication with former loved ones or friends."<sup>346</sup> The legal issue was whether the parents of eight minor children between the ages of two and seventeen were negligent based solely on their religious beliefs.<sup>347</sup>

Six of Leonard Black's daughters were married, five of whom were either plural wives or married to men who later acquired multiple wives.<sup>348</sup> All of Mr. Black's married daughters were under eighteen years old when they married, and one was only fifteen.<sup>349</sup> Mr. Black "took no action when he knew that five of his daughters were entering into [a polygamous] relationship."<sup>350</sup> Vera (Johnson) Black testified that "if her children were taken away . . . she would be unwilling to promise that she and Mr. Black would refrain from polygamous cohabitation in order to get her children back."<sup>351</sup> Both parents confessed that they did not tell their children that polygamous marriage was illegal.<sup>352</sup>

The Utah District Court found that Leonard and Vera Johnson Black, "by their . . . own conduct and example in living in polygamy and by associating themselves with a religious group whose members practice and advocate polygamy [had] encouraged their children to become polygamists when they became of marriageable age."<sup>353</sup> Though the court found that "there was no evidence that any of the children were destitute and without proper sustenance, clothing or medical care," the home of Leonard and Vera Johnson Black was nonetheless an "*immoral environment for the rearing of said children.*"<sup>354</sup> The district court held as a matter of law that the children were neglected within the meaning of section 55-10-6 of the Utah Code and ordered the children into foster care.<sup>355</sup>

The Supreme Court of Utah held that it was proper to deprive parents of the control and custody of their children because the children had been neglected under Utah law due to the parents' polygamous relationship and teachings.<sup>356</sup> "One year after the raid, the Arizona Welfare Department conducted an updated study of the

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346. *Id.*

347. See BRADLEY, *supra* note 10, at 177 ("No testimony offered in any of the court cases either asserted or established that Vera [Johnson] was an unfit mother in any way except for her religious beliefs.").

348. *In re Black*, 283 P.2d 887, 896 (Utah 1955).

349. *Id.*

350. *Id.* at 911.

351. *Id.*

352. *Id.*

353. *Id.* at 891.

354. *Id.* (emphasis in original).

355. *Id.*

356. *Id.* at 899-900.



circumstances of [the] various fundamentalist women and their children. . . . All of the women returned to Short Creek when they had the chance.”<sup>357</sup> Apparently, the practice of polygamy was not jeopardized by accusations, arrests, or litigation.<sup>358</sup>

### III. WHY THE TEXAS CHILD REMOVAL FAILED

The overall reason that the largest child removal in modern U.S. history failed was because the State of Texas overreached its authority trying to protect children who did not fit within the emergency child removal legal standard. At the core of the FLDS case was the ultimate question posed by many in the media: was this case more about the disapproval of a particular religion or the alleged abuse of children?<sup>359</sup> It may have been bias that caused CPS to focus more on the “pervasive belief system” than how the actual facts of the case supported the danger posed to the some of the children on the YFZ Ranch. Considering the fact that Warren Jeffs, the leading prophet of the FLDS, has been convicted for being an accomplice to child rape (between a fourteen-year-old child bride and her nineteen-year-old first cousin) and has been charged with sexual assault, bigamy charges, and “charges related to the underage marriage of two FLDS girls,”<sup>360</sup> it is understandable that Texas authorities feared that children on the YFZ Ranch were at risk for abuse or neglect.

Perhaps at the heart of the matter is the state’s willingness and ability to prosecute members of the FLDS for bigamy or child bigamy. Although state and federal laws provide law enforcement the necessary tools to target anyone who engages in the practice of polygamy,<sup>361</sup> officials arguably did not opt to fully enforce the law during the Texas

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357. BRADLEY, *supra* note 10, at 146.

358. *Id.* at 147.

359. See, e.g., *Child Welfare in Texas*, LAS VEGAS REV.-J., June 2, 2008, at 6B (questioning the motive of CPS in taking the children, and positing that it had more to do with religious differences than with concern for the children’s welfare); Gregory A. Hession, *Whose Children Are They, Anyway?*, NEW AM., June 23, 2008, at 21 (suggesting that “hysteria over religious or political beliefs” was behind the mass seizure and subsequent court case); Ken Rodriguez, *CPS Remains Blind to its Blunders in Polygamist-Ranch Case*, SAN ANTONIO EXPRESS-NEWS, June 4, 2008, at 01B (implying that CPS took all of the children because it saw only “a community of religious polygamists”).

360. Associated Press, *Estate of Rulon Jeffs Seeks Control of Trust*, DESERET NEWS, Nov. 28, 2009, at B04.

361. See TEX. PENAL CODE ANN. § 25.01 (Vernon Supp. 2009) (providing that bigamy is a prosecutable offense); *Davis v. Beason*, 133 U.S. 333, 341, 344, 348 (1890) (affirming that United States courts had jurisdiction to hear charges related to religiously-motivated polygamy, despite the Free Exercise Clause of the First Amendment of the Constitution), *abrogated by Romer v. Evans*, 517 U.S. 620 (1996); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (holding that religious duty is not a constitutionally protected defense to the criminal indictment of polygamy).

raid. Various reasons have been noted regarding the failure of law enforcement to confront polygamists, including “difficulty in actually proving polygamist behavior,”<sup>362</sup> an aversion to making enforcement a priority,<sup>363</sup> “insufficient resources and funding” to prosecute polygamists,<sup>364</sup> “general misconception[s among law enforcement officials] concerning the scope of First Amendment protection for religious practices,”<sup>365</sup> and concerns about the government’s ability to handle the “massive influx of children” in state care if the government arrested all polygamist parents.<sup>366</sup> Though child abuse and sexual assault of children appear to be easier to prosecute than polygamy, many of the same enforcement issues arise when dealing with the FLDS, such as the difficulty in proving the crime without willing witnesses, and the “lack of formal records.”<sup>367</sup>

The State of Texas eventually did bring bigamy charges against several men on the YFZ ranch, including Raymond Merrill Jessop and eleven others who were indicted in the fall of 2008 on various criminal charges.<sup>368</sup> Interestingly, the State of Texas seems to be trying the sexual assault cases separately from the bigamy cases.<sup>369</sup> Raymond Jessop was the first polygamist sect member to stand trial,<sup>370</sup> and he was convicted of sexually assaulting his sixteen-year-old spiritual wife in November of 2004 at the YFZ Ranch.<sup>371</sup> He was sentenced to ten years in prison and an \$8000 fine.<sup>372</sup> Jessop, who allegedly has nine wives, will be tried later on the separate bigamy charge.<sup>373</sup> The evidence that weighed heavily in the sexual assault case was the DNA results from the paternity testing of Jessop, the victim, and the child, as well as church documents seized from the April 2008 raid on the ranch.<sup>374</sup>

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362. Jason D. Berkowitz, Note, *Beneath the Veil Of Mormonism: Uncovering The Truth About Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615, 629 (2006-2007).

363. *Id.* at 630.

364. *Id.* at 631.

365. *Id.* at 632.

366. *Id.*

367. See Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL’Y 101, 141 (2006) (discussing the difficulties inherent in the prosecution of crimes related to polygamy).

368. Trish Choate, *FLDS Trial: Jessop Guilty of Sexual Assault*, GO SAN ANGELO STANDARD-TIMES, Nov. 5, 2009, <http://www.gosanangelo.com/news/2009/nov/05/jury-in-jessop-trial-will-hear-closing-arguments/>. Jessop was convicted of sexual assault of a child, a second-degree felony. *Id.*

369. Roberts, *supra* note 52.

370. *Id.*

371. *Id.*; Choate, *supra* note 368.

372. *Texas Polygamist Sect Member*, *supra* note 52, at 61.

373. Roberts, *supra* note 52.

374. Trish Choate, *Talk of ‘Celestial Wives,’ Long-Term Effects of Assault*, GO SAN

It could be argued that the state did not have enough time to obtain admissible evidence to show that all of the children were at risk for abuse or neglect before the due process hearing. Many times in child welfare cases there are parties to the suit who know relevant facts to the legal question at issue but are unable to prove the facts in court because of an uncooperative or unavailable witness.<sup>375</sup> Other times the children are the keepers of useful information, but because of the protective nature of most courts, family code provisions to prevent additional trauma to the child, and exceptions to the hearsay rule, they are not called to testify.<sup>376</sup> The children's attorneys in the YFZ case complained that they were unable to access records and documents necessary to better represent their clients during the due process hearing.<sup>377</sup> The sheer volume of the case posed a logistics nightmare for the district court personnel in the small town of San Angelo.<sup>378</sup> Much of what might have been available in a larger venue was not available in this case. Although time and resources may have been factors in the outcome, there are four other distinct reasons the case failed.

#### A. History Repeats Itself

The Short Creek raid of 1953 in Arizona was the largest removal of children due to allegations of abuse and neglect prior to the Texas FLDS raid.<sup>379</sup> Because it involved the same religious sect and the removal of the children centered on similar allegations of underage plural marriages,<sup>380</sup> the Short Creek raid of 1953 was an appropriate precedent case for the Texas FLDS raid. The similarities of the two raids are striking — both were alleged to stem from government conspiracies, both involved legal, civil and criminal lawsuits, both stimulated media backlash because of the child removals, both engendered sympathy from Americans for the women and children, both were costly for the state child protective service agencies, and both raids

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ANGELO STANDARD-TIMES, Nov. 9, 2009, <http://www.gosanangelo.com/news/2009/nov/09/courtroom-mood-solemn-as-flds-sentencing-hearing/>.

375. See, e.g., 2 AM. JUR. 2D *Proof of Facts* § 6 (1974) (discussing the difficulty in finding evidence, including witnesses, to prove battered child syndrome).

376. See TEX. FAM. CODE ANN. §§ 104.002-.006 (Vernon 2008) (describing Texas rules of evidence pertaining to statements by children in child abuse cases).

377. Ismael Estrada et al., *Witness: Teens at Ranch Said Any Age OK to Marry*, CNN.COM, Apr. 18, 2008, <http://www.cnn.com/2008/CRIME/04/17/polygamy.custody/>.

378. See *id.* (describing the process in the courtroom as “chaotic” and “laborious,” and noting such difficulties as limited courtroom space and the need for parties to utilize “multiple locations around town, linked by closed-circuit television to the courthouse”).

379. Wendy Koch, *Second Arrest Made at Texas Polygamist Ranch*, USA Today, Apr. 7, 2008, [http://www.usatoday.com/news/nation/2008-04-07-polygamist-compound\\_N.htm](http://www.usatoday.com/news/nation/2008-04-07-polygamist-compound_N.htm).

380. *Id.*

resulted in the return of every child to their parents.<sup>381</sup> Perhaps Texas did not have the time prior to determining its legal strategy to invest in researching the case law generated by the Short Creek raid, but had it done so it might have altered how the Texas case unfolded. Specifically, Texas would have been aided by knowing what legal claims the State of Arizona made against the parents in the FLDS and why those claims were unsuccessful. This would have enabled Texas to determine how to best frame the actions or inactions of the parents regarding the treatment of the children who were the alleged victims of sexual abuse.

The charges lodged against the FLDS during the 1953 raid “included rape, statutory rape, carnal knowledge, polygamous living, cohabitation, bigamy, adultery, and misappropriation of school funds.”<sup>382</sup> In both Texas and Arizona, the government emphasized the belief system of the parents and how the parents brought up their children to maintain the lifestyle to which they had been exposed.<sup>383</sup> The opinion of the court in Arizona was that “the morals of [the] children [were] endangered, and they [were] in danger of becoming law violators if they [were] permitted to remain in [the] community and in the custody and control of their . . . parents.”<sup>384</sup> Though *In re Black* did hold that raising children in a polygamous environment was morally wrong and illegal,<sup>385</sup> later in history the Utah court declined to apply this rule in a subsequent child custody case involving a dissolved polygamous family and another adoption case.<sup>386</sup>

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381. See Geoffrey Fattah, *Parallels to Short Creek Raid in 1953 are Pointed Out*, DESERET NEWS, Apr. 10, 2008, at A04 (noting that “what is unfolding in Texas is history almost repeating itself,” according to Professor Martha Sonntag Bradley, University of Utah, author of *KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS*, *supra* note 10); compare *supra* text accompanying notes 295-331 with *supra* text accompanying notes 2-31, 242-267 (discussing the facts of the Short Creek raid of 1953 and the FLDS raid in 2008).

382. BRADLEY, *supra* note 10, at 131.

383. See *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*1 (Tex. App. May 22, 2008) (mem.) (noting the Department’s reliance on the “pervasive belief system” of the FLDS, [that] the male children are groomed to be perpetrators of sexual abuse and the girls are raised to be victims of sexual abuse” to justify removal of the children from their FLDS parents); *In re Black*, 283 P.2d 887, 911, 913 (Utah 1955) (finding that the parents were guilty of neglect because they were raising their children to believe in a polygamous lifestyle).

384. BRADLEY, *supra* note 10, at 156.

385. *In re Black*, 283 P.2d at 913.

386. See *Johanson v. Fischer (In re Adoption of W.A.T.)*, 808 P.2d 1083, 1086 (Utah 1991) (holding that the petitioners’ religious belief in plural marriage was one factor the trial court must consider to determine whether specific placement “would promote the interest of child[ren] to be adopted” and that the “[p]rospective . . . parents’ illegal or unconstitutional conduct . . . [was] not properly considered as a threshold determination in adoption petition”); *Sanderson v. Tryon*, 739 P.2d 623, 627 (Utah 1987) (holding that the practice of “polygamy is alone insufficient to support a custody award or to permit meaningful

The legality of the raid was questioned by members of the Arizona House of Representatives because of the use of government funding, and many in the public posed constitutional questions centered on privacy and freedom of religion.<sup>387</sup> These criticisms were very similar to those meted out by the public after the Texas Supreme Court ruling in the YFZ Ranch case.<sup>388</sup> Unlike in Texas, however, the children's cases in Arizona were heard individually.<sup>389</sup> Another striking similarity was that a small percentage of the girls between the ages of fourteen and seventeen years on both the Arizona and Texas compounds were either pregnant or were the mothers of young children.<sup>390</sup> In Arizona, the juvenile court focused on approximately fifty girls between eleven and eighteen years of age because "they were potential plural wives and mothers."<sup>391</sup> Arizona's Attorney General had "compiled profiles of each family unit" before the Short Creek raid "based on census records, birth certificates, and school census records."<sup>392</sup> This information was not readily available to Texas before the raid at YFZ Ranch, and CPS compiled profiles of family units after the children were removed from their parents and DNA samples were collected.<sup>393</sup>

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review on appeal"). Both decisions substantially limit *In re Black* without expressly overturning it.

387. BRADLEY, *supra* note 10, at 150-51.

388. See Hession, *supra* note 359 (stating that the court was infringing on the parents' privacy with some of its demands, and arguing that despite the media hype about alleged sexual abuse, freedom of religion remains one of the central tenets of the U.S. Constitution); Corrie MacLaggan, *Year After Raid, Bills Consider Removal Policy*, AUSTIN AM.-STATESMAN, Apr. 3, 2009, at A01 (discussing the desire of some legislators, who were "disturbed" by the manner in which the YFZ raid was conducted, to rewrite the child removal laws).

389. BRADLEY, *supra* note 10, at 177; see also *supra* note 162 and accompanying text (discussing the single mass hearing for the Texas FLDS children).

390. BRADLEY, *supra* note 10, at 100; ELDORADO INVESTIGATION, *supra* note 17, at 7.

391. BRADLEY, *supra* note 10, at 100.

392. *Id.* at 99-100.

393. See Order Vacating Temporary Managing Conservatorship and Additional Temporary Orders at 3-5, *In re Minor Children From the YFZ Ranch*, Nos. 2779-2902, 2905-2908 (51st Dist. Ct., Schleicher County, Tex. June 2, 2008) (ordering the parents to submit to having photographs and fingerprints taken and providing information about the make-up of each household); Tex. Dep't of Family & Protective Servs., Statement on Reunification Plan (June 2, 2008), [http://www.dfps.state.tx.us/About/News/2008/eldorado/2008-06-02\\_plan.asp](http://www.dfps.state.tx.us/About/News/2008/eldorado/2008-06-02_plan.asp) (describing the order to return the children and the accompanying conditions). There was some controversy as to whether CPS really did not know which child belonged to which parent, because the children were ordered to be returned to their parents prior to the DNA results coming back, and there was little confusion when it came time to return the children. See Janet Elliott, *Sect Family Hesitant to Return to Ranch*, HOUSTON CHRON., June 4, 2008, available at [http://www.chron.com/CDA/archives/archive.mpl?id=2008\\_4578762](http://www.chron.com/CDA/archives/archive.mpl?id=2008_4578762) (noting that most of the DNA results had not yet come in, but two days after the order to return the children to their families, almost 400 children had left state custody).

Similar to the case in Texas, many Americans were opposed to the removal at Short Creek because of media coverage that described tearful children being physically pulled away from their anguished mothers.<sup>394</sup> One difference in the two cases is that the Arizona authorities were primarily concerned with cracking down on polygamy as opposed to child abuse and neglect. It was clear from the onset of the Short Creek raid that the purpose was to free women and young girls in the FLDS from what Arizona Governor John Howard Pyle referred to as white slavery.<sup>395</sup> One of the chief instigators of the Short Creek raid, Judge Jesse Faulkner, stated that there were only two ways to stop polygamy.<sup>396</sup> First, the state could “prosecute and convict and sentence every man and woman guilty.”<sup>397</sup> Second, the authorities could “take the children of these bogus marriages and turn them over to a proper department for placement in juvenile homes or for adoption.”<sup>398</sup> Interestingly, Texas has in short order switched gears to address Judge Faulkner’s first stopgap for polygamy since the YFZ child protection case ended.<sup>399</sup>

It would have been useful for Texas to have known the pitfalls of the Short Creek raid of 1953. Even though the State of Arizona was able to identify the parents and children at Short Creek so that individualized hearings could be held,<sup>400</sup> the arguments of both state governments were ultimately flawed. If the attorney general or the local district attorneys had the benefit of the legal history of the cases, it could have made a difference in the testimony and evidence presented to the court. If nothing else, DFPS would have relied less heavily on the pervasive belief system on the YFZ ranch and more on proving the actual risks to the physical health and safety of the children at risk.

## *B. Flawed Arguments*

### *1. One Household*

DFPS removed 468 children from the YFZ Ranch, not because it was able to show that each child’s physical health and safety was

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394. See JESSOP WITH PALMER, *supra* note 307, at 21 (recalling the image of crying children being pulled from their mother’s arms at Short Creek).

395. BRADLEY, *supra* note 10, at 97, 113 (“One of the government’s motives in the 1953 raid was to ‘free’ these women from a form of sexual slavery and to ‘protect’ the young women of Short Creek from an untenable situation of limited choice . . .”).

396. *Id.* at 120-21.

397. *Id.* at 121.

398. *Id.*

399. See Choate, *supra* note 368 (indicating that after the 2008 raid, eleven men were indicted on various criminal charges related to polygamy).

400. BRADLEY, *supra* note 10, at 177 (noting that the policy of juvenile courts in Utah in the 1950s was to hear children’s cases individually).

in danger, but because it asserted that all the children were part of one household.<sup>401</sup> At the time of this removal, Texas law provided that when one child is found to be at risk for neglect or abuse in a household, the court may take that into consideration when determining whether other children in the same household are at risk for neglect or abuse.<sup>402</sup> The CPS supervisor, Angie Voss, testified that when she has “made an assessment that there[] [is] a child that has either been abused in the home or is at risk of abuse,” her belief is that all of the other children in that home are unsafe.<sup>403</sup> Ms. Voss also stated that she was very concerned about the “overall mindset” and the “pervasive belief”<sup>404</sup> that “when the prophet decided for them to be married, which could be . . . at any age, no age too young, they would be married and . . . have as many babies as they could.”<sup>405</sup> Her explanation of why her concerns involved all members of the household was that during her contact with the children and the adults on the YFZ Ranch, they explained to her that they are “one big family, one large community, and that they all share the same belief system.”<sup>406</sup> Ms. Voss testified that she observed this pattern at the YFZ Ranch, was able to identify several victims, and was concerned that all the children at the YFZ Ranch were potential victims.<sup>407</sup> There was also evidence from the Bishop’s Record that all of the various families at the YFZ Ranch were housed in a location known as “Residence R17.”<sup>408</sup>

The term “household” is not defined in chapter 261 in the Texas Family Code, the chapter that pertains to investigations, but it is defined in chapter 263, which deals with review of children that have been placed under the care of DFPS.<sup>409</sup> According to the statute, “[h]ousehold” means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.<sup>410</sup> This is particularly useful because chapter 263 deals with the review of placements of children in foster homes where unrelated persons would live together in the same home.<sup>411</sup> Within the context

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401. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (mem.).

402. *See* TEX. FAM. CODE ANN. §§ 262.107(b), .201(d) (Vernon 2008 & Supp. 2009) (allowing a court to consider whether a guardian has abused another child when determining whether a child should be removed).

403. 4 Reporter’s Record, *supra* note 15, at 257.

404. *Id.*

405. *Id.* at 205.

406. *Id.* at 258.

407. *Id.*

408. Bishop’s Record, *supra* note 90.

409. TEX. FAM. CODE ANN. § 263.001(a)(3) (Vernon Supp. 2009).

410. *Id.*

411. *See id.* §§ 263.001(a)(2), (a)(4), .002 (Vernon 2008) (defining substitute care, which includes foster care, as the placement of a child in the home of someone who is not the child’s parent, and the court’s ability to review the child’s placement there).

of the FLDS case, there were many children and persons living in R17 who were not related to one another.<sup>412</sup> Ms. Voss testified about the families who lived together, stating that "all of the women are called mothers to all of the children that call one another brothers and sisters."<sup>413</sup> She further stated that there are "mothers with their biological children who are married to a man who is married to several other women," with whom he has other biological children.<sup>414</sup>

Chapter 261 does offer a definition for a person who is considered responsible for a child's care, custody or welfare.<sup>415</sup> This person is one "who traditionally is responsible for a child's care, custody, or welfare, including . . . a member of the child's family or household as defined by Chapter 71 [or] a person with whom the child's parent cohabits."<sup>416</sup> Chapter 71 deals with protective orders and family violence, and the definition of "household" is identical to the definition in chapter 263.<sup>417</sup> According to the Texas Family Code, each mother who lived in a household on the YFZ Ranch could be considered responsible for the care, custody, or welfare of every child in the household.<sup>418</sup> It stands to reason that perhaps DFPS may have been able to group many of the family members that resided in one dwelling together for the sake of removal as a "household."

The assertion that all 468 of the children came from the same household was a stretch, though, and DFPS offered contradictory testimony to that point. Ms. Voss testified that during the investigation, she and other investigators had to go "house to house" to locate other children that were not brought forth initially by the FLDS leader Merrill Jessop.<sup>419</sup> When asked what she meant when she said "house to house," Ms. Voss stated that many of the houses on the ranch are "three story structures, [with] lots and lots of rooms."<sup>420</sup> She testified that she went to approximately six or seven homes during her investigation.<sup>421</sup> She also testified that there was a teenager who was either pregnant or had had a child in every one of the nineteen

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412. See 4 Reporter's Record, *supra* note 15, at 230-31 (explaining that many non-related people live in the same dwelling on the ranch); see also Bishop's Record, *supra* note 90 (referring to all the housing on YFZ Ranch as Residence R17).

413. 4 Reporter's Record, *supra* note 15, at 230.

414. *Id.*

415. § 261.001(5).

416. *Id.* § 261.001(5)(B)-(C).

417. Compare *id.* § 71.005 with § 263.001(a)(3) (defining household in exactly the same words).

418. See *id.* §§ 71.005, 261.001(5)(B) (defining the person who is responsible for a child's welfare as a member of the child's household and defining a household as a group of people living in the same dwelling).

419. 4 Reporter's Record, *supra* note 15, at 199, 221-22.

420. *Id.* at 225-26.

421. *Id.* at 226.



residences on the ranch — even though she did not go into every single residence or talk to all the residents in each residence.<sup>422</sup>

One of the parents' attorneys challenged the court, stating that the Department was "trying to proceed on a one-size fits all cookie-cutter approach to a whole lot of different families . . . [and] individual parents."<sup>423</sup> He further stated that he did not think it was "fair to ask the Court to make a decision on four hundred plus children based on global allegations, rather than giving the Court the benefit of specific facts or allegations against people whom the Court is being asked to separate from the children."<sup>424</sup> Clearly, all of the families did not live in the same dwelling. There were nineteen units on the YFZ Ranch,<sup>425</sup> but no way to tell who lived where without testimony and cooperation of parents.<sup>426</sup> Very few parents testified to show where and with whom they lived.<sup>427</sup>

The law requires due process for each child regarding the state's burden to prove an immediate danger to the physical health and safety of that child.<sup>428</sup> The state cannot lump sexual abuse, or risk of sexual abuse, on all 468 children living in various homes on the YFZ Ranch without "sufficient evidence."<sup>429</sup> Ms. Voss submitted her evidence of the twenty young women who gave birth when they were seventeen years old or younger and the seven teenagers who conceived their children at the age of fifteen years or younger.<sup>430</sup> Rather than grouping together all 468 children into one household, DFPS should have filed suit against the parents of those teenagers who were seventeen years old and younger who had given birth already and/or were currently pregnant minors. Once such a suit was filed, the children who lived in the same house as those teenagers also could have been removed.<sup>431</sup> This would have given DFPS's argument more credibility, and it likely would have been able to prove the first element under section 262.201(b) along with the testimony and evidence

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422. 5 Reporter's Record, *supra* note 15, at 30-31.

423. *Id.* at 29.

424. *Id.*

425. *Id.* at 30.

426. 4 Reporter's Record, *supra* note 15, at 233-34.

427. *See id.* at 3 (showing that only four mothers and no fathers testified at the hearing).

428. TEX. FAM. CODE ANN. § 262.201(b)(2) (Vernon Supp. 2009).

429. *Id.* § 262.201(b).

430. 5 Reporter's Record, *supra* note 15, at 30; *see also* CPS Investigator's Chart, *supra* note 20 (listing seven girls who conceived at fifteen years of age or younger, and twenty girls who gave birth at seventeen years of age or younger).

431. *See, e.g.*, § 262.201(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 . . . has sexually abused another child.").

presented by Ms. Voss.<sup>432</sup> One reason for the failure of the FLDS removal was the over-inclusion of hundreds of children by DFPS in the same "household" when the actual facts could not substantiate its assertion.<sup>433</sup>

## 2. *No Due Process*

The law of the land provides that parents should have adequate due process when the state intervenes in their private family life and removes a child because of an allegation of abuse or neglect.<sup>434</sup> The Texas Supreme Court describes the relationship between a parent and a child as a constitutionally protected right "far more precious than property rights."<sup>435</sup> Furthermore, the Texas Family Code provides that each child should have a full adversarial hearing to determine if the state has met its burden of proof for removal under section 262.201.<sup>436</sup>

Though the lower court opined that it could not determine another way to proceed without violating the statute mandating the fourteen-day hearing, case law supported that the trial court does not lose jurisdiction over the case if the full adversary hearing is not held within the prescribed period of fourteen days.<sup>437</sup> Strategically, it was in DFPS's interest to file a motion for continuance in order to seek additional information to confirm the parentage of the 468 children in its care as well as provide CASA and the AALs adequate

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432. § 262.201(b)(1); see 5 Reporter's Record, *supra* note 15, at 30 (stating that there was either a teenaged mother or a pregnant teen in every house the witness entered).

433. See *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2-\*3 (Tex. App. May 22, 2008) (mem.) (acknowledging DFPS's argument that the entire ranch was one household, but not finding it persuasive).

434. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child [guaranteed under the Fourteenth Amendment] does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."). A parental rights termination proceeding interferes with that fundamental liberty interest. *Id.* at 753. "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-54. See *In re E.D.L.*, 105 S.W.3d 679, 688 (Tex. App. 2003), in which the court agreed with the Texas Department of Protective and Regulatory Services (TDPRS) "that the purpose of section 262 is to afford parents the opportunity to challenge TDPRS's right to retain any children whom TDPRS has taken into custody under an ex parte order from the court."

435. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1976)).

436. § 262.201(a).

437. See, e.g., *In re B.T.*, 154 S.W.3d 200, 207 (Tex. App. 2004) ("The trial court does not lose jurisdiction if it fails to timely conduct the hearing. Instead, the remedy for the parent and TDPRS is to compel the trial court by mandamus to conduct the adversarial hearing promptly.").

opportunity to meet and interview all of their clients prior to the fourteen-day hearing. An additional period of time could have helped with the logistics and presentation of the case by all parties.

Another solution that would have allowed DFPS to provide a due process hearing for each child or group of siblings would have been to file a preliminary petition alleging abuse and neglect, while securing a safety plan for the children to remain in Texas in the custody of the mothers.<sup>438</sup> Such a petition would not require a temporary removal order because the state would request to be appointed temporary managing conservator along with a protective parent.<sup>439</sup> Thus, a due process hearing would not have to be scheduled within fourteen days, and could be scheduled promptly at such a time as DFPS could determine parentage. The safety plan could have included voluntary DNA testing as well as the agreement of the mothers to keep all FLDS men off the YFZ Ranch during the pendency of the case or until the hearing.<sup>440</sup> This would have allowed the women and children to remain in their homes, and the cost to the state would have been the price of utilizing security, the local police force, or the Texas Guard to guard against, for example, unauthorized persons coming on the ranch. If an incident or violation of the safety plan arose, DFPS could have removed or instigated legal action for removal of the children, and its actions in developing the safety plan would have helped demonstrate at a subsequent fourteen-day hearing that it made reasonable efforts to prevent removal of the children from their homes.<sup>441</sup> Likely fewer children would have been removed from the ranch in the first place, and DFPS would still have had access to the ranch and the children.

There is an argument that the State of Texas sacrificed due process of the children and parents in order to gain access to the documents on the ranch and have the court order DNA testing before

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438. See §§ 105.001(a)(1), 262.001(a) (Vernon 2008 & Supp. 2009) (allowing the government to request to be appointed as a temporary conservator of the child); Tex. Dep't of Family & Protective Servs., Child Protective Services Handbook §§ 2234.33, 2234.4-.41, available at [http://dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_2234.4.jsp](http://dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2234.4.jsp) (last visited Feb. 7, 2010) [hereinafter CPS Handbook] (defining a safety plan as a written agreement between DFPS and a cooperative parent to protect the safety of the child while the child remains in the home with a protective parent).

439. See §§ 105.001(a)(1), 262.205(a)-(e) (allowing the court to appoint a temporary conservator of the child, and allowing the state to request such an order).

440. See CPS Handbook, *supra* note 438, § 2234.33 (describing the types of conditions the safety plan may contain, including “[t]he worker may develop as many safety plans with as many persons as needed for the individual circumstances”).

441. See § 262.201(b)(3) (permitting the court to disallow returning a child to his or her parent if the court finds, *inter alia*, that “reasonable efforts have been made to enable the child to return home, but there [remains] a substantial risk of continuing danger if the child is returned home”).

women and children fled the state.<sup>442</sup> The DNA testing was and is important to the criminal prosecution of multiple FLDS men indicted on criminal charges of sexual assault and bigamy.<sup>443</sup> As mentioned earlier, the DNA testing and evidence gathered from the raid was key to the conviction of Raymond Jessop, the first polygamist sect member tried for sexual assault of a child.<sup>444</sup> It was arguably easier to bypass procedural and privacy rights in the civil child protection suit, as opposed to adhering to more strict guidelines and objections to securing this same evidence under criminal rules of procedure and evidence.<sup>445</sup> The likelihood is low, however, that Texas planned its strategy out with such detail. Of course, the failed DFPS removal may not be such a failure after all if the facts gathered during the civil case secure the pleas and criminal convictions of the alleged twelve perpetrators.

### 3. Religion versus Abuse

The crux of the legal case against the FLDS parents was that the authoritarian belief system that allowed underage marriage and sex with minors was abusive.<sup>446</sup> DFPS asserted that this belief system not only affected the girls but was detrimental to the boys in that it taught them to replicate the sexual abuse when they reached adulthood.<sup>447</sup> The state's expert witness, Dr. Bruce Perry, testified that although there were elements of the community that were healthy with respect to raising children, "the element of their belief system that allow[ed] underage marriage and marital relations between thirteen-, fourteen-, fifteen-year-old kid[s] and a grown adult [was] abusive."<sup>448</sup>

Dr. Perry testified about the belief system's emphasis on obedience and the group's motivation for compliance: to honor God.<sup>449</sup> He further testified that the children were not given the opportunity to make real choices because they were only presented with "the appearance of a choice."<sup>450</sup> The so-called choices involved "one side . . . packed

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442. See, e.g., Ben Winslow, *Dates Set for Trials of 12 FLDS Men*, DESERET NEWS, Jan. 13, 2009, at A06 (noting Willie Jessop's belief that law enforcement had "an agenda" all along, and was never on the ranch to search for sixteen-year-old Sarah Jessop).

443. See Choate, *supra* note 374 (discussing the importance of DNA evidence at Raymond M. Jessop's trial).

444. *Id.*

445. See *supra* Part I.B (discussing the relatively low evidentiary standards for child protection suits).

446. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (mem.).

447. *Id.*

448. 5 Reporter's Record, *supra* note 15, at 73.

449. *Id.* at 73-74.

450. *Id.* at 75.

with all kinds of good things” and the other side “packed with not so good things.”<sup>451</sup> Dr. Perry testified that this lack of offering the children independent choice hindered their brain development such that they only possessed the capability of a six- to ten-year-old to make independent decisions.<sup>452</sup> Dr. Perry ultimately stated that fostering an environment where children will grow up to have “a high potential of replicating sexual abuse of . . . children” and are unable to develop their decision-making capacities was neglectful.<sup>453</sup> Further, arguments were made regarding the alleged excommunication of young male teens from the FLDS due to their rebellion against the community’s ideals, and a growing interest in the “secular” world.<sup>454</sup>

The United States Supreme Court has long held that religion cannot be used to excuse acts of abuse, and that the state has the authority to intervene in the private life of families in order to protect a child from harm:

[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience . . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare . . . this includes, to some extent, matters of conscience and religious conviction.<sup>455</sup>

It has also been settled that the state has authority to regulate actions that are prompted by religious beliefs.<sup>456</sup> “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”<sup>457</sup> Freedom

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451. *Id.* at 74-75.

452. *Id.* at 81-82.

453. *Id.* at 77-82.

454. *See id.* at 219-23 (discussing the “lost boys” phenomenon); *see also* Brienne M. Billie, Note, *The “Lost Boys” of Polygamy: Is Emancipation the Answer?*, 12 J. GENDER RACE & JUST. 127, 134, 138, 141-43 (2008) (asserting that in order for polygamy to operate successfully, “church leaders . . . [keep] the male population in check to reduce the competition for suitable brides,” and, as a result of excommunication, young FLDS teens may be left homeless as well as economically, socially, educationally, and psychologically ill-equipped to live outside the FLDS community).

455. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (citations omitted).

456. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 166 (1878) (“Laws . . . cannot interfere with mere religious belief and opinions, [but] they may with practices.”).

457. *Id.*

of expression and religion cannot be used to excuse actions which are prohibited by law.<sup>458</sup> The Supreme Court in *Reynolds v. United States* made it clear that doctrines of religious belief could not be made superior to the law of the land without creating an ineffective government.<sup>459</sup>

In terms of regulating beliefs covered under the Free Exercise Clause of the First Amendment, there is an established method of determining when government may regulate conduct prompted by religious beliefs.<sup>460</sup> Prior to 1990, the government was required to justify the imposition of a substantial burden on a religious practice with a compelling state interest.<sup>461</sup> When applying the pre-1990 standard, courts considered: (1) whether the law interfered with the free exercise of a sincere religious belief; (2) whether the law was "essential to accomplish an overriding governmental" objective; and (3) whether accommodating the religious conduct would "unduly interfere with fulfillment of the governmental interest."<sup>462</sup>

In *Wisconsin v. Yoder*, the United States Supreme Court addressed whether the state's compulsory school attendance laws violated the First Amendment rights of members of the Amish religion.<sup>463</sup> The Supreme Court held that the parents could not be punished for violation of the compulsory education laws.<sup>464</sup> The Court placed a value on the Amish system of vocational training, determining that the young Amish people were receiving education that would prepare them for life within their community.<sup>465</sup> Since their community had a history of productive citizenship, the Court reasoned that it was unlikely that the Amish children would become a burden on society.<sup>466</sup> The alternative of enforcing the compulsory education laws on the Amish would have, according to the majority, interfered with the parents' long-standing practice of religious inculcation of their children and exposed the children to an environment hostile to Amish beliefs.<sup>467</sup>

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458. *Id.* at 166-67.

459. *Id.*

460. *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972).

461. *See, e.g., id.* at 214 (requiring the state to provide an interest that can overcome the interest in maintaining the free exercise of religion; *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (using a compelling state interest test). *But see* *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888-89 (1990) (holding the compelling state interest test inapplicable).

462. *United States v. Lee*, 455 U.S. 252, 256-59 (1982).

463. *Yoder*, 406 U.S. at 207.

464. *Id.* at 235-36.

465. *Id.* at 222.

466. *Id.*

467. *Id.* at 211, 222.

In *Sherbert v. Verner*, the United States Supreme Court considered whether a South Carolina statute violated the appellant's First Amendment rights by disqualifying her from receiving unemployment benefits after she refused to work on Saturday, which was her religion's Sabbath Day.<sup>468</sup> The Court upheld the appellant's claim to a free exercise of religion exemption because the employer failed to demonstrate that no alternative forms of regulation would combat abuses of this exemption (the filing of fraudulent claims feigning religious objections) without infringing First Amendment rights.<sup>469</sup>

In 1990, the United States Supreme Court retreated from the *Yoder* and *Sherbert* test and held that the First Amendment does not prohibit governments from burdening religious practices through neutral, generally applicable laws.<sup>470</sup> In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court concluded that the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law [prohibits] conduct that his religion prescribes.'" <sup>471</sup> *Smith* involved two employees who were fired from their employment because they ingested peyote while participating in a religious ceremony of the Native American Church.<sup>472</sup> They applied for unemployment compensation benefits which the Employment Division denied because their employer had discharged them for work-related misconduct.<sup>473</sup> The Oregon Court of Appeals reversed based on its conclusion that the denial of benefits violated the free exercise rights of the two employees as protected by the First Amendment.<sup>474</sup> The Oregon Supreme Court affirmed.<sup>475</sup> Employment Division sought certiorari, which the United States Supreme Court granted.<sup>476</sup> The Court reversed, determining that the *Sherbert* test which required a compelling government interest does not apply where the challenged state action that allegedly inhibits the free exercise of religion is a generally applicable criminal law.<sup>477</sup> Justice Scalia further stated that the only cases where the Court has "held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the

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468. *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

469. *Id.* at 407, 410.

470. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990).

471. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

472. *Id.* at 874.

473. *Id.*

474. *Id.*

475. *Id.* at 875.

476. *Id.*

477. *Id.* at 884-85.

Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.”<sup>478</sup> In these hybrid situations, strict scrutiny is applied.<sup>479</sup>

There is a conflict that exists within constitutional law when the Free Exercise Clause of the First Amendment is applied to a parent’s ability to influence his or her child’s actions through speech and the state’s ability to intervene in private family life in order to protect a child from harm.<sup>480</sup> The significance of the Texas Court of Appeals statement regarding the imposition of certain tenets of a belief system on a child is underscored in *Shepp v. Shepp*, a Pennsylvania case which dealt with the issue of whether the courts could disallow parents from advocating religious tenets that, if acted upon, would constitute criminal conduct.<sup>481</sup> This case dealt directly with the issue of bigamy within a polygamist sect, and evaluated whether a father could be prohibited from teaching his minor female child about polygamy, plural marriages or multiple wives.<sup>482</sup> The mother and father were Mormons when they married in 1992, and were divorced in 2001.<sup>483</sup> The Mormon church excommunicated the father for the same reason the mother divorced him: the father was a fundamentalist who believed in polygamy.<sup>484</sup> The mother “expressed concerns that [the father] would introduce [their daughter] Kaylynne to men so that she would be ready to engage in polygamy once she reach[e]d the age of thirteen.”<sup>485</sup>

The father denied that he would try to marry Kaylynne into a polygamist relationship, but that “it [was] his job to help her learn about and understand alternatives.”<sup>486</sup> Manda, a daughter of the mother from a previous marriage, “testified that when she was thirteen years old, [the f]ather (who [was] her stepfather) told her ‘that if you didn’t practice polygamy . . . you were going to hell.’”<sup>487</sup> The father further told his stepdaughter that in Pennsylvania a fourteen-year-old could get married with a parent’s permission, and suggested the two of them should wed because they already resided

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478. *Id.* at 881.

479. *See id.* at 881-86 (declining to use strict scrutiny for non-hybrid cases).

480. *See, e.g., Shepp v. Shepp*, 906 A.2d 1165, 1168-69 (Pa. 2006) (highlighting the conflict between the Free Exercise Clause and parental autonomy to raise children).

481. *Id.* at 1174.

482. *Id.* at 1167-68.

483. *Id.* at 1166.

484. *Id.* at 1166-67.

485. *Id.* at 1167.

486. *Id.*

487. *Id.* at 1168.



in the house together and were already related.<sup>488</sup> The father denied Manda's allegation.<sup>489</sup>

The trial court noted that “[c]ontact [between a parent and a child] can be limited only when the parent has been shown to suffer from severe mental or moral deficiencies that constitute a grave threat to the child.”<sup>490</sup> The trial court further found that there was no evidence of a grave threat to the child in this case, even though evidence of a moral deficiency may have existed because of the father's belief in plural marriage.<sup>491</sup> The trial court allowed the parents to continue raising the child in the Mormon faith, but specifically barred the father from teaching her about multiple wives, polygamy, or plural marriages while the child was a minor.<sup>492</sup>

The father appealed the case to the superior court which affirmed the lower court's decision, but disagreed with the finding that the father did not pose a grave threat to his daughter.<sup>493</sup> The superior court stated that the:

Father's promotion of his beliefs to his stepdaughter involved not merely the superficial exposure of a child to the theoretical notion of criminal conduct, but constituted a vigorous attempt at moral suasion and recruitment by threats of future punishment. The child was, in fact, warned that only by committing an illicit act could she comply with the requirements of her religion.<sup>494</sup>

The superior court expressed additional trepidation that the father's desire to instill a belief in polygamy in his daughter would “become insistence that she engage in such conduct.”<sup>495</sup>

On appeal from the father, the Pennsylvania Supreme Court reversed the order of the superior court.<sup>496</sup> The majority stated that:

This case implicates two highly important values: the free exercise of religion as guaranteed by the First Amendment . . . and the public policy of this Commonwealth, as set forth in section 5301 of the Domestic Relations Code, “when in the best interest of the child, to assure a reasonable and continuing contact of the child

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488. *Id.*

489. *Id.*

490. *Id.* (citation omitted).

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.* (citation omitted).

495. *Id.*

496. *Id.* at 1174.

with both parents after a separation or dissolution of the marriage and a sharing of the rights and responsibilities of child rearing by both parents.”<sup>497</sup>

The state supreme court found that advocating Mormon fundamentalism did not constitute a grave threat of harm to the child, and concluded there was insufficient basis in the instant case for the court to encroach upon the father’s constitutional right to discuss religion with his child as he saw fit.<sup>498</sup> Second, the court held that:

a court may prohibit a parent from advocating religious beliefs, which, if acted upon, would constitute a crime. However, . . . it may do so only where it is established that advocating the prohibited conduct would jeopardize the physical or mental health or safety of the child, or have a potential for significant social burdens.<sup>499</sup>

The court applied the strict scrutiny analysis to this hybrid case, and ruled that the father’s constitutional rights under the Free Exercise Clause and the state public policy of encouraging contact between children and divorced parents outweighed the state’s authority under the *parens patriae* doctrine.<sup>500</sup>

In *Shepp*, the father argued that “he [was] simply a parent who wishe[d] to share his sincere religious beliefs with his child.”<sup>501</sup> In support of his view that the courts may not interfere with this right, he relied upon the Supreme Court’s holding in *Wisconsin v. Yoder*, which recognized “that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”<sup>502</sup> The Pennsylvania Supreme Court’s ruling in *Shepp* would appear to support the Texas Supreme Court decision in the YFZ case, in that Texas could not establish that the prohibited conduct (i.e., the pervasive belief system) jeopardized the physical or mental health or safety of all the children, or possessed a potential to impose significant social burdens. There is a strong argument to be made, however, that physical or mental health of the pregnant FLDS minors on the ranch was at risk.<sup>503</sup> The dissenting judge in *Shepp* and Professor Jeffrey Shulman argue that the strict scrutiny standard gives too much deference to the parent’s claim of constitutional rights

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497. *Id.* at 1168-69 (quoting 23 PA. CONS. STAT. ANN. § 5301 (West 2001)).

498. *Id.* at 1174.

499. *Id.*

500. *Id.*

501. *Id.* at 1169.

502. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Shepp*, 906 A.2d at 1169.

503. See Roberts, *supra* note 52 (pointing out that at least one sexual assault was committed at the YFZ Ranch).

without considering the coercive nature of religious beliefs in the familial context, as well as society's interest in regulating immoral and criminal conduct.<sup>504</sup> In addition, as the concurring opinion of Justice Eakin in *Shepp* points out, the case called for an analysis of the best interests of the child by a preponderance of the evidence — like any child custody case — rather than a strict scrutiny analysis.<sup>505</sup> This improperly elevated the father's fundamental right to raise his daughter over the mother's fundamental right.<sup>506</sup>

While the civil case before the Court of Appeals in Texas addressed the issue of whether there was sufficient risk of harm to the FLDS children that would warrant their removal from home,<sup>507</sup> an underlying fact supported future criminal charges — the birth of children to minor females fathered by men on the YFZ Ranch.<sup>508</sup> Sex crimes were implicit in the circumstances of these young girls, and the district court in Texas saw the potential risk of future harm for the children.<sup>509</sup> The Pennsylvania Supreme Court's ruling in *Shepp* gives a peek into what may lead to a United States Supreme Court review in the future.<sup>510</sup> The critical decision that must be made is the process by which a court should determine *when* or *how* mental or emotional harm impairs a child's feeling of safety in his or her home.

### *C. Every Child is Not Protected*

“The men in power get the young girls,” says Roger Hoole, a name partner with Hoole & King in Salt Lake City who represents former FLDS members. “The problem is not really polygamy; the problem is the belief that women and children are unilaterally the property of the priesthood, and they raise the girls from the cradle to grow up and be mothers and plural wives. It's all the girls have ever known.”

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504. See *Shepp*, 906 A.2d at 1179-80 (Baer, J., dissenting) (stating that Pennsylvania should take into consideration the state's interest in protecting the public welfare); Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173, 174 (2008) (arguing that “the law grants the religiously motivated parent a special constitutional privilege . . . , a privilege that generally trumps any countervailing interests of the state or rights of the child”).

505. *Shepp*, 906 A.2d at 1174-75 (Eakin, J., concurring).

506. *Id.*

507. *In re Steed*, No. 03-08-00325-CV, 2008 WL 2132014, at \*1, \*4 (Tex. App. May 22, 2008) (mem.).

508. *Id.* at \*1-\*2.

509. See 5 Reporter's Record, *supra* note 15, at 340 (finding that the requirements of section 262 had been met); see also TEX. FAM. CODE ANN. § 262.201(b)(2) (Vernon Supp. 2009) (requiring an urgent need to remove the child because of danger to the child's physical safety or health).

510. *Shepp*, 906 A.2d at 1174 (“[A] court may prohibit a parent from advocating religious beliefs which, if acted upon, would constitute a crime.”).

Choate adds, "I hope the lesson learned isn't that if you have enough people, and their actions are confusing or duplicitous, you can do what you want. Because if that's the case, the state doesn't have any power to protect the most vulnerable."<sup>511</sup>

There is a question regarding whether the religion that the FLDS practice is mentally or emotionally abusive to children. One might argue that extremists of all religions could be considered abusive<sup>512</sup> — does this mean that children who belong to outlier religions are always at greater risk of being removed? A further question that arises is at what point is a mental or emotional injury to a child deemed an immediate danger to the child? Several factors must be considered when determining whether psychological maltreatment can be substantiated: the "[l]evel of severity and chronicity or duration of the caregiver behavior are the guiding standards used by most states to identify behavior as" abusive.<sup>513</sup>

"In most cases, psychological maltreatment is substantiated when a chronic pattern is identified."<sup>514</sup> For example, "[m]any caregivers occasionally ask a child to take on inappropriate responsibilities; psychologically neglectful parents do this routinely (e.g., a [seven]-year-old makes most of the family decisions because her mother is high most of the time)."<sup>515</sup> Sometimes, "caregiver behavior is so severe that a case will be substantiated on the basis of a single incident (e.g., shaving a girl's hair off to humiliate her or encouraging the child to get high with the parent)."<sup>516</sup> Arguably, if a parent forced or coerced an underage child to marry or engage in sexual acts with an adult, it would likely qualify under the above-described standards as psychological maltreatment.

The simple fact of the matter is that the Texas Family Code does not provide DFPS the opportunity to remove children on an emergency basis because of emotional or mental abuse.<sup>517</sup> The emergency removal standard allows for children to be removed when their physical health or safety are in danger or when they have been victimized

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511. Stephanie Francis Ward, *Discovering Eldorado*, 94 A.B.A. J., Oct. 2008, at 70.

512. See Richard Dawkins, RichardDawkins.net, Religion's Real Child Abuse (May 15, 2006), <http://richarddawkins.net/articles/118> (discussing how certain religious teachings can be considered mental abuse); see also Posting of rever to Scienceblogs, [http://scienceblogs.com/effectmeasure/2009/11/freethinker\\_sunday\\_sermonette\\_177.php](http://scienceblogs.com/effectmeasure/2009/11/freethinker_sunday_sermonette_177.php) (Nov. 8, 2009, 06:24 EST) (discussing how some kinds of religious upbringing can be considered abusive).

513. NELSON J. BINGGELI ET AL., *PSYCHOLOGICAL MALTREATMENT OF CHILDREN* 54 (2001).

514. *Id.*

515. *Id.*

516. *Id.* at 55.

517. See TEX. FAM. CODE ANN. § 262.201(b)(1) (Vernon Supp. 2009) (taking into consideration only whether the child's *physical* health or safety have been endangered).

by neglect or sexual abuse.<sup>518</sup> Although emotional or mental abuse is included in the definition of “abuse” in the Texas Family Code,<sup>519</sup> it is not part of the legal removal standard.<sup>520</sup> In actuality, “[p]sychological maltreatment is the most common form of child abuse” because it is present in almost every case of physical abuse, physical neglect, and sexual abuse.<sup>521</sup> Legal experts assert that “the severest trauma of child sexual abuse is not the physical act, but rather the emotional repercussions of the abuse, including the abuse of power, betrayal of trust, intimidation, threats, shame, and guilt.”<sup>522</sup> While the DFPS investigator and an expert witness in the YFZ case testified that the children were being emotionally abused, this ultimately was insufficient under state law to warrant removal.<sup>523</sup>

A prime example of the psychological maltreatment that goes on within the FLDS is demonstrated in the recounting of a teenage girl’s experience between the time she found out she would be married to her first cousin at the age of fourteen and the day of her marriage.<sup>524</sup> Elissa Wall recalls becoming the teenage bride of her first cousin at fourteen years of age:

I had been in the FLDS Church from the moment I was born. It was all I knew and the only way I could imagine living. From my teachings, I knew that the prophet’s job was to dictate what was best for us and that the words he spoke came straight from God. I believed that my impending marriage was the will of God and therefore nothing could be done to stop it. But still, I had to try.

I also knew that I was different from other girls in my community. I wanted an education, and maybe even to become a nurse or teacher someday. During my year in public school, I’d come to realize things were possible that I’d never dreamed before. Sure, I knew that I wanted to be a mother of good priesthood children, but not at fourteen. I wanted children *and* a future, and I dared to think that both were possible.

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... Getting married is the highest honor for a girl in the FLDS Church. It was what women lived for — our dream and

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518. *Id.* §§ 262.101(1), .102(a)-(b), .104(a), .107(a)-(b), .201(b) (Vernon 2008 & Supp. 2009).

519. *Id.* § 261.101(1)(A),(B), (4)(A) (Vernon 2008).

520. See sources cited *supra* note 518 (examining the Texas Family Code sections that allow removal of a child).

521. BINGGELI ET AL., *supra* note 513, at xi.

522. ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 364 (1999).

523. 4 Reporter’s Record, *supra* note 15, at 277; 5 Reporter’s Record, *supra* note 15, at 73, 133.

524. ELISSA WALL WITH LISA PULITZ, STOLEN INNOCENCE 1 (2008).

our mission. Even though I was only fourteen, it was hard not to get caught up in all the excitement. Soon, though, those feelings would pass, and the anxiety returned.<sup>525</sup>

Elissa wrote about two other girls who were assigned husbands at the same time as her, and described how one girl attempted suicide because her marriage announcement appeared to be a reaction to an improper friendship she had developed with an older FLDS boy.<sup>526</sup> She also wrote about how her mother interrupted her while she was writing down her thoughts of what was happening in her journal, telling her that her words were not private and that she should write things that she would not regret later.<sup>527</sup> Elissa makes clear in her book that the actions and inactions of her mother supported the illegal marriage that she tried so hard to avoid.<sup>528</sup>

Another significant impact of being a teenage bride that Elissa recounts is the fact that she was subject to forced sex throughout her marriage to her first cousin, which resulted in three pregnancies, the outcome of which was two miscarriages and a stillbirth by the age of sixteen.<sup>529</sup> Elissa had no choice in the matter of her sexual life — much like that of other young girls around the world who are in forced marriages.<sup>530</sup> Other women who have escaped the FLDS lifestyle also recount being brainwashed and abused.<sup>531</sup> Elissa Wall was able to find justice within the criminal law system, as she was the star witness in the prosecution of Warren Jeffs in Utah for being an accomplice to rape.<sup>532</sup> Until psychological abuse is specifically recognized within the removal statute in Texas, though, it will be difficult to show that there is an immediate danger to children living in FLDS communities when their circumstances are not as harrowing as Elissa Wall's. Moreover, United States courts will need to resolve the ultimate issue that the Pennsylvania Supreme Court considered in *Shepp*: the level of psychological or emotional harm necessary to prove grave danger

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525. *Id.* at 125, 127.

526. *Id.* at 127.

527. *Id.* at 128.

528. *See, e.g., id.* (illustrating Wall's anxiety resulting from her mother's words about her diary not being private).

529. *Id.* at 167, 185, 236, 239.

530. *See, e.g.,* Karine Belair, *Unearthing the Customary Law Foundations of "Forced Marriages" During Sierra Leone's Civil War: An Analysis of the Possible Impact of International Criminal Law on Customary Marriages and Women's Rights in Post-Conflict Sierra Leone*, 15 *COLUM. J. GENDER & L.* 551, 551-52 (2006) (describing the process, sometimes violent, by which women are forced into marriage and the lack of control they have over their sexual lives).

531. FLORA JESSOP & PAUL T. BROWN, *CHURCH OF LIES* 3, 16-17 (2009).

532. WALL WITH PULITZ, *supra* note 524, at 352.

to a child which would enable the states' *parens patriae* powers to trump Free Exercise Clause claims by parents.<sup>533</sup>

#### *D. Who is the Victimized Child?*

##### *1. No Sexual Abuse Outcry*

At the onset of the investigation, the YFZ Ranch was raided by state and federal troopers as well as DFPS.<sup>534</sup> DFPS underestimated the number of children who would be found on the ranch, and as a result was overwhelmed with how to go about interviewing the children without their parents, in a manner designed to yield DFPS the most information about their home life.<sup>535</sup> In a typical case, a child who makes an allegation about sexual or physical abuse is taken to a local child advocacy center where forensic interviewers videotape an interview of child.<sup>536</sup> During the interview, a police detective, the DFPS and/or district attorney, and a DFPS investigative worker observe and provide feedback and questions to the forensic interviewer for the child.<sup>537</sup> The multidisciplinary team can then discuss the child's case and offer suggestions on how to proceed with the potential criminal and civil suits.<sup>538</sup> DFPS was not able to transport the children to the local child advocacy center in this case, and had a difficult time interviewing children outside of the presence of their mothers.<sup>539</sup>

"The Primer," a joint report of Utah and Arizona Attorney General's Offices, explains the FLDS culture and provides guidelines for people attempting to help victims from polygamous communities.<sup>540</sup> The Primer's findings are similar to those of Livia Bardin, M.S.W., in her article "Child Protection in an Authoritarian Community: Culture

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533. See *Shepp v. Shepp*, 906 A.2d 1165, 1178-79 (Pa. 2006) (discussing the tension between allowing parents to teach their children certain religious beliefs and the state's interest in protecting children from harm).

534. See *supra* Part I (describing the raid on the YFZ Ranch).

535. See, e.g., 5 Reporter's Record, *supra* note 15, at 223-24 (describing the somewhat chaotic environment in which the children were being interviewed).

536. Theodore P. Cross et al., *Child Forensic Interviewing in Children's Advocacy Centers: Empirical Data on a Practice Model*, 31 CHILD ABUSE & NEGLECT 1031, 1032-33 (2007).

537. See *id.* at 1033 (discussing the use of interdisciplinary teams to increase the effectiveness of the interviews).

538. See *id.* (noting that the interdisciplinary teams share decision-making responsibilities).

539. E.g., 5 Reporter's Record, *supra* note 15, at 223-24; 4 Reporter's Record, *supra* note 15, at 160-62.

540. UTAH ATTORNEY GEN. OFFICE & ARIZ. ATTORNEY GEN. OFFICE, THE PRIMER: A GUIDEBOOK FOR LAW ENFORCEMENT AND HUMAN SERVICES AGENCIES WHO OFFER ASSISTANCE TO FUNDAMENTALIST MORMON FAMILIES 7-9 (2009), available at [http://www.attorneygeneral.utah.gov/polygamy/The\\_Primer.pdf](http://www.attorneygeneral.utah.gov/polygamy/The_Primer.pdf) [hereinafter THE PRIMER].

Clash and Systemic Weakness.”<sup>541</sup> Bardin is a clinical social worker with a background in child welfare and a specialty in problems of cult involvement.<sup>542</sup> She investigated allegations stemming from Arizona and Utah that CPS avoids intervention in fundamentalist Mormon communities (FMCs).<sup>543</sup>

As part of her investigation, Bardin conducted a limited survey of former members of FMCs to get information about their personal childhood experiences of abuse and neglect and any interactions they had with CPS.<sup>544</sup> She also interviewed CPS workers who had interacted with FMC members.<sup>545</sup> Bardin reviewed accounts of women in isolated, authoritarian groups, who may suppress their own instincts and sanction a leader’s “mistreatment or even removal of their children.”<sup>546</sup> Most participants, though not all, reported ongoing abuse during childhood, including physical abuse such as regularly “being kicked, whipped, beaten, shaken, shoved off balance[,] or knocked down.”<sup>547</sup> Even though all of the respondents had repudiated FMC beliefs, most did not identify marriage of teenage girls to much older men as sexual abuse,<sup>548</sup> regarding it instead as curtailment of choice. Bardin identified several factors that complicate CPS investigations in FMCs, which include: (1) children may be uncooperative because they subscribe to the group’s beliefs or fear being returned to the community after cooperating, where they would be punished for their cooperation;<sup>549</sup> (2) CPS workers may feel intimidated;<sup>550</sup> (3) practical difficulties such as the geographic isolation of some rural communities, which makes it hard for workers to arrive without notice and easy for families under investigation to disappear;<sup>551</sup> (4) the large number of children per family (one worker spoke of trying to interview forty-two children) and lack of privacy make it difficult to interview all those involved;<sup>552</sup> and (5) the political power of FMCs in rural areas may affect the willingness of elected officials to move promptly and

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541. See Livia Bardin, *Child Protection in an Authoritarian Community: Culture Clash and Systemic Weakness*, 4 CULTIC STUD. REV. 233, 233 (2005) (exploring whether CPS in Utah and Arizona avoid interventions in polygamous Mormon communities).

542. International Cultic Studies Association: Profiles, Livia Bardin, M.S.W., [http://www.icsahome.com/infoserv\\_profile/bardin\\_livia.asp](http://www.icsahome.com/infoserv_profile/bardin_livia.asp) (last visited Jan. 22, 2010).

543. Bardin, *supra* note 541, at 233.

544. *Id.* at 235.

545. *Id.*

546. *Id.*

547. *Id.* at 238.

548. See *id.* at 237, 239 tbl.1 (showing “only [one] respondent who connected underage marriage with sexual abuse”).

549. *Id.* at 247.

550. *Id.* at 245-46.

551. *Id.* at 236.

552. *Id.* at 246.



appropriately, while the FMCs' readiness to accuse investigators of prejudice may have a chilling effect on enforcement agencies.<sup>553</sup>

In the YFZ hearing itself, the state's expert witness, Dr. Bruce Perry, stated that because of the nature of how the children were raised to fear outsiders, it would be unlikely that they would feel comfortable talking to DFPS investigators.<sup>554</sup> In addition, according to Utah psychologist Larry Beall, the nature and "basic structure of polygamy is authoritarian and secretive."<sup>555</sup> Dr. Beall states that "[t]he men who practice it believe they have the authority to govern and control their wives and children in the family relationship," and that this "control can take extreme forms."<sup>556</sup> According to Dr. Beall, a psychologist who has worked with polygamous families for many years,<sup>557</sup> the prominent characteristics of polygamous cults<sup>558</sup> include: (1) a controlling central figure; (2) "[r]evelation from God dictates the words and acts of the central figure"; (3) "[i]ndependent thinking and outside information are shunned"; (4) "[r]elationships with others outside the cult are prohibited"; (5) unfavorable attitudes about education; (6) society is presented as evil, wicked, and dangerous; (7) group members are policed to prevent disloyalty; (8) violence is exerted against women and children to maintain control; (9) "[e]motional expressions are undesirable"; (10) "[p]ersonal desires are unwanted"; (11) imposition of a patriarchal caste system; and (12) women viewed as property or possession.<sup>559</sup>

With regard to the caste system, Dr. Beall states that one of the reasons there is such disparity between the reports from those who have fled polygamy and those who remain in polygamy has to do with the function of women within this hierarchy and the accoutrements

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553. *Id.* at 249.

554. 5 Reporter's Record, *supra* note 15, at 70.

555. Larry Beall, Trauma Awareness & Treatment Center TATC, The Impact of Modern-Day Polygamy on Women & Children, <http://www.traumaawareness.org/id19.html> (last visited Jan. 22, 2010).

556. *Id.*

557. See Brooke Adams, *Sentence is Expected Tuesday for FLDS Man*, SALT LAKE TRIB., Nov. 10, 2009, available at 2009 WLNR 22493252 ("Utah psychologist Larry Beall, who specializes in trauma, told jurors that over his 21-year career he had counseled 20 former FLDS members, five of whom were women.").

558. The author defines a cult as having three elements:

- (1) doctrinal teachings and practices, which because of their emotionally, physically, or sexually abusive nature, would be judged by society outside the cult, as destructive, harmful, and/or criminal;
- (2) coercion or force by its leaders to insure [sic] compliance in the cult's members[.] and
- (3) secrecy to prevent influence from the outside society and to maintain isolation of its members.

Beall, *supra* note 555.

559. *Id.*

that accompany their individual status in the family.<sup>560</sup> Plural wives who are devoted and supportive of the policies and teachings of the prophet “will receive superior living conditions and better treatment within their group. This differential between living standards may explain why some plural wives report only positive aspects of their polygamous experiences.”<sup>561</sup>

Older female children who are already wives may be taught that telling an outsider about abuse risks publicizing the fact that individuals in the FLDS community clearly disobey anti-bigamy laws.<sup>562</sup> “[T]his attention [could] lead to the destruction of their famil[ies], communit[ies], or marriage, [by] forcing a potential witness or victim . . . to choose between reporting the crime and endangering his or her family structure and way of life.”<sup>563</sup> In this way, FLDS members are marginalized, and “as long as polygamy remains a crime, the state cannot expect the people within polygamist communities to cooperate in finding and reporting abuse.”<sup>564</sup> Considering the history of FLDS interaction with state child protection agencies, the normal method of interviewing children and potential witnesses of abuse does not work with this population.<sup>565</sup>

Without a cooperative child victim in the YFZ case, the state’s case began to unravel because there was no first-hand personal testimony of a witness who had actually made an accusation that a man in her household had physically or sexually abused her.<sup>566</sup> In many cases of abuse, a child tells someone that her caregiver has done something to her that qualifies as abuse under the law.<sup>567</sup> In other cases, a child may state that her caregiver has failed to do something which qualifies as neglect under the law. In still other cases, there is physical evidence of abuse and neglect whereby no words need be spoken by the child, such as the presence of illegal drugs in a newborn, an unexplained third-degree burn on a five-month-old, or the diagnosis of a sexually transmitted disease in an eight-year-old.<sup>568</sup> Certain

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560. *Id.*

561. *Id.*

562. Jeffrey Michael Hayes, Comment, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STAN. J. C.R. & C.L. 99, 107 (2007).

563. *Id.*

564. *Id.*

565. *See id.* (“[P]olygamists are well aware of the fact that the law views them as felons.” (citation omitted)).

566. *See* 4 Reporter’s Record, *supra* note 15, at 276-77 (illustrating the witness’s inability to give an example of a child from the ranch alleging physical or mental abuse).

567. *See* Ramona Alaggia, *Many Ways of Telling: Expanding Conceptualizations of Child Sexual Abuse Disclosure*, 28 CHILD ABUSE & NEGLECT 1213, 1218 (2004) (discussing purposeful disclosure by victims of child abuse).

568. *See* ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., RECOGNIZING CHILD ABUSE AND NEGLECT: SIGNS AND SYMPTOMS 3-4 (2007), <http://www>

situations are considered abuse per se.<sup>569</sup> There is not always a child victim who is verbal, and there are many cases where a lay witness or expert witness testifies about circumstances that constitute abuse and/or neglect of a child.<sup>570</sup> When Sarah Jessop, also known as Sarah Barlow, was never identified or located, DFPS turned to other evidence collected to attempt to show that the children on the YFZ Ranch were in immediate physical danger.

The only evidence that DFPS could use in order to establish the children were in continuing physical danger was the fact that they saw young, pregnant teenagers as well as teenagers who had borne children.<sup>571</sup> Since this evidence proved successful for DFPS at the initial ex parte hearing held after the children had already been taken into custody,<sup>572</sup> there was likely not much consideration regarding the use of Angie Voss as the sole DFPS witness. Many times the efficient use of court time is a higher priority in child welfare cases than the strict adherence to the rules of evidence.<sup>573</sup> The YFZ case, with hundreds of attorneys, respondent parents, and the children who were the subject of the suit, made the presentation of evidence even more problematic than in regular cases. Angie Voss's testimony proved to be much too cursory and not specific enough to prove that all of the children's physical health or safety were in danger.<sup>574</sup> In the memorandum opinion issued by the Third Court of Appeals, the testimony of DFPS is called into question as to the facts upon which Voss based her statements.<sup>575</sup> Had DFPS chosen to present the testimony of more DFPS special investigators who had actually interviewed the children and/or

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childwelfare.gov/pubs/factsheets/sp\_signs.cfm (giving examples of conditions that should give immediate rise to suspicions of child abuse or neglect).

569. Christopher A. Warlick et al., *Keeping Childhood Sexual Abuse on the Urologic Radar Screen*, 66 *UROLOGY* 1143, 1149 (2005) (explaining the necessity to report certain genital infections to CPS regardless of additional evidence).

570. See, e.g., NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 320, 342-43 (2004) (pointing out that some children may have trouble testifying, and in that case witnesses can be helpful to the case).

571. Petition for Orders in Aid of Investigation of a Report of Child Abuse or Neglect, *In re Children of YFZ Ranch*, No. 2904 (51<sup>st</sup> Dist. Ct., Schleicher County, Tex. Apr. 5, 2008); Affidavit in Support of Petition, *supra* note 2, at 5.

572. See 5 Reporter's Record, *supra* note 15, at 340 (finding that sufficient evidence had been presented to convince the court that the children could be removed).

573. See Mark Hardin, Director, Nat'l Child Welfare Res. Ctr. on Legal & Judicial Issues, *Improving Courts' Handling of Child Abuse and Neglect Cases: A List of Suggested Reforms*, at 1-2, <http://www.abanet.org/child/rcjji/samlist.pdf> (last visited Feb. 22, 2010) (discussing how setting time limits for child abuse and neglect cases can improve the litigation process and illustrating the priority given to judicial efficiency, even in child abuse cases).

574. *In re Steed*, 2008 WL 2132014, at \*3.

575. *Id.* at \*3; see also Petition for Writ of Mandamus, *supra* note 5, at 3-6 (laying out the evidence that Angie Voss and Dr. Bruce Perry presented at the hearing).

some of the parents of the children, it may have been able to meet the first element of the legal standard set forth in section 262.201<sup>576</sup> of the Texas Family Code for more than just a few children.

## 2. *More Evidence, Please*

In many DFPS cases, investigators often find other evidence that shows neglect or abuse in addition to the primary reason for the referral.<sup>577</sup> This additional evidence, such as drug use, unsanitary or unsafe living conditions, often is enough to warrant removal of the children.<sup>578</sup> In the YFZ case, there was enough evidence presented at the fourteen-day hearing to prove that young teenagers were married to older men and had borne children prior to age eighteen.<sup>579</sup> The Father's Family Information Sheet (Bishop's Record), investigation reports of at least five teenage girls, testimony of the FLDS expert witness and some of the FLDS mothers corroborated the fact that some teens were married and had children between the ages of fifteen and seventeen.<sup>580</sup> The law in Texas provides that the general age requirement to marry is eighteen years old, and that a person sixteen years old or older, but not yet eighteen, can marry only with the consent of his or her parents.<sup>581</sup> The Bishop's Record did not reflect any wives below the age of sixteen.<sup>582</sup> The Texas Family Code, however, does provide that with regard to the marriage relationship, a minor must apply to the county clerk to be married and submit documents establishing parental consent.<sup>583</sup> A court order may also be executed in order to authorize the marriage of a minor.<sup>584</sup> In any event, no FLDS parent could give legal consent without providing a written declaration to the county clerk.<sup>585</sup> Thus, every marriage of

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576. TEX. FAM. CODE ANN. § 262.201(b)(1) (Vernon Supp. 2009) (providing that "the court shall order the return of the child to the parent . . . unless the court finds sufficient evidence . . . that: (1) there was a 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").

577. See, e.g., *In re A.R.B.*, No. 14-08-00452-CV, 2009 WL 3425358, at \*1 (Tex. App. 2009) (mem.) (indicating that after the referral for severe burns on a young girl's face, investigators also found scarring patterns on her body consistent with other physical abuse).

578. See *In re Z.C.*, 280 S.W.3d 470, 474 (Tex. App. 2009) ("A parent's illegal drug use and drug-related criminal activity may support a finding that the child's surroundings endanger his physical or emotional well-being").

579. *In re Steed*, 2008 WL 2132014, at \*1-\*2.

580. See *supra* notes 82-91 and 168-189 (discussing the testimony of the witnesses and the exhibits entered into evidence by the state).

581. TEX. FAM. CODE ANN. §§ 2.101, .102(a) (Vernon 2008 & Supp. 2009).

582. Bishop's Record, *supra* note 90.

583. §§ 2.003, .102.

584. *Id.* § 2.103.

585. *Id.* § 2.102(b).

an FLDS child under the age of eighteen was nonconsensual and illegitimate under the law.

There were exhibits admitted by DFPS that reflected DFPS investigations of nineteen teenage girls on the YFZ Ranch.<sup>586</sup> Throughout the documentation gathered by DFPS, there was no evidence presented in court that any of these girls stated that a man had assaulted them physically or sexually.<sup>587</sup> Some admitted to sexual relations with their husbands, and others denied being touched in any kind of sexual way or invoked the Fifth Amendment and refused to answer questions.<sup>588</sup>

There were eight additional DFPS investigative caseworkers who interviewed the teenage mothers and the adult mothers who gave birth in their teens on the YFZ Ranch,<sup>589</sup> but only one investigative supervisor testified on behalf of DFPS.<sup>590</sup> In the interest of time, DFPS probably did not want to present any duplicative evidence; however, it would have been valuable to hear testimony from different witnesses regarding the interviews with some of the other teenage girls who were not part of the group of five who were pregnant. It would also have been helpful to hear about the interviews with the teenage boys. Many of the investigative reports contained the names of siblings who lived with the teenage girls,<sup>591</sup> and it would have been useful to ask questions of how the marriage and subsequent births of the teens impacted the younger children.

In one home in particular there were five sister-wives where two of the mothers tried to cover for one another with regard to the age of the younger wife and her child.<sup>592</sup> The young sister-wife cried

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586. See 6 Reporter's Record, *supra* note 15, at 2 (listing CPS investigative summaries for eleven girls); 7 Reporter's Record, *supra* note 15, at 3 (listing CPS investigative summaries for eight girls).

587. 4 Reporter's Record, *supra* note 15, at 276-77 (illustrating the investigator's inability to point out one instance of a girl from the ranch alleging physical abuse).

588. See *id.* at 195-96, 201 (noting that some girls invoked the Fifth Amendment and that one girl acknowledged that she was pregnant at seventeen years old, necessitating the conclusion that she was sexually active with her husband).

589. CPS Investigator's Chart, *supra* note 20 (listing the names of the investigators who interviewed teenage mothers and adult mothers who gave birth in their teens as Tina Martinez, Rebecca Baxter, Patricia Koetter, Ruby Gutierrez, Kelly Walker, Joy Hallum, Barbara Cockrell, and Michelle Neely).

590. Petition for Writ of Mandamus, *supra* note 5, at 2.

591. See, e.g., Sally Jeffs CPS Summary, *supra* note 185 (listing siblings who resided in the same house as the victim, Sally Jeffs); CPS Investigation Summary: Margaret Barlow, Petitioner's Exhibit 8, 6 Reporter's Record, *supra* note 15 (same, victim Margaret Barlow).

592. CPS Investigation Summary: Janet Jessop, Petitioner's Exhibit 13, 6 Reporter's Record, *supra* note 15 ("Mary [a sister-wife] started to cry and said she wanted to be honest but she did not want to get anyone in trouble. . . . She asked to take the place of one particular mother that had a child under the age of [eighteen].").

during the interview and expressed fear of getting someone in trouble who had had a child under the age of eighteen.<sup>593</sup> She expressed wanting to take that mother's punishment.<sup>594</sup> This testimony would have been very relevant to determining whether there was any physical danger to the children on the ranch in that the interviewer could have been questioned about exactly what this "punishment" entailed.

The state did not present any other evidence regarding the risk to the younger children, both male and female, on the YFZ Ranch.<sup>595</sup> Since younger children under the age of ten made up 71.5% (332 children) of the total number of children removed from the ranch,<sup>596</sup> the en masse hearing worked against the state's argument that all of the children were at risk. As it turned out, some of the supposed teenage children removed were actually adults, which meant teenagers ages fourteen to seventeen comprised less than 10% of the group, and pre-pubescent children ages ten to thirteen comprised 13.4% of the total.<sup>597</sup> It is unknown whether there was any additional evidence that the state could have presented to meet its burden under the Texas Family Code as to all of the children — with only one bite at the apple, Texas was unable to show abuse under its removal standard in effect at the time.

### 3. *Between the Cracks*

Justice Harriet O'Neill agreed with the Third Court of Appeals and the Texas Supreme Court that there was no imminent risk to the pre-pubescent girls and teenage boys on the YFZ Ranch.<sup>598</sup> Child removals under the Texas Family Code are allowed when there is an immediate danger to the child's physical health or safety or when the child has been a victim of neglect or sexual abuse.<sup>599</sup> Under the definition of neglect, a child could be removed from the YFZ Ranch if the child had been left "in a situation where [she] would be exposed to a substantial risk of physical or mental harm" and the parents did not make arrangements for the "necessary care" of the child, or

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593. *Id.*

594. *Id.*

595. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (mem.).

596. Tex. Dep't of Family & Protective Servs., May 2, 2008 Counts, Placement of Children from Eldorado, available at [http://www.dfps.state.tx.us/About/News/2008/2008-05-02\\_eldorado\\_counts.asp](http://www.dfps.state.tx.us/About/News/2008/2008-05-02_eldorado_counts.asp) (last visited Feb. 23, 2010).

597. *Id.*

598. *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 616 (Tex. 2008) (per curiam) (O'Neill, J., concurring in part, dissenting in part).

599. TEX. FAM. CODE ANN. §§ 262.102, .104, .107 (Vernon 2008).

demonstrated “an intent not to return.”<sup>600</sup> While this arguably could include a circumstance where parents agreed to the spiritual marriage of a child under the age of eighteen, the Texas Family Code specifically provides that “placing a child in or failing to remove the child from a situation in which the child would be exposed to a substantial risk of sexual conduct harmful to the child” is a neglectful act or omission.<sup>601</sup>

Texas stated that there were forty-three females between twelve and seventeen years old who were removed from the YFZ Ranch.<sup>602</sup> The evidence presented at the fourteen-day hearing showed that five young women who had given birth between thirteen and sixteen years old were now legally adults and not eligible for protection by DFPS.<sup>603</sup> It is uncertain whether these young women gave their correct date of birth, but the only real pattern that could be shown was that of teenage pregnancy.<sup>604</sup> Out of the twenty different DFPS investigation documents for these young women, only six admitted to being married.<sup>605</sup> Most of the women refused to give any information about fathers of their children.<sup>606</sup> This left a bit of a hole in the state’s argument which it attempted to fill by the testimony of Dr. Perry and even Dr. Walsh.<sup>607</sup> The fact of the matter remained that there were five minor females on the YFZ Ranch that had become pregnant between thirteen and seventeen years of age,<sup>608</sup> as well as other female

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600. *Id.* § 261.001(4)(A).

601. *Id.* § 261.001(4)(B)(iv).

602. ELDORADO INVESTIGATION, *supra* note 17, at 3.

603. *See* CPS Investigator’s Chart, *supra* note 20 (listing the birth dates of the girls and their ages at the time they gave birth). Alice Jessop, Louisa Jessop Steed, Pamela Jessop Jeffs, Marilyn Keate Barlow, and Sarah Cathleen Jessop Nielsen had given birth between the ages of fourteen and sixteen, and were eighteen years old or older at the time of the YFZ raid. *Id.*

604. *See* Petition for Writ of Mandamus, *supra* note 5, at 2-3 (describing the pattern of teenage marriage and pregnancy as well as the way the girls switched names and other tactics they used to mislead investigators).

605. CPS Investigation Summary: Rebecca Dutson, Petitioner’s Exhibit 7, 6 Reporter’s Record, *supra* note 15; CPS Investigation Summary: Ruleen J. Emak, Petitioner’s Exhibit 10, 6 Reporter’s Record, *supra* note 15; CPS Investigation Summary: Janet J. Jessop, Petitioner’s Exhibit 13, 6 Reporter’s Record, *supra* note 15; CPS Investigation Summary: Alice Jessop, Petitioner’s Exhibit 14, 6 Reporter’s Record, *supra* note 15; CPS Investigation Summary: Sarah E. Johnson, Petitioner’s Exhibit 17, 7 Reporter’s Record, *supra* note 15; CPS Investigation Summary: Marie Steed, Petitioner’s Exhibit 21, 7 Reporter’s Record, *supra* note 15. Sarah E. Johnson did not speak explicitly about being married, but her married status was inferred because she had a five-month-old daughter. CPS Investigation Summary: Sarah E. Johnson, Petitioner’s Exhibit 17, *supra*.

606. *See* sources cited *supra* note 605 (listing only five women who gave specific information about their husbands).

607. *See* 5 Reporter’s Record, *supra* note 15, at 73, 77, 169-71 (discussing the allegedly abusive practices of the FLDS Church).

608. *In re* Steed, No. 03-08-00325-CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (mem.).

teens of marriageable age that were at risk for sexual abuse.<sup>609</sup> These children fell between the cracks during the en masse hearing and the subsequent appellate court review. Had the state filed the cases individually rather than argue that all of the children were part of one household, these children may have been afforded the protection of the state and remained in foster care.

#### IV. THE DIFFERENCE MAKERS

##### A. Procedural Moves

DFPS has fourteen days from the time that they remove a child from his or her parents to the time of the full adversary hearing before a district court judge regarding whether the child should remain in the custody of the state.<sup>610</sup> In this short time frame, the DFPS investigator is charged with completing a large number of tasks, including interviewing the children, parents, relatives, caregivers, school or daycare personnel (if any), conducting background checks on prospective relative placements, conducting a home study on a prospective relative placement, gathering documentation of the abuse from doctors or other service providers, and videotaping or audiotaping the interviews with children unless good cause can be shown for not taping.<sup>611</sup> Due to the overwhelming number of parents and children in the YFZ case, DFPS could have requested a motion for continuance from the court in order to delay the occurrence of the fourteen-day temporary order hearing. DFPS may then have been able to sort out the various families, match children with mothers and fathers (if possible) so that they could correctly identify each set of parents, gather more evidence, or spend more time thoroughly interviewing the children and parents involved.

Section 262.103 of the Texas Family Code provides that “[a] temporary restraining order or attachment of the child issued under [Chapter 262] expires not later than [fourteen] days after the date it is issued unless [the order] is extended as provided by the Texas Rules of Civil Procedure.”<sup>612</sup> The Texas Rules of Civil Procedure allow for postponement or continuance,<sup>613</sup> which DFPS could have requested because of the fact that many of the DFPS case workers encountered

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609. *See id.* (noting that DFPS had not proved that the boys and pre-pubescent girls were in danger, but failing to address the status of the pubescent girls).

610. TEX. FAM. CODE ANN. § 262.201(a) (Vernon Supp. 2009).

611. *Id.* §§ 261.301(a)-.302, 262.114 (Vernon 2008 & Supp. 2009).

612. *Id.* § 262.103 (Vernon 2008).

613. TEX. R. CIV. PROC. 330 (Vernon 1977) (allowing the court to grant a continuance for cause).



uncooperative parents and children during the investigation. Although DFPS had obtained an order from the court which directed the leaders of the YFZ Ranch to allow DFPS on their property to interview the children,<sup>614</sup> DFPS could not easily match the children with their parents for various reasons, including the fact that some mothers did not claim their children and stated that they belonged to a sister-wife instead.<sup>615</sup> Some children gave DFPS different names on various occasions.<sup>616</sup> There were also parents who were not located on the YFZ Ranch and therefore may not have received notice of the lawsuit and fourteen-day hearing regarding their children.<sup>617</sup> Though the Texas Family Code does require that the hearing be held fourteen days after the removal of the children,<sup>618</sup> Texas courts have provided for some exceptions to this rule.<sup>619</sup> In light of the massive number of people involved, securing accurate names of the children, notice and service of process on all parents, and additional evidence should have qualified as good cause for a continuance of the first due process hearing. A continuance could have made a difference in the way the case was presented by DFPS as well as increased the amount of evidence presented.

### *B. Judicial Administrative Action*

The Texas Family Code provides that there be a presiding judge over each administrative judicial region, and that this presiding judge, “after conferring with the judges of courts in the region having family law jurisdiction and a child protection caseload, shall determine which courts require the appointment of a full-time or part-time associate judge to complete each case within the times specified in Chapters 262 and 263.”<sup>620</sup> Section 201.201 of the Texas Family Code sets forth

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614. Order for Investigation, *supra* note 79.

615. See Petition for Writ of Mandamus, *supra* note 5, at 2 (“One alleged mother identified four children as being hers and later indicated that they were not.”); see *supra* text accompanying notes 592-594 (describing sister-wives who claimed their younger sister-wife’s child in order to protect her).

616. Petition for Writ of Mandamus, *supra* note 5, at 2.

617. See Bishop’s Record, *supra* note 90 (listing mothers who lived outside the YFZ Ranch although their husbands and children remained on the ranch); see also TEX. FAM. CODE ANN. § 262.201(f) (Vernon Supp. 2009) (“When citation by publication is needed . . . because the location of the parent . . . is unknown, the court may render a temporary order without delay . . . without regard to whether notice of the citation by publication has been published.”).

618. TEX. FAM. CODE ANN. § 262.201(a) (Vernon Supp. 2009).

619. See, e.g., *In re J.M.C.*, 109 S.W.3d 591, 595 (Tex. App. 2003) (“If a full adversary hearing is not held within fourteen days, the remedy for both the parents and [DFPS] is to compel the trial court by mandamus to conduct the adversary hearing promptly.”).

620. § 201.201(a) (footnotes omitted).

parameters whereby the judges in the region of Eldorado, Texas, and other judges from neighboring regions could have come together to appoint part-time associate judges to assist the local district court judge in hearing the statutorily required fourteen-day hearing.<sup>621</sup> In fact, presiding judges of administrative judicial regions could limit the appointment of a full-time or part-time associate judge “to a specified period and . . . terminate [the] appointment at any time.”<sup>622</sup> Whereas the State Bar of Texas came together in an enormous fashion to recruit over 350 family law attorneys to represent the children of the YFZ Ranch, there was not as much rallying to assist the local judiciary in its role as fact finder in this extremely complex case that garnered worldwide media attention.<sup>623</sup>

Instead, Judge Barbara Walther, a seasoned District Court Judge experienced in the area of family law, was stuck with maneuvering the docket with three to four cases involving over 200 parents and 468 children.<sup>624</sup> The presiding judge of the administrative judicial region could have intervened to offset the complexity of the case and relieve the impossible task of providing a full adversarial hearing for each parent before one local district court judge.<sup>625</sup> Section 201.201 of the Texas Family Code provides that an associate judge “may be appointed to serve more than one court”<sup>626</sup> and can be hosted in a county determined by majority vote of the presiding judges of the administrative judicial region.<sup>627</sup> Associate judges from different counties experienced in handling child protection cases could have been appointed to serve in San Angelo to assist Judge Walther. Though the associate judge’s decision at the fourteen-day hearings could have been appealed by requesting a *de novo* hearing,<sup>628</sup> many of the cases, if filed individually by the state district attorney’s office, likely would

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621. *Id.* § 201.201(c).

622. *Id.* § 201.201(b).

623. John Council, *400 Lawyers Volunteer as Ad Litem in FLDS Removal Cases*, TEX. LAWYER, Apr. 15, 2008, <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=900005508748>; John Council, *Polygamist Compound Removal Cases to Test State Civil Justice System*, TEX. LAWYER, Apr. 10, 2008, <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=900005508464>.

624. ELDORADO INVESTIGATION, *supra* note 17, at 13; Council, *Polygamist Compound Removal*, *supra* note 623; Arthur Raymond, *Texas Judge Separates FLDS Custody Cases*, DESERET NEWS, July 26, 2008, *available at* 2008 WLNR 13956967; Texas Courts Online, *In the Interest of the Children at YFZ Ranch*, <http://www.courts.state.tx.us/yfzranch/home.asp> (last visited Feb. 24, 2010).

625. It appears Presiding Judge Dean Rucker did appoint Judge John J. Specia (retired) to help Judge Walther, but the extent of Judge Specia’s assistance is unclear. Texas Courts Online, *In the Interest of the Children at YFZ Ranch*, *supra* note 624.

626. § 201.201(c).

627. *Id.* § 201.203(a) (Vernon 2008).

628. *Id.* § 201.015(a) (Vernon Supp. 2009).

have been dismissed for lack of evidence. The state would have been forced to meet its burden for each child individually, and the cases where actual abuse and neglect occurred could have been appropriately addressed.

After the fourteen-day hearing, the judiciary in the region took advantage of Chapter 201 and appointed several associate judges to assist the district with the next set of court hearings.<sup>629</sup> At this point however, DFPS had already had the children removed and placed in foster care.<sup>630</sup> In late July 2008, Judge Walther ordered DFPS to break up the lawsuit and file the cases separately.<sup>631</sup> By the time the cases were being sorted out by the state, though, the Texas Supreme Court had already come down with its decision that the children should be returned to their families at the YFZ Ranch.<sup>632</sup> Judicial administrative action could have made a difference in the FLDS case which may have resulted in the avoidance of trauma to many of the pre-pubescent children who were placed into foster care.

### C. Media Neutrality

There have been hundreds of news articles regarding the Texas FLDS case since the removal of the children in April of 2008.<sup>633</sup> Anecdotally, a survey of thirty-one attorneys who represented children in the case found that several of them believed that the media helped shape the outcome of the case.<sup>634</sup> Initially when the case was first reported, the media was very pro-DFPS, and expressed horror at the teenage girls being forced into sex and plural marriages at very early ages and having children.<sup>635</sup> After the media coverage describing the children being forced apart from their mothers and the interviews

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629. Paul A. Anthony, *Extra Judges Mustered for Monumental Child Status Hearings in YFZ Ranch Custody Case*, GO SAN ANGELO STANDARD-TIMES, May 9, 2008, <http://www.gosanangelo.com/news/2008/may/09/extra-judges-mustered-for-monumental-child-in/>.

630. Derbyshire, *supra* note 33.

631. Raymond, *supra* note 624.

632. *Id.*

633. A Westlaw search on Feb. 24, 2010, for all news articles regarding the 2008 raid on the YFZ Ranch in Texas returned over 500 results.

634. Survey for Attorneys ad Litem[] in FLDS Case (Aug.-Oct. 2008) (on file with author). The anonymous Internet survey consisted of ten questions, including one that asked, "[h]ow much influence do you think the media made on the case?" and was conducted by the author via SurveyMonkey.com. The survey culled responses from thirty-one attorneys.

635. *E.g.*, Bryan Appleyard, *Church of the Child Brides*, SUNDAY TIMES (U.K.), June 22, 2008, at 48, 51; Albert Hawkins, *We Had Good Reason to Act: Texas Child Protection Officials Saw a Pervasive Pattern of Abuse*, USA TODAY, June 3, 2008, at 11A; Brooke Adams, *Texas Report: Child Abuse, Neglect Widespread in FLDS*, SALT LAKE TRIB., Dec.24, 2008, available at 2008 WLNR 24648645.

with the mothers, the country's cultural and moral compass changed and more critical coverage of the case ensued.<sup>636</sup> The mothers were the ones who were seen as victims, and quickly the language in the press changed from children rescued from abusers to children ripped apart from their families.<sup>637</sup> The interesting thing about the media's response is that both statements arguably were true.

News articles heavily focused on the subject of the custody battle between the state and the FLDS, and the subsequent criminal trials. There were a substantial number of articles that were critical of DFPS and played to the issue of fractured FLDS families.<sup>638</sup> Some attorneys complained that the state leaked information to the media, while others complained that the FLDS used the media to soften the public perception of polygamy and the women and children involved in the case.<sup>639</sup> It can definitely be argued by both sides that the media helped to disseminate information that would eventually sway the public in one direction or another. Though sympathy was drawn from the depiction of distraught mothers and children immediately after the raid, a much less forgiving tone has been adopted over the indictment of a dozen men on bigamy and sexual assault charges.<sup>640</sup> Whereas the civil suit against the parents arguably failed to protect the children most at risk, the criminal suits will likely succeed in prosecuting the perpetrators of crimes against children.<sup>641</sup> The question becomes whether the mothers will continue to advocate for and raise the children within the polygamous lifestyle, despite the fact that some of the men will be convicted and sentenced to terms in prison.

With the advent of the Internet, blogs, and invited commentary from the public by the media, it is questionable whether the media

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636. See, e.g., Roberts, *supra* note 1, at 7C (describing the state's accusations against the YFZ Ranch inhabitants as "damning," and noting that the breadth of the state's removal was beginning to raise constitutional questions and concerns).

637. *Id.*; see also Ty Meighan, Editorial, *Polygamists in Texas Try to Spin it Their Way*, AUGUSTA CHRON., Apr. 23, 2008, at A09 (noting that after FLDS mothers appeared on national television, "some people . . . blasted the state's actions" and "complained about the 'horrible' assault by 'San Angelo authorities'").

638. *Cheers and Jeers*, FORT WORTH STAR-TELEGRAM, May 31, 2008, at B15; Dennis Romboy, *Lawyer is Keen on Justice for FLDS Clients*, DESERET NEWS, June 9, 2008, at B01; Jan Jarboe Russell, *Polygamy Case Drives Home Need to Reinvent Child Welfare System*, SAN ANTONIO EXPRESS-NEWS, June 22, 2008, at 09B.

639. Survey for Attorneys, *supra* note 634.

640. See Gary Martin, *Top-Ranking Senator Files Legislation to Aid Victims of Polygamist Sects*, HOUSTON CHRON., July 25, 2008, at A8; Winslow, *supra* note 442, at A06 (discussing the indictments of FLDS men).

641. See Choate, *supra* note 374 (reporting on the guilty verdict in the case against Raymond Merrill Jessop, and noting that the evidence seized during the raid was instrumental in the prosecution's case); Dave Hawkins, *Jeffs Awaits Arizona Trial*, CORPUS CHRISTI CALLER TIMES, Jan. 2, 2010, at B10 (reporting that Allen Eugene Keate was the second member of the YFZ Ranch to be convicted and sentenced for sexual assault of a child). Mr. Keate was sentenced on Dec. 18, 2008, to ten years in prison. *Id.*

just reports the story or plays to the interest of its viewers and readers.<sup>642</sup> It remains to be seen whether the media will be critical of DFPS actions in the FLDS community in the future. It is quite possible that the criminal cases may yield more evidence that might be useful in subsequent civil child protection cases. If new evidence is located, DFPS may be able to file individual suits against parents who have been abusive or neglectful, but this time the media, as well as the evidence, will be on DFPS's side.

#### *D. Full Inclusion of the Children*

Though child protection cases are primarily about the safety and well-being of the children who are the subject of the suit, it is rare to see a child in court at a fourteen-day hearing or at any other hearing for that matter.<sup>643</sup> The extent to which children are regularly included in the court's supervision of a case is through their GAL and their attorney.<sup>644</sup> Appointment of a GAL and attorney is mandatory pursuant to the Texas Family Code.<sup>645</sup> The GAL and the attorney for the child can be the same person — one attorney is appointed in a dual capacity.<sup>646</sup> The FLDS case appeared to start out with the assumption that these two roles would conflict with one another such that each child needed a different person as GAL and an attorney.<sup>647</sup> CASA were appointed as the GALs and over 350 attorneys from around the state of Texas were appointed as attorneys for the children.<sup>648</sup>

GALs are charged with providing the court with recommendations relating to the best interests of the child and the bases for the recommendations.<sup>649</sup> The attorneys for children are to represent the

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642. See Committee of Concerned Journalists, *Can Journalism Be Impartial? The Media's Relationship to Fact, Fairness and Gossip* (Dec. 4, 1997), <http://www.concernedjournalists.org/node/297> (discussing the results of a journalists' forum on topics such as objectivity and bias in the news media).

643. Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOURO L. REV.* 745, 776 (2006).

644. See *TEX. FAM. CODE ANN.* §§ 107.011(a), .012 (Vernon 2008) (making appointment of a GAL and an AAL mandatory in order to represent the best interests of the child).

645. *Id.*

646. *Id.* §§ 107.011(b)(3), .0125.

647. See *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008) (per curiam) ("The hearing was attended by scores of attorneys for the parties, attorneys ad litem, guardians ad litem, Texas Court Appointed Special Advocates (CASA), and many others."); Amanda Bronstad, *Raid on Sect Brings an Army of Attorneys*, *NAT'L L.J.*, May 5, 2008, at 4 (describing the number of pro-bono attorneys ad litem working on the FLDS case).

648. *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d at 615; Bronstad, *supra* note 647, at 4.

649. § 107.002.

child's expressed objectives or desires in court, and the children are owed the same duties that attorneys are obligated to give to adults, with the only caveat being the competence of the child to direct the representation of the attorney.<sup>650</sup> The Texas Family Code provides that in the situation where the child is not competent, the attorney can substitute his or her judgment for the child.<sup>651</sup> This issue of competence is typically correlated with age, although this characteristic of a child is not always an accurate way to determine competence.<sup>652</sup> In the case of the FLDS, where Dr. Perry had already testified as to the children's ability to make decisions and the unavailability of real choices in their lives,<sup>653</sup> it may have been helpful for the judge to have heard individualized testimony about the competence and capacity of a select few of the teenage girls, with assistance from their GALs and attorneys ad litem.

Interviews with children who may have been abused and neglected are difficult and require training, which is why many are handled by child advocacy centers where specially trained forensic interviewers conduct them.<sup>654</sup> San Angelo, Texas did have a child advocacy center for children to be interviewed, but unfortunately the children were not transported there for interviews.<sup>655</sup>

[T]he severest trauma of child sexual abuse is not the physical act, but rather the emotional repercussions of the abuse . . . .  
The child is not protected from those aspects of the abuse merely

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650. *Id.* §§ 107.003-.004; Haralambie, *supra* note 522, at 286.

651. § 107.008(b). "An attorney ad litem . . . who determines that the child cannot meaningfully formulate [his or her] objectives of representation may present to the court a position that the attorney determines will serve the best interests of the child." *Id.* If there is a separate GAL appointed to the child, the AAL has to consult with the GAL regarding his or her opinion or recommendation for the child, but is not bound by it. *Id.* § 107.008(c)(1)-(2).

652. See Haralambie, *supra* note 522, at 333 (noting that in some states competency is tied to age, but pointing out that it can be determined in other ways).

653. 5 Reporter's Record, *supra* note 15, at 81-82.

654. Marcia Sue Cohen-Liebman, *Art Therapy, in* RECOGNITION OF CHILD ABUSE FOR THE MANDATED REPORTER, *supra* note 157, at 227, 238-29 (noting that "[t]he central component of a child abuse investigation is an interview of the alleged victim by a specialized and highly skilled child interview specialist or law enforcement agent," and that the Children's Advocacy Center is a nationwide model used to conduct multidisciplinary interviews that promote interagency collaboration and minimize secondary trauma associated with the investigative process); see also Theodore P. Cross et al., *Evaluating Children's Advocacy Centers' Response to Child Sexual Abuse*, OJJDP JUV. JUST. BULL., Aug. 2008, at 1-4, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/218530.pdf> (noting the significant role that children's advocacy centers play in response to child sexual abuse because of the multidisciplinary investigation team, coordinated forensic interviews, and child-friendly environment).

655. See 4 Reporter's Record, *supra* note 15, at 160-62 (illustrating the fact that the investigators stayed on the ranch to interview the children).

because a third party is able to ensure that the physical act is not repeated. A child who maintains contact with the alleged abuser during the evaluation process may *feel* unprotected and may be exposed to very subtle threats and manipulations that impair the child's ability and willingness to disclose the abuse to the evaluator.<sup>656</sup>

It is quite possible that being interviewed on the YFZ Ranch was not that conducive to determining how some of the teenage girls truly felt about their situation.<sup>657</sup> Giving the girls the opportunity to speak to the judge who would decide their fate may have been just the impetus needed for a few to speak out on what was an unbearable circumstance, similar to what Elissa Wall described in her book.<sup>658</sup>

On the other hand, it cannot be assumed that the teenage girls who were at risk for underage spiritual marriages would have expressed a desire to leave their homes just because they had the opportunity to speak directly to the judge. On the contrary, some children who have been abused and removed from their homes express the desire to return home.<sup>659</sup> This response illustrates why the role of the GAL is so important. In the FLDS case, one attorney experienced the conflict of representing a seventeen-year-old female who accused her attorney of not representing her interests.<sup>660</sup> The child, who is the daughter of Warren Jeffs and alleged wife of Raymond Jessop, was determined by the attorney to be incompetent to direct her own representation.<sup>661</sup> Judge Walther ended up maintaining the original attorney on the case rather than replacing her with another attorney who would pursue the expressed wish of the child, which was to return home to the ranch.<sup>662</sup> Giving children a voice obviously does not mean that a judge will acquiesce to their wishes, but it does allow the judge

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656. Haralambie, *supra* note 522, at 364.

657. 5 Reporter's Record, *supra* note 15, at 70-71 (testifying that the children would likely feel uncomfortable disclosing intimate, potentially upsetting information).

658. See WALL WITH PULITZ, *supra* note 524, at 347-51 (recounting Wall's interactions with attorneys and investigators, which led her to press charges against Warren Jeffs).

659. Douglas J. Besharov, *Introduction to HOLLIDA WAKEFIELD & RALPH UNDERWAGER, ACCUSATIONS OF CHILD SEXUAL ABUSE* 3, 13 (1988); see also Robin Fretwell Wilson, *Sexually Predatory Parents and the Children in Their Care: Remove the Threat, Not the Child*, in *HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE* 39, at 51-52 (Nancy E. Dowd et al. eds., 2006) (noting the psychological damage experienced by sexually abused children removed from their home due to separation from their non-abusive mother, foster care drift, and the significant risk of sexual victimization in foster care).

660. Ben Winslow, *FLDS Teen Seeking a New Lawyer*, DESERET NEWS, Sept. 3, 2008, at A09.

661. *Id.*

662. Brooke Adams, *New Move to Unseat Attorney Representing Polygamous Sect Leader's Daughter*, SALT LAKE TRIB., Feb. 5, 2009, available at 2009 WLNR 2289916.

to consider their viewpoint and at times observe how they developed their opinion on a particular matter.

In the YFZ case, even if the children were unwilling to testify or be interviewed in chambers with the judge, the AALs were cut short during the due process hearing itself.<sup>663</sup> Many of the attorneys for the children lodged objections at the beginning and end of the fourteen-day hearing regarding denial of due process and equal protection for the children under the Constitution.<sup>664</sup> They also objected to the format of the hearing under the Texas Family Code, arguing that the code entitled each individual child to a full adversarial hearing.<sup>665</sup> Full inclusion of the AALs could have made a difference in the outcome of the case if their motions, questions, and arguments had been individually heard.

## CONCLUSION

### *A. Legislative Changes*

According to the Texas Constitution, the Texas Legislature must meet every two years.<sup>666</sup> The potential, therefore, exists that the Texas Family Code may undergo significant changes on a biennial basis. During the 2009 legislative session, there were at least two bills that attempted to address some of the problems that existed during the FLDS case. Senate Bill 1440 proposed a civil warrant option which would allow DFPS to proceed with an investigation of abuse under section 261.<sup>667</sup> This bill basically set forth a structured method for DFPS to obtain information during an investigation and an avenue to obtain access to a child when parents do not consent to making the child available for an interview.<sup>668</sup> The current law provides that a family law court can grant orders in aid of investigation for good cause without a hearing if a person interferes with an investigation of a report of child abuse or neglect.<sup>669</sup> The new law would have allowed the state to seek a court order in aid of an investigation without having to give notice to the parents or file a suit to obtain conservatorship.<sup>670</sup>

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663. See, e.g., 4 Reporter's Record, *supra* note 15, at 12-15 (objecting to the format of the hearing but having the objection, and future objections along the same lines, overruled).

664. *Id.* at 12-16.

665. *Id.* at 12-13.

666. TEX. CONST. Art. III, § 5 (amended 1999).

667. S.B. 1440, 81st Leg., Reg. Sess. (Tex. 2009).

668. *Id.* §§ 3(g), 4(b).

669. TEX. FAM. CODE ANN. § 261.303(a)-(b) (Vernon 2008). There is no definition in the statute of what constitutes "good cause," or an indication of how to demonstrate good cause. *Id.*

670. S.B. 1440 § 3(g).



One of the provisions of the bill allowed the state to obtain an order from the court for medical, psychological, or psychiatric records of a child in a situation when the parents do not consent.<sup>671</sup> In addition to obtaining health records, this section includes the department's request for a child to submit to medical, psychological, or psychiatric examination under court order.<sup>672</sup>

Senate Bill 1440 created a legal standard for proving to the court that aid was necessary in an investigation, and deleted the good cause clause in the current statute. In order to obtain an order in aid of an investigation or for health records of a child, DFPS would have to execute an affidavit with

facts sufficient to lead a person of ordinary prudence and caution to believe that:

- (1) based on the information available, a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect;
- (2) the requested order is necessary to aid in the investigation; and
- (3) there is a fair probability that allegations of abuse or neglect will be sustained if the order is issued and executed.<sup>673</sup>

The language that is significant is the inclusion of mental health in the investigation of abuse or neglect, especially in light of the fact that the removal standard only refers to the physical health and safety of children. This addition shows recognition of the importance of considering psychological maltreatment at the very beginning of the case, and may eventually signal a change in the removal standard in Texas to include mental health.

Senate Bill 1440 also provided that the application and affidavits utilized to acquire court orders in aid of an investigation could be filed any day, including Sunday.<sup>674</sup> "A court may designate an associate judge to render this order," and the order would be immediately effective without ratification of the designating judge.<sup>675</sup> A court could render the order *ex parte* or require notice and a hearing before issuance of an order in aid of an investigation.<sup>676</sup> In order to require notice and a hearing, the court would have to determine that: "(1) there is no immediate risk to the safety of the child; and (2) notice and a hearing are required to determine whether the requested access to persons, records, or places or transport of the child is necessary to aid

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671. *Id.* §§ 4(c), (c-1).

672. *Id.* § 4(c).

673. *Id.* § 4(c-2)(1)-(3).

674. *Id.* § 4(c-3).

675. *Id.* § 4(f).

676. *Id.* § 4(l).

in the investigation.”<sup>677</sup> Finally, if the court denied the request for an ex parte order under this section, it would not act as a bar to the issuance of a criminal warrant.<sup>678</sup>

This bill passed through the legislature but was vetoed by Governor Rick Perry because of protests from parents regarding the state’s ability to access their children with no notice and no hearing upon suspicion of abuse or neglect.<sup>679</sup> It was dubbed the “Take Away Your Child Act” and was stated to be an overreaction to the raid that took place at the YFZ Ranch.<sup>680</sup> Many parents argued that their Fourth Amendment rights were stripped away by this bill, and that this bill completely undermined parental rights.<sup>681</sup> Governor Perry did not reference the FLDS case in his official statement as to why he vetoed the bill,<sup>682</sup> but he did reference *Gates v. Texas Department of Protective and Regulatory Services*.<sup>683</sup> He commented that the *Gates* case created some uncertainty regarding how state caseworkers could transport children from their homes to obtain interviews in order to complete investigations.<sup>684</sup> He further stated that Senate Bill 1440 was the state’s attempt to clarify this process for caseworkers, but that it “overreache[d] and may not give due consideration to the Fourth Amendment rights of a parent or guardian.”<sup>685</sup>

Another proposed bill contained language that addressed several problems that surfaced during the FLDS case. House Bill 4255 provides that the court may find that even though DFPS made no efforts to prevent or eliminate the need to remove a child, “the court may find that based on the circumstances, no reasonable efforts would prevent or eliminate the need to remove a child.”<sup>686</sup> Since the appellate court found that the state did not show reasonable efforts,<sup>687</sup> it

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677. *Id.* § 4(D)(1)-(2).

678. *Id.* § 4(m).

679. Senate Journal, 81<sup>st</sup> Leg., Reg. Sess., at 5164-65 (Tex. 2009) (Proclamation by the Governor of the State of Texas) [hereinafter Veto Proclamation].

680. Sarah Foster, NewsWithViews.com, Coalition Asks Texas Governor to Veto “Take Away Your Child Act” (June 18, 2009), <http://www.newswithviews.com/NWV-News/news149.htm>.

681. *Id.*

682. Veto Proclamation, *supra* note 679, at 5164-65.

683. *Gates v. Tex. Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 423 (5th Cir. 2008) (holding that exigent circumstances did not exist to justify initial warrantless entry into home by social workers from DFPS). The court ultimately concluded that exigent circumstances justified the removal of the children from the home on the date of entry, but emphasized that the facts of the latter exigent circumstances analysis were not revealed until after the children were interviewed in the home. *Id.* at 430 n.17.

684. Veto Proclamation, *supra* note 679, at 5164.

685. *Id.*

686. H.B. 4255, § 6(b)-(c), 81st Leg., Reg. Sess. (Tex. 2009).

687. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*4 (Tex. App. May 22, 2008) (mem.).

would be helpful for the state if it could show that under certain circumstances, this reasonable effort would not have to be made. House Bill 4255 also seeks to modify the Texas Family Code such that a court may only issue an order to remove the alleged perpetrator from the home, rather than the child, if all available facts indicate that the remaining parent or guardian is going to abide by the terms of the temporary restraining order.<sup>688</sup> Since the Texas Supreme Court determined that the district court had broad authority to protect children short of separating them from their parents, including the option to remove the alleged perpetrator,<sup>689</sup> the author of the bill wanted to ensure the safety of children if both parents were aware of the abuse and took no reasonable steps to prevent it.<sup>690</sup> House Bill 4255 did not reach the legislature for a vote at the end of the 2009 legislative session,<sup>691</sup> but is going through various stages for submission in the 2011 legislative session. The Texas Legislature did not consider amending some of its definitions, such as the term “safety” within the context of chapter 261 and 262 (so as to include a mentally secure home environment), or include the term “mental and emotional danger” within chapter 262 of the Texas Family Code.<sup>692</sup>

### *B. Switching Gears*

After all of the children were returned, the Texas Attorney General’s Office indicted several men on the YFZ Ranch, as well as Warren Jeffs, who was jailed in Arizona at the time.<sup>693</sup> When dealing with child sexual abuse, criminal law can sometimes provide more protection for children because of their age.<sup>694</sup> “A child’s age, dependent

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688. H.B. 4255 § 7(b)(4).

689. *In re* Tex. Dep’t of Family & Protective Servs., 255 S.W.3d 613, 615 (Tex. 2008) (per curiam).

690. Press Release, Harvey Hilderbran, Texas House of Representatives, Rep. Hilderbran Bill Seeks Strong Protection for Victims of Child Abuse (Mar. 18, 2009), available at <http://www.house.state.tx.us/news/release.php?id=2610>.

691. See, e.g., Texas Legislature Online, Legislative Session 81(R) History, <http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=81R&Bill=HB4255&Sort=A> (last visited Mar. 4, 2010) (noting that the bill was placed on the general state calendar in May 2009).

692. Compare TEX. FAM. CODE ANN. §§ 261.001, 262.201 (Vernon 2008 & Supp. 2009) with H.B. 4255, 81st Leg., Reg. Sess. (Tex. 2009) (failing to make any changes regarding the child’s safety or any addition of the terms mental or emotional danger).

693. News Release, Greg Abbott, *supra* note 51; see also ELDORADO INVESTIGATION, *supra* note 17, at 4 (stating that all of the children were returned by June 4, 2008).

694. See, e.g., *New York v. Ferber*, 458 U.S. 747, 757 (1982) (noting that the Court has “sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights,” and holding that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance”); *Bellotti v. Baird*, 443 U.S.

status, and inability to consent make nonviolent child sexual abuse both criminal and wrong, even when the child does not appear to be physically or emotionally damaged by the encounter.”<sup>695</sup> “[I]nstitutionalized patriarchy,” however, caused centuries of silence and shame about child sexual abuse.<sup>696</sup> The early marriages within the FLDS are promoted within the religion as a badge of honor and serve to legitimate, at least within their culture, the sexual activity between adult men and minor females.<sup>697</sup> Professor and scholar Martin Guggenheim notes in his recent article that the child welfare system is ill-equipped to deal with polygamy cases, and the criminal justice system is where this type of case is most appropriately handled.<sup>698</sup>

For a criminal prosecution to occur, a child victim would have to testify against her spiritual husband. The Supreme Court in *Crawford v. Washington* established that a person accused of a crime has the right under the Fourth Amendment to confront and cross-examine his accuser, regardless of the age of the victim.<sup>699</sup> The only way that a child would be absolved of testifying in a criminal court proceeding is if the child was unavailable and the defendant had the prior opportunity to cross-examine the witness.<sup>700</sup> Although *Crawford* does not apply in civil court, it does impact the prosecution of criminal child abuse cases because child hearsay statements are no longer generally admissible when the child is not available to testify.<sup>701</sup> It

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622, 634 (1979) (noting that the Court has acknowledged “three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults,” including “the peculiar vulnerability of children [and] their inability to make critical decisions in an informed, mature manner”); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) (“*Iprens patriae* is inherent in the supreme power of every State . . . for the prevention of injury to those who cannot protect themselves.”).

695. Erna Olafson, *Child Sexual Abuse, in* SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN 151, 152 (B.J. Cling ed., 2004) (citation omitted).

696. *Id.*

697. See *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (mem.) (highlighting DFPS’s belief that the ranch inhabitants have a “pervasive belief system” encouraging marital relationships between older men and minor girls).

698. Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759, 762, 812 (2009).

699. See *Crawford v. Washington*, 541 U.S. 36, 59, 68 (2004) (stating that under the Sixth Amendment, testimonial statements may only be submitted in lieu of the witness’s presence in the courtroom when the witness is unavailable and the accused has had an opportunity to cross examine the witness prior to trial).

700. *Id.* at 68.

701. See, e.g., Laurie E. Martin, Note, *Child Abuse Witness Protections Confront Crawford v. Washington*, 39 IND. L. REV. 113, 113 (2005) (noting that the Court’s decision in *Crawford* invites “questions about the validity of many protective statutes and child hearsay exceptions under the Confrontation Clause” by “establish[ing] that testimonial, out-of-court statements by witnesses not appearing at trial are inadmissible unless the witness is unavailable, . . . and the defendant had a prior opportunity to cross-examine

is unlikely that the state of Texas will attempt to use any spiritual wives who are unwilling to testify in the criminal cases. Furthermore, if the DNA testing is sufficient to show parentage by adult men of children borne to minors, there may be no need for testimony of the alleged victims.<sup>702</sup>

The impact of constitutional law on criminal cases involving religion is that it is fairly clear that the FLDS men will not be able to use the First Amendment as a defense in any of their pending criminal suits. In *State v. Hardesty*, the Court of Appeals of Arizona held that Arizona laws prohibiting the possession of marijuana are neutral laws of general applicability, and thus “the Free Exercise Clause of the First Amendment does not afford [a d]efendant an exemption from these laws, even if they have the incidental effect of burdening his religious practices.”<sup>703</sup> Though the indicted FLDS men might argue that the state bigamy statutes are targeted against fundamentalist polygamous groups, similar to the statute against animal sacrifices in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>704</sup> strict scrutiny review of bigamy laws will not be appropriate. State laws against bigamy are neutral laws of general applicability; thus no heightened constitutional protection will be afforded for any man charged with bigamy or sexual assault of a minor.<sup>705</sup>

### C. *The Big Picture*

While it is hard to fathom over 400 children being removed from their parents at the same time, the reality is that these children represented a less than three percent increase in the number of youths in Texas foster care.<sup>706</sup> At the time of this child removal, there were approximately 17,500 children in foster care.<sup>707</sup> The latter number

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the witness”). *But see* TEX. FAM. CODE ANN. §§ 104.002-.006 (Vernon 2008) (listing various hearsay exceptions to the rule that child witnesses in child abuses cases must be present to testify).

702. *See* Choate, *supra* note 368 (discussing the importance of DNA testing in the Raymond Merrill Jessop criminal case).

703. *State v. Hardesty*, 204 P.3d 407, 413 (Ariz. Ct. App. 2008).

704. 508 U.S. 520, 531, 545-46 (1993) (holding that a law targeting certain religious conduct was subject to strict scrutiny because it embodied an attempt to prohibit a specific practice of a particular religion and therefore was not a law of general applicability).

705. *See, e.g., State v. Holm*, 137 P.3d 726, 742 (Utah 2006) (finding that Utah’s bigamy law is a law of general applicability).

706. Letter from Carey D. Cockerell, Commissioner, Tex. Dep’t of Family & Protective Servs., to The Honorable Jane Nelson, Chairman of the Health & Human Servs. Comm. (Apr. 30, 2008), available at [http://www.dfps.state.tx.us/documents/about/pdf/2008-04-30\\_Nelson.pdf](http://www.dfps.state.tx.us/documents/about/pdf/2008-04-30_Nelson.pdf).

707. *Id.*

should be the more alarming of the two, but the public is typically not made aware of how many children are caught up in the child welfare system.<sup>708</sup> Another alarming fact of which most of the nation is unaware is that the majority of children in foster care are African-Americans.<sup>709</sup> One of the key difference-makers in the YFZ case was the media.<sup>710</sup> It was not lost on many within the child welfare system that more attention and deference were given to these white families and mothers than to the collective thousands of African-American children disproportionately affected in child protection cases.<sup>711</sup>

The State of Texas raid of the YFZ Ranch played out in similar fashion as the Short Creek Raid of 1953 with many of the same mistakes made by state authorities and arguably similar ultimate results. Though Texas did not enter the YFZ Ranch with the express intent of arresting all the adults for the crime of polygamy as Arizona did in 1953, both states did focus on child sexual abuse. The dominant theme of both legal cases centered around the religious beliefs of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, and the appeals revolved around whether the state's proof of actual harm to the children was sufficient, as well as the underlying legal issue: whether the state's action infringed on the group's First Amendment rights.

It is unlikely that another raid will occur in Texas or any other state any time soon. If history serves as an indicator, the FLDS will learn from its mistakes and retreat even further to isolated areas in the United States, perhaps in states where law enforcement does not care to enforce bigamy statutes.<sup>712</sup> The health and safety of the FLDS children are still of concern to many who saw the broad brush of

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708. See ABC News/Time Poll: Foster Care, *Broad Support for Reform in U.S. Foster Care System*, ABC NEWS, May 30, 2006, at 5, available at <http://abcnews.go.com/images/Politics/1011a1FosterCare.pdf> (noting that in answer to the question of how much attention the respondents have paid to the foster care system, 31% said "only some," 39% said "hardly any," and 4% said "none").

709. See *Report of the Race, Class, Ethnicity, and Gender Working Group*, 70 FORDHAM L. REV. 411, 411-12, 419 (2001) (discussing the fact that although 55% of children placed in foster care in a short period were black, and 70.4% of all children in foster care were black, there is a lack of public acknowledgment of the issue, and recommending that the public should be educated about the racial imbalance).

710. See *supra* text accompanying notes 633-642 (discussing the media's role in the outcome of the case).

711. See Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POLY 109, 110-12 (2008) (documenting the overrepresentation of African-American children in foster care in the United States and proposing a new federal law to address the issue of disparate impact).

712. See Driggs, *supra* note 268, at 57-60 (recounting the increasing pressure from the Mormon Church as well as state authorities, which was behind the polygamists' move to Short Creek).

the court seemingly sweep some abuses under the rug. Perhaps the final lesson will be learned by state agencies that consider the various types of harms inflicted upon children each day and make decisions about whether to separate families or work to keep them together. State court systems are left with unresolved questions regarding how to weigh physical and mental harm and danger to a child against a parent's religious rights and the state's power to intervene in private family matters in order to protect a child. The "Texas Mis-Step" does not have to be a failure if the child welfare system improves as a result. The question remains: will the judiciary, lawyers, and state agencies address the necessary critical issues to ensure the safety of children who are now and will in the future reside in FLDS communities?