GRANDPARENT AND FOSTER PARENT INTERVENTIONS IN DFPS CASES

1) Review Texas Family Code and Texas Rules of Civil Procedure relating to standing and best interest
2) Evaluate case, law, timing, opposition
3) Carefully Prepare Pleadings with care- Plead and serve all parties. PMC with or without termination? PMC to CPS vs. PMC direct to intervenor
   a) Consider adoption subsidy
   b) Evaluate the advantage of not having to continue to deal with CPS
4) Motion to Strike and Response
5) Child Advocates?
6) PPT Meetings and relationships with caseworker, other attorneys, parents and Ad Litem
7) Discovery
   a) Written
   b) Depositions
8) Best Interest test.
9) Mediation?
10) Sample Pleadings, motions

NO. 0000-00000J

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
JOE SMITH AND	§	**315TH JUDICIAL DISTRICT**
JACK SMITH	§	
	§	
CHILDREN	§	**HARRIS COUNTY, TEXAS**

PETITION IN INTERVENTION OF GRANDPARENTS IN SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP FOR CONSERVATORSHIP AND/OR TERMINATION OF PARENTAL RIGHTS

This Petition in Intervention is brought by JOHN DOE and JANE DOE. In support, Intervenors show:

1. Parties

Intervenors are the maternal grandfather and step-grandmother of the children the subject of this suit. Intervenors have standing to intervene in this proceeding as more fully detailed below and in § 102.003 General Standing to File Suit Texas Family Code attached hereto and labeled Exhibit A.

2. Jurisdiction

This Court has acquired and retains continuing, exclusive jurisdiction of this suit and of the children the subject of this suit as a result of prior proceedings.

3. Children

The following children are the subject of this suit:

Name: JOE SMITH
Sex: Male
Birth date: 01/01/02
County of residence: Harris

Name: JACK SMITH
Sex: Male

Birth date: 01/01/01
County of residence: Harris

4. Mother

The mother of the children the subject of this suit is LARA SMITH.

5. Father

The alleged biological or presumed father of the children the subject of this suit is JEFF SMITH. In the event JEFF SMITH is not the father of one or both of the children, the alleged biological father of the children is unknown.

6. Court-Ordered Relationships

Persons having a court-ordered relationship with the children the subject of this suit are **Texas Department of Family and Protective Regulatory Services** who has temporary managing conservatorship of the children. Process may be served through their attorney of record, **George Washington**, 100 Washington Drive, Suite 1, Houston, Texas 77002. Process may be served on the **Attorney Ad Litem** for the children through their attorney **John Adams**, 200 Fannin, Suite 2, Houston, Texas 77002. The mother of the children the subject of this suit is Lara Smith who can be served through her attorney of record **Thomas Jefferson**, 300 Jefferson Rd. Suite 3 Houston, Texas 77002. The alleged biological and or presumed father of the children the subject of this suit is Jeff Smith who can be served through his attorney of record **James Madison**, 400 Madison Rd, Suite 4, Houston, Texas 77002.

The unknown father of the children the subject of this suit may be served through his attorney of record, **James Monroe**, 500 Monroe St. Suite 500, Houston, Texas 77002

7. Property

There has been no change of consequence in the status of the property of the children the subject of this suit since the prior order was rendered.

8. Standing

The intervenors have standing to intervene in this matter because they are maternal grandfather and step-grandmother of the children and have substantial past contact with the children during the one (1) year period preceding the filing of the petition. They have further standing to intervene because the children have been placed in their home by the Texas Department of Protective and Regulatory Services since May 29, 2008. There is satisfactory proof to the court that appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair the children's physical health or emotional development. There has been a finding of abuse and neglect. The children have resided in the home of the intervenors grandfather and step-grandmother numerous times prior to the Texas Department of Family and Protective taking custody.

9. Conservatorship

It is in the best interest of the children that the Texas Department of Family and Protective Regulatory Services or intervenors JOHN DOE and JANE DOE be appointed sole managing conservators of the children. Further, appointment of the parents as joint managing conservators would not be in the best interest of the children because the appointment would significantly impair the children's physical health or emotional development. Intervenors request that the court consider section § 263.307 "Factors in

Determining Best Interest of Child" when making a decision concerning the children (See Exhibit B).

10. Involuntary Termination of Parent Child Relationships

Intervenor believes that the rights of all parents should be terminated. There is clear and convincing evidence that the parent has:

(A) voluntarily left the children alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the children alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;

(C) voluntarily left the children alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

(D) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children;

(E) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

(F) failed to support the children in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;

(G) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;

(H) constructively abandoned the children who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services or an authorized agency for not less than six months, and:

(i) the department or authorized agency has made reasonable efforts to return the children to the parent;

(ii) the parent has not regularly visited or maintained significant contact with the children; and

(iii) the parent has demonstrated an inability to provide the children with a safe environment;

(I) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the children who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the children's removal from the parent under Chapter 262 for the abuse or neglect of the children;

(J) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the children, and:

(i) failed to complete a court-ordered substance abuse treatment program; or

(ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

(K) knowingly engaged in criminal conduct that has resulted in the parent's:

(i) conviction of an offense; and

(ii) confinement or imprisonment and inability to care for the children for not less than two years from the date of filing the petition; and

(2) that termination is in the best interest of the children.

11. Support

LARA SMITH, mother and JEFF SMITH, presumed alleged father are obligated to support the children and should be ordered by the Court to make payments for the support of the children and provide medical child support in the manner specified by the Court.

12. Request for Temporary Orders

Intervenors request the Court, after notice and hearing, to make temporary orders for the safety and welfare of the children, including but not limited to the following:

Appointing Intervenors temporary sole managing conservators.

Ordering Respondents to pay child support while this case is pending.

Ordering the preparation of a social study into the circumstances and condition of the children and of the home of the grandparents requesting managing conservatorship and or possession of the children or in the alternative termination of the parental rights of all parents.

13. Prayer

Intervenors pray for relief as requested in this petition.

Intervenors pray for general relief.

Respectfully submitted

Elizondo & Elizondo
909 Fannin, Suite 3050
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By:________________________________

Terry Lea Elizondo
State Bar No. 06521600
Attorney for Intervenors

Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on January 6, 2009.

____

Terry Lea Elizondo
Attorney for Intervenors

CAUSE NO. 0000-00000J

IN THE INTEREST OF	§	IN THE DISTRICT COURT
	§	
JOE SMITH	§	HARRIS COUNTY, TEXAS
	§	
A CHILD	§	315TH JUDICIAL DISTRICT

INTERVENORS' RESPONSE TO RESPONDENT'S MOTION TO STRIKE PETITION IN INTERVENTION FOR TERMINATION OF PARENTAL RIGHTS AND ADOPTION OF CHILD

Intervenors, **John Doe and Jane Doe**, ask the Court to deny Respondents', **Lara Smith and the Texas Department of Protective and Regulatory Services**, motions to strike intervenors' petition in intervention for termination of parental rights and adoption of child.

INTRODUCTION

The Texas Department of Protective and Regulatory Services ("TDPRS") instigated this litigation with the filing of an *original suit* affecting the parent-child relationship on January 31, 2006. The suit's purpose, filed against **Lara Smith**, was for the protection of her child, for conservatorship, and for termination of the parent-child relationship. At the time the suit affecting the parent-child relationship was filed, TDPRS had general standing to file an *original suit* affecting the parent-child relationship. *See* TEX. FAM. CODE ANN. § 102.003(a)(2) (Vernon Supp. 2006).

The child, **Joe Smith**, has consistently resided with **John Doe and Jane Doe** since August 16, 2006.

ARGUMENTS AND AUTHORITIES

JOHN DOE AND JANE DOE HAVE STANDING TO INTERVENE IN THE EXISTING LAWSUIT, FILED BY TDPRS.

Contrary to Respondent's belief, in certain circumstances, a foster parent does have standing to file an original suit and has broader standing to intervene in an existing suit. *In re A.M.*, 60 S.W.3d 166, 168 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *In re M.T.*, 21 S.W.3d 925, 926 (Tex. App.—Beaumont 2000, no pet.). Generally, unless a foster parent has approval to adopt the child, a foster parent only has standing to file an *original suit* when the foster parent has custody of a child, placed by TDPRS of Protective and Regulatory Services, in the person's home, for at least twelve (12) months ending not more than 90 days preceding the date the petition was filed. TEX. FAM. CODE ANN. § 102.003(a)(12); 102.003(c) (emphasis added). Clearly, since the child is less than twelve (12) months old and, assuming the foster parents have not been approved to adopt the child, they do not have standing to bring an original suit under the Texas Family Code. TEX. FAM. CODE ANN. § 102.003(a)(12); 102.003(c).

Intervenors, **John and Jane Doe**, as foster parents, do have standing to *intervene in an existing suit*. *In re A.M.*, 60 S.W.3d at 168; *In re M.T.*, 21 S.W.3d at 926 (emphasis added). The Texas appellate courts have specifically identified a distinction between bringing an *original suit* and *intervening in an existing suit*. *Id.* Section 102.003 of the Texas Family Code identifies who may file an *original* suit affecting the parent-child relationship, and the definition includes a suit filed by TDPRS. TEX. FAM. CODE ANN. § 102.003; *In re M.T.*, 21 S.W.3d at 926. As mentioned above, TDPRS filed the original suit on January 31, 2006, and it is in TDPRS's *original* suit that Intervenors, **John and Jane Doe**, seek to intervene.

The Department, citing *Mendez*, alleges an intervenor bears the burden to show a justiciable interest, legal or equitable, in the lawsuit. *Mendez v. Brewer*, 626 S.W.2d 498, 499

(Tex. 1982). In *Mendez*, the Supreme Court held the foster parents lacking standing to intervene when the *sole* interest alleged by the foster parents in their petition in intervention was their wish to adopt the child if the parent-child relationship was terminated. *Mendez*, 626 S.W.2d at 499-500 (emphasis added). Notwithstanding the fact that **John and Jane Doe's** petition in intervention alleges more than a mere desire to adopt **Joe Smith**, the rule enunciated in *Mendez* has been deprived of its precedential value because the uncertainty, which existed at the time *Mendez* was decided, has been eliminated by the Legislature's subsequent amendments to the Texas Family Code. *See generally Rodarte v. Cox*, 828 S.W.2d 65, 70 (Tex. App.—Tyler 1991) (stating that whatever uncertainty existed when *Mendez* was decided was eliminated by the Legislature's subsequent amendment to section 11.03 which specifically provided for the trial judge to determine whether one with substantial past contact with a child has standing to bring such a suit.). The provision, as it existed at the time *Mendez* was decided, provided that "[a] suit affecting the parent-child relationship may be brought by any person with an interest in the child." *Mendez*, 626 S.W.2d at 500. The current, and amended provision, provides that the court may grant a grandparent *or another person* leave to intervene in an existing suit if the court determines that the grandparent or other person has had substantial past contact with the child and if there is satisfactory proof that appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. TEX. FAM. CODE ANN. § 102.004(b) (Vernon Supp. 2006).

Unlike the foster parents in *Mendez*, **John and Jane Doe's** petition in intervention is not based solely on their desire to adopt the child, **Joe Smith**. Instead, their primary reason for filing a petition in intervention is to protect the child's best interest, to provide a stable environment for the child, and to satisfy the child's emotional and physical needs, both now and in the future.

JOHN AND JANE DOE HAVE STANDING TO INTERVENE IN THE EXISTING SUIT FILED BY TDPRS BECAUSE THEY HAVE HAD SUBSTANTIAL PAST CONTACT WITH JOE SMITH AND SATISFACTORY EVIDENCE INDICATES THAT APPOINTING EITHER PARENT AS A CONSERVATOR WOULD SIGNIFICANTLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.

The court may grant a grandparent *or another person* leave to intervene in an existing suit if the court determines that the grandparent or other person has had substantial past contact with the child and if there is satisfactory proof that appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. TEX. FAM. CODE ANN. § 102.004 (Vernon Supp. 2006). TDPRS's motion to strike the Doe's petition in intervention for termination of parental rights and adoption of child opines that "it is not Petitioner's opinion that Texas Family Code § 102.004 was intended to allow foster parents a backdoor through which they could involve themselves in cases involving children in the care of the department." *See The Department's Motion to Strike Petition in Intervention for Termination of Parental Rights and Adoption of Child at 3.* Instead of relying on the TDPRS's "opinion," Intervenors choose to rely on Texas case law which has recognized this alleged "backdoor" and approved of it by applying a "relaxed standing rule" when a petition in intervention has been filed by a "qualified party." *See In re A.M.*, 60 S.W.3d 166, 169 (Tex. App.—Houston [1st Dist.] 2001) (citing section 102.004 of the Texas Family Code and stating that the code allows the trial court to grant a "grandparent *or other person* deemed by the court to have had substantial past contact with the child" leave to intervene in a pending suit filed by an authorized party.); *In re M.T.*, 21 S.W.3d 925, 926 (Tex. App.—Beaumont 2000) (explaining that the "relaxed standing rule" may allow a party, who cannot file an original suit affecting the parent-child relationship, to intervene in a suit filed by a qualified party.). Under the "relaxed standing rule," and according to Texas case law, the

Legislature has created an easier standing test for intervenors based on its policy decision that the overriding concern for the best interest of the child, when a termination suit is already pending, outweighs the concern for the privacy of the parties. *In re A.M.*, 60 S.W.3d at 169; *See also In re M.T.*, 21 S.W.3d at 926.

JOHN AND JANE DOE HAVE STANDING TO INTERVENE IN THE EXISTING SUIT FILED BY TDPRS BECAUSE THEY HAVE HAD SUBSTANTIAL PAST CONTACT WITH JOE SMITH

The Texas Family Code provides that the court may grant a grandparent *or another person* leave to intervene in an existing suit if the court determines that the grandparent or other person has had substantial past contact with the child and if there is satisfactory proof that appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. TEX. FAM. CODE ANN. § 102.004(b) (Vernon Supp. 2006).

The existence of "substantial past contact" is neither statutorily defined nor is it specifically defined by applicable case law. *In re C.M.C.*, 192 S.W.3d 866, 871 (Tex. App.—Texarkana 2006, no pet. hist.). Rather, the existence of "substantial past contact" is an inherently fact-intensive inquiry and the standard is intended to be flexible in order to deal with "inevitable situations which could not be otherwise anticipated by the drafters." *Id*. In other cases, the courts have found "substantial past contact" sufficient to confer standing when a seventeen-month old child had resided with the foster parents for fourteen months, when a step-grandmother and the child had been close since birth and the child resided with the step-grandmother, and when the children had resided with the foster parents for fourteen months. *See In re A.M.*, 60 S.W.3d at 168; *In re Hidalgo*, 938 S.W.2d 492, 495-96 (Tex. App.—Texarkana 1996, no writ); *In re M.T.*, 21 S.W.3d at 926.

Respondent, **Lara Smith**, attempts to distinguish *In re A.M.* and *In re M.T.* by mathematically comparing the number of months the children, in the respective cases, spent with their foster families. However, a mathematical comparison is exactly what the drafters of the statute intended to avoid. In *In re C.M.C*, the court of appeals explained that the existence of "substantial past contact" is neither statutorily defined nor is it specifically defined by applicable case law, but is an inherently fact-intensive inquiry and the standard is intended to be flexible in order to deal with "inevitable situations which could not be otherwise anticipated by the drafters." *In re C.M.C.*, 192 S.W.3d 866, 871 (Tex. App.—Texarkana 2006, no pet. hist.).

Respondent, **Lara Smith**, attempts to distinguish *In re M.T.* and *In re A.M.* by arguing that the children at issue had resided with the parents for well over fourteen (14) months before the foster parents filed for intervention. *In re M.T.*, 21 S.W.3d at 927. However, the additional facts of *In re M.T.* reveal that the two foster children, K.T. and M.T., were moved into the Roberts' home when they were four months and thirty months old, respectively. *Id.* Although the exact timing is unclear, it is clear that K.T. and M.T. resided with the Roberts for fourteen months and that they were four months and thirty months, respectively, when placed with the Roberts. *Id*. A logical extension of these facts indicates that at the expiration of fourteen months, K.T. had spent 77.77% of her entire life living with the Roberts, and that M.T. had spent only 31.81% of her entire life living with the Roberts. *See id.* Nevertheless, the court of appeals concluded that the record supported the trial court's implied finding of past substantial contact. *Id.*

In this situation, **John and Jane Doe** have had substantial past contact with **Joe Smith**. In this case, **John and Jane Doe** have had possession of the **Joe Smith** since August 16, 2006. As of January 24, 2007, **John and Jane Doe** have maintained custody of and have cared for **Joe**

Smith for 162 days of the child's 362 day existence. During these 162 days, or 44.75% of Christopher's entire life, **John and Jane Doe** have maintained custody of and have cared for **Joe Smith** on a daily basis. During **Joe Smith's** life with the Doe's, he has grown attached to and has formed important bonds with **John and Jane Doe**. Taking **Joe Smith** from **John and Jane Doe** would disrupt his growth and development and would destroy the attachment bonds he has formed during the last 162 days.

JOHN AND JANE DOE HAVE STANDING TO INTERVENE IN THE EXISTING SUIT FILED BY TDPRS BECAUSE SATISFACTORY EVIDENCE INDICATES THAT APPOINTING EITHER PARENT AS A CONSERVATOR WOULD SIGNIFICANTLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.

Satisfactory evidence indicates that appointing either parent as a conservator would significantly impair the child, **Joe Smith's** physical health or emotional development. Developing case law has identified certain acts or omissions which significantly impair a child's physical health or emotional development, including physical abuse, severe neglect, abandonment, drug or alcohol abuse, or immoral behavior on the part of the parent. *Chavez v. Chavez*, 148 S.W.3d 449 (Tex. App.—El Paso 2004, no pet.). In *May v. May*, the court found sufficient evidence to support granting custody of the children to their maternal grandfather because allowing the biological father to retain custody would significantly impair the physical health or emotional development of the child. *May v. May*, 829 S.W.2d 373, 377-78 (Tex. App.—Corpus Christi 1992, no writ). The court found that the following acts were sufficient to prove significant impairment: (1) the father was convicted of possessing marijuana within the two years preceding the custody battle; (2) the father and mother were selling drugs out of their house with the children present; (3) the father had used illegal drugs; (4) the father failed to pay court ordered child support; and that (5) the father failed to exercise any visitation periods. *Id*. at 375.

In this case, neither parent of the child should be appointed as sole managing conservator, nor should both parents be appointed as joint managing conservators, and such appointment would significantly impair the child, **Joe Smith's** physical health or emotional development. *See* TEX. FAM. CODE ANN. § 102.004(b). The mother's appointment would significantly impair the child, **Joe Smith's** physical health or emotional development because she was convicted of a felony within the last two years, has never had any contact with the child, and has since been deported. Similarly, the father's appointment as a conservator would endanger the child's physical health or emotional development because the father has failed to pay court-ordered child support, and has failed to exercise any visitation periods.

THE BEST INTEREST OF THE CHILD MUST BE THE COURT'S PRIMARY COSIDERATION IN DETERMINING THE ISSUES OF CONSERVATORHIP AND POSSESSION OF AND ACCESS TO THE CHILD.

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child. TEX. FAM. CODE ANN. § 153.002 (Vernon Supp. 2006). Common factors employed to determine "best interest," in a suit requesting possessory conservatorship of a minor child, include: (1) the desires of the child; (2) the emotional and physical needs of the child, now and in the future; (3) the emotional and physical danger to the child, now and in the future; (4) the plans for the child by the party seeking the change; and (5) the stability of the home or proposed placement. *In re M.A.M.*, 35 S.W.3d 788, 790; *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

Although the "best interest of the child" is often quoted as the Respondents' primary goal, it seems that Respondents have completely neglected their duty to satisfy **Joe Smith's** best interest. For example, Respondent, **Lara Smith's**, motion to strike states that **Joe Smith** previously resided in a different foster home but was moved, under a plan to transfer him to

Brownsville, five months ago. Under the Brownsville transfer plan, **Joe Smith** was to be placed with his half-siblings in Brownsville and, eventually, be reunited with his mother, **Lara Smith.** After five months, **Joe Smith** has not been transferred to Brownsville and TDPRS has failed to take any steps to secure reunification. In fact, after five long months, TDPRS has failed to take any action to instigate the transfer process. If TDPRS was truly acting in the child's best interest, TDPRS would have immediately investigated, approved and transferred **Joe Smith** to Brownsville. An immediate transfer would have been in the child's best interest because it would have avoided the attachment Joe has formed with the Doe family. Now, after **Joe Smith** has formed significant and important attachments to **John and Jane Doe**, TDPRS wants to uproot him, for the third time in less than a year, and place him in a home with several teenagers.

Respondents have failed to consider the factors relevant to determining the "best interest of the child." Respondents have failed to consider the emotional and physical needs of Joe or have clearly overlooked the fact that the child is currently in a home with two devoted parents and an extended family, and is currently cared for by his loving grandparents and foster parents. The Brownsville plan involves uprooting his current schedule, life and sense of normalcy to send him to an institutional type foster home with eight other teenage children, including a two teenage half-siblings. Moreover, the reunification is unlikely to ever occur because John's biological mother is unable to enter the country legally and the TDPRS's motion states that it previously rejected a plan to take the child to Mexico because he is a United States citizen. Furthermore, the home Joe currently resides in is more stable than the proposed Brownsville home. In Houston, Joe is provided with a safe environment, is not around teenagers, and is able to get the attention an infant deserves. In the Brownsville home, Joe, who is not even one-year old, will be placed into a fast-paced, institutional type facility.

Conclusion

Under the *relaxed standing rule*, **John and Jane Doe** have standing to intervene in the suit filed by TDPRS because they have had substantial past contact with **Joe Smith** and satisfactory evidence exists which indicates that appointing **Lara Smith** as sole managing conservator would significantly impair the child's physical health or emotional development. Allowing intervention, after an existing suit has already been filed is considered under the *"relaxed standing rule,"* and is supported by sound policy. The policy reflects the belief that when a suit is already pending, concern for the privacy of the parties is subordinate to the overriding concern for the best interest of the children.

PRAYER

For these reasons, Petitioner respectfully requests that this Court set this motion for a hearing, with a Court Reporter, and after the hearing, grant Intervenors' Petition in Intervention for Termination of Parental Rights and Adoption of Child and Request for Further Orders.

Respectfully Submitted,

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Texas Bar No. 06521600

Attorney for Intervenors
John and Jane Doe

CERTIFICATE OF SERVICE

I, Terry Lea Elizondo, the undersigned attorney, do hereby certify that a true and correct copy of the above and foregoing instrument was served on all counsel of record, in open court, on the 24th day of January, 2007.

Terry Lea Elizondo

CAUSE NO. 0000-00000J

IN THE INTEREST OF	'	**IN THE DISTRICT COURT OF**
	'	
JOE SMITH	'	**HARRIS COUNTY, TEXAS**
	'	
A CHILD	'	**309TH JUDICIAL DISTRICT**

JOHN DOE AND JANE DOE'S BRIEF IN RESPONSE TO LARA SMITH'S PLEA IN ABATEMENT

Come now Petitioners, JOHN DOE and JANE DOE, (hereafter Petitioners), who file this their Brief in Response to Respondent's Plea in Abatement and would show in support thereof the following:

1. Issue

On or about December 8, 2008, Respondent, LARA SMITH, by and through her attorney, GEORGE WASHINGTON forwarded a Plea in Abatement in this cause which was supported by Verification by LARA SMITH. Within this Plea for Abatement, LARA SMITH states, that Petitioners, JOHN DOE and JANE DOE have no standing because the Petitioners did not have actual care, control and possession of the child...for at least six months ending not more than 90 days preceding June 17, 2008, the date the Petitioners filed their Petition.

Petitioners continue to assert their standing under **Tex. Fam. Code ' 102.003(9).** The child's principal residence has been with the Petitioners from 2003 until the present.

2. Background

LARA SMITH and the child at issue are Sudanese refugees who began to attend Petitioners church after coming to the United States. The child's father is deceased. In 2003, the child was invited to live with Petitioners when his mother, LARA SMITH, was unable to care for his needs.

LARA SMITH accepted Petitioners offer calling it a gift from God.

For over five years, the child's principal residence has been in Petitioners home. LARA SMITH gave Petitioners the authority to make educational and medical decisions for the child. Petitioners enrolled the child in school and in their health insurance program. Petitioners were involved in all aspects of raising the child and treated him as one of their own. No formal custody arrangement was made because everyone was in agreement about what was best for the child. From 2003 until the present, the child has only stayed with his mother for short temporary periods. There was no plan for the child's return to his mother's home.

In 2007, after 4 years of a positive relationship with the Petitioners, LARA SMITH'S behavior became very erratic and she became very oppositional toward the Petitioners. LARA SMITH began threatening to remove the child from the Petitioners home. Beginning in early June 2008, LARA SMITH held the child essentially captive in her home. He was left in a locked apartment and prevented from attending his extracurricular activities or having contact with the Petitioners. In June, Petitioners filed suit. The child, now 15, has expressed his desire to continue to live with Petitioners.

3. JOHN DOE and JANE DOE have standing to file suit under ***Section 102.003(9).***

Petitioners have had actual care, custody and control of the child for approximately five years not ending more than 90 days before they filed suit on June 17, 2008.

A. ***Section 102.003(9)*** *does not require a continuous and uninterrupted 6 month period but instead looks to the child=s principal place of residence during the time in question.*

AIn computing the time necessary for standing under Subsections (a)(9), (11), and (12) the court may not require that the time be continuous and uninterrupted, but shall consider the child's

principal place of residence during the relevant time preceding the date of commencement of the suit. ***See* Tex. Fam. Code 102.003(b)**. In her Plea in Abatement, LARA SMITH offers that the child returned to her home for the month of December 2007 and on the weekends from January 2008 through May 2008. Petitioners dispute that the child was in LARA SMITH's home for the month of December. The child did stay with LARA SMITH for 2 weeks during November and visited her during the Christmas holidays, but was primarily in the home of the Petitioners for the month of December. Even so, any of these temporary absences from the home of the Petitioners should not affect their standing under **102.003(9). <u>Doncer v. Dickerson,</u> 81 S.W.3d 349, 361 (Tex.App.-El Paso 2002, no pet.)**(a stepmother acquired standing after the death of her husband under 102.003(a)(11) by establishing the child's principal residence was with her for at least six months over a two year period, when her husband had visitation consistent with the Standard Possession Order).

B. The child's principal residence has been the home of the Petitioners since 2003.

Principal residence has been defined as A(1) a fixed place of abode; (2) occupied consistently over a substantial period of time; (3) which is permanent rather temporary.@ **<u>In the Interest of M.P.B.</u>, 257 S.W.3d 804, 809 (Tex.App.-Dallas 2008, no pet.); <u>Doncer v. Dickerson,</u> 81 S.W.3d 349, 361 (Tex.App.-El Paso 2002, no pet.).** This does not include temporary arrangements for momentary housing difficulties, inconvenient travel schedules, the pursuit of higher education, or the inability to provide child care. **<u>Doncer,</u> 81 S.W.3d at 362.** Determination of standing under this section is fact specific and made on an ad hoc basis. **<u>Id.</u>** In the case at hand, Petitioners have provided a fixed place of abode for the child, who has occupied it consistently over five years and

which is permanent rather than temporary.

In **<u>In the Interest of M.P.B.,</u>** a grandmother established standing under **102.003(9)** when the mother and the child lived in a nearby apartment and the child spent every weekend, one other night per week, and every vacation that the grandmother had off work at the grandmother's house. **<u>M.P.B.,</u> 257 S.W.3d at 809.** The grandmother testified she was significantly involved in raising the child. **<u>Id.</u>** The child spent more time at the grandmother=s house than the mother's house. **<u>Id.</u>** She clothed her, taught her to do her ABC's and to spell her name, and was Aas much a primary care giver, if not more@ than the mother. **<u>Id.</u>** The court found that although the care, control and possession was not exclusive, with the mother's consent, the grandmother provided the child with a fixed place of abode, occupied consistently over a substantial period of time, that was permanent rather than temporary. **<u>Id.</u>** The record did not suggest a temporary arrangement for momentary housing difficulties, inconvenient travels, the pursuit of higher education, or the inability to provide child care. **<u>Id.</u>**

Consistently from 2003 until the present, Petitioners have been primarily responsible for the upbringing of the child. Like in **<u>M.P.B,</u>** the child has spent significantly more time with the Petitioners than with LARA SMITH. Like the grandmother in **<u>M.P.B</u>** taught the child how to spell her name and do her ABC's, Petitioners have been involved, assisted and encouraged both the child's extracurricular and school activities. On visits with his mother the child is left unattended and is unable to participate in school activities. Petitioners have consistently attended parent/teacher conferences, choir performances, and sporting events, LARA SMITH has not. Just as in **<u>M.P.B,</u>** although their care control and possession has not been exclusive of the child's mother and has been

with her consent, the Petitioners have been more the caregivers for the child than the mother, LARA SMITH. This arrangement was not a temporary relief for the mother. The Petitioners provided a permanent, fixed place of abode for the child and the child has resided there for five years.

In **In re Kelso,** paternal grandparents were determined not to have standing under **102.003(9)**, when the court determined that the child's stays at their home were on a temporary basis only and the mother controlled where the child would stay and for how long. **In re Kelso, 266 S.W.3d 586, 590-91 (Tex.App.-Fort Worth, 2008, orig. proceeding).** The grandparents claimed they had possession of the child from March of 2007 until November of 2007. **Id. at 588.** The mother contended that she never let the child live with the grandparents and that the longest period of time the child spent with them was a month and a half maybe two around Easter 2007, a couple of weeks at Thanksgiving, one week at Christmas, and then from the end of January until the hearing sometimes after March 6, 2008. **Id.** By the grandparents own admission, the mother had possession of the child in November of 2007, the grandmother called and asked for permission to have the child over the holidays and the mother agreed only when the grandmother agreed to take the child's brother for the holiday as well. **Id.** In January 2008, a family issue came up for the mother and she asked the grandparents if they would take the child again. **Id at 589.** The grandparents admitted the child was scheduled to return to the mother on March 9, 2008. **Id at 588.** The mother became angry when the suit was filed and demanded return of the child early on March 6, 2008. **Id at 588.**

LARA SMITH contends that she withdrew her consent for the child to stay with the Petitioners on December 2007, the child stayed exclusively with her during that month and stayed with the Petitioners from January 2008 through May 2008 only during the week and for the sole

purpose of attending school. However, since 2003, the understanding has been that it is in the child=s best interest to live with the Petitioners. The child has formed relationships there and has expressed a preference to continue to live with the Petitioners. At the time of filing the Petitioners= petition, the child had gained admission and intended to attend Houston Christian High School where he has received a significant scholarship. His mother has refused to participate with his education. If he lived with his mother he would be denied that educational opportunity and be cut off from friends and the people he has come to consider his family.

Unlike **Kelso**, the Petitioners never agreed to a specific ending date for the child's residence in their home. Also unlike **Kelso**, there is no dispute that the child has lived with the Petitioners exclusively prior to the period LARA SMITH now questions. His permanent residence was with the Petitioners and he would temporarily visit his mother. In **Kelso,** the mother claims she never let the child ***live with*** the grandparents but in this case, LARA SMITH called the child living with the Petitioners a gift from God.

The child lived with the Petitioners as part of a permanent arrangement so he would have the opportunity to enjoy a stable household and educational opportunities. This was not meant to end at any specific point or meant as temporary relief for his mother but was indefinite and agreed by all to be in the child's best interests.

4. Prayer

Wherefore premises considered, Petitioners pray the Court will find that they have standing under **Tex. Fam. Code ' 102.002(9)** and deny Respondent, LARA SMITH's Plea in Abatement.

Petitioners pray that the above relief be granted. Petitioners pray for general relief.

Respectfully submitted,

TERRY LEA ELIZONDO

____
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ATTORNEY FOR INTERVENORS
JOHN DOE and JANE DOE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief in Response to Rachel Biar=s Plea in Abatement was forwarded to:

George Washington, Attorney for Respondent, 100 Washington St., Houston, Texas 77479 - ***via hand delivery***;

John Adams, Amicus Attorney for the child, 200 Adams, Suite 2 Houston, Texas 77002 -***via hand delivery***;

Thomas Jefferson, Co-Counsel for Petitioners, 300 Jefferson Blvd, Ste 3, Houston, TX 77056 - ***via hand delivery***

on the____day of January, 2009.

____
Terry Lea Elizondo

CAUSE NO. 0000-00000J

IN THE INTEREST OF	'	IN THE DISTRICT COURT OF
	'	
JOE SMITH	'	HARRIS, T E X A S
	'	
A CHILD	'	315TH JUDICIAL DISTRICT

JOHN AND JANE DOE'S. BRIEF IN RESPONSE TO JEFF SMITH AND LARA SMITH'S MOTION TO STRIKE

Come now Intervenors, JOHN DOE and JANE DOE, (hereafter Intervenors), who file this their Brief in Response to Jeff Smith and Lara Smith's Motion to Strike and would show in support thereof the following:

1. Issue

On or about December 8, 2008, JEFF SMITH and LARA SMTIH, by and through their attorney, filed a Motion to Strike the Intervention of JOHN DOE and JANE DOE in this cause. Within this Motion to Strike, JEFF SMITH and LARA SMITH state, that Intervenors, JOHN DOE and JANE DOE, have no standing because neither the Petition in Intervention nor any attachments provide the Court with adequate facts to support an allegation the (a) the child's present circumstances would significantly impair the child's physical health or emotional development or (b) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.@

2. *The Court should grant JOHN DOE and JANE DOE. standing under* ***102.004(b)*** *of the Texas Family Code.*

If the Court finds satisfactory proof that appointment of either parent as sole, or both parents as joint, managing conservators at this time would significantly impair the child's physical health or emotional development, the court should grant JOHN DOE and JANE DOE. standing under **Tex. Fam. Code ' 102.004(b)** as the paternal grandparents of the child. Standing is conferred for intervention by the existence of the grandparent relationship without the need for substantial past contacts. **In re M.A.M., 35 S.W.3d 788, 790 (Tex. App.-Beaumont 2001, no pet.).** Further, grandparents possess a justiciable interest as "natural guardians" of a grandchild. ***See*** **Herod v. Davidson, 650 S.W.2d 501, 503**

(Tex. App.--Houston [14th Dist.] 1983, no writ).

In **Whitworth v. Whitworth,** a paternal grandmother who alleged no past conduct with the child was found to have standing to intervene in parents' divorce action to seek managing conservatorship for a child because the child's best interest was already before the court and being litigated, and allegations of inappropriate and questionable behavior by both parents had been asserted, raising the question of parental custody. **Whitworth v. Whitworth, 222 S.W.3d 616, 621-22 (Tex.App.-Hous. (1 Dist.) Mar 16, 2007, no pet.)** An intervenor in a suit affecting the parent-child relationship does not need to plead or prove the standing required to institute an original suit because managing conservatorship is already in issue. **Whitworth, 222 S.W.3d at 621 (*Citing* Segovia-Slape v. Paxson, 893 S.W.2d 694, 696 (Tex. App.-El Paso 1995, no writ)).** This relaxed standing rule for intervention promotes the overriding policy in all suits affecting the parent-child relationship, that of protecting the best interest of the child. **Id.**

Subchapter 102.004(b) applies to interventions seeking managing conservatorship as well as those seeking possessory conservatorship. **Whitworth, 222 S.W.3d at 621 (*Citing* In re Hidalgo, 938 S.W.2d 492, 496 (Tex. App.-Texarkana 1996, no writ)).** This holding is not unconstitutional because grandparent standing does not overrule the parental presumption; standing to intervene means only the right to be heard, not the right to win. **Whitworth, 222 S.W.3d at 622 n. 3.**

Like in **Whitworth**, the best interests of the child in this case are already being litigated and there have been allegations of inappropriate and questionable behavior by both parents. The court should therefore follow the reasoning in **Whitworth** and grant the paternal grandparents leave to intervene.

Some courts and the dissent in **Whitworth** construe **102.004(b)** to require the grandparents to have had Asubstantial past contact with the child@ in order to be granted standing. **Whitworth, 222 S.W.3d at 645 (Keyes, J., dissenting); In re C.M.C., 192 S.W.3d 866 (Tex.App.-Texarkana 2006, no pet.)**. The **Whitworth** majority did not follow this reasoning however. **Id. at 646-47.** Further, **In re**

M.A.M. directly rebutted the argument when it found that the qualifying phrase, Adeemed by the court to have had substantial past contact with the child,@ modifies Aother person,@ not Agrandparent or other person.@ **In re M.A.M., 35 S.W.3d 788, 790 (Tex. App.-Beaumont 2001, no pet.). Section 102.004(b)** recognizes two classes of persons: 1) grandparents, and 2) other persons deemed by the court to have had substantial past contact with the child. **Id.** Because JOHN DOE and JANE DOE are indisputably the biological paternal grandparents of the child, no finding of substantial past contact with the child is required for them to satisfy the standing requirement of **Section 102.004(b)**. **Id.**

4. Prayer

Wherefore premises considered, Petitioners pray the Court will find that they have standing under **Tex. Fam. Code ' 102.004(b)** and deny the Motion to Strike of Intervenors JOHN DOE and JANE DOE.

Petitioners pray that the above relief be granted. Petitioners pray for general relief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Brief in Response to JEFF SMITH and LARA SMITH's Motion to Strike was served on:

George Washington, Attorney for DFPS, 100 Washington Street, Suite 100, Houston, Texas 77551 **-via hand delivery;**

John Adams, Attorney for Jeff Smith and Lara Smith, 200 Adams Street, Houston, Texas 77550 **- via hand delivery;**

Thomas Jefferson, Attorney/Guardian Ad Litem for the child, 300 Jefferson Road 3, Houston, Texas 77586 - **via hand delivery;**

on this the th day of January 2009

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Terry Lea Elizondo