I. Jurisdiction

A. Judgment Void When Court Lacks Jurisdiction

In 2010, the 307th Judicial District Court of Gregg County, Texas ("District Court") entered an order that established parentage and determined conservatorship issues with regard to the child. In 2015, the Department filed a petition in the County Court at Law No. 2 of Gregg County ("the CCL") under Chapter 262, which requested conservatorship of the child and sought to terminate Mother's and Father's parental rights. Mother's rights were terminated.

Mother appealed the judgment entered by the CCL terminating her parental rights to the child. After concluding the CCL was without jurisdiction to enter the order, the Court of Appeals vacated the judgment and dismissed the case.

Citing to TFC § 155.001, the Court observed that the District Court "acquire[d] continuing, exclusive jurisdiction over the matters . . . in connection with the child" in 2010 when it entered a judgment regarding the child. TFC § 155.001(a) provides "Except as otherwise provided by this section, a court acquires continuing, exclusive jurisdiction over the matters provided for by this title in connection with a child on the rendition of a final order."

The Court then noted that a suit brought by a governmental entity requesting an order under Chapter 262 "may be filed in a court with jurisdiction to hear the suit in the county in which the child is found" even though another court may have continuing, exclusive jurisdiction under Chapter 155.

Referencing TFC § 262.201, which provides that the result of a full adversary hearing is "an appropriate temporary order under Chapter 105", the Court reasoned that while the CCL properly entered emergency temporary orders under its Chapter 262 authority, Chapter 262 did not authorize the entry of a final order in a suit affecting the parent-child relationship in this case. Rather, Section 262.203 required the CCL to "transfer the suit to the court of continuing, exclusive jurisdiction, if any." Section 262.203 provides, in pertinent part, "On the motion of a party or the court's own motion, if applicable, the court that rendered the temporary order shall in accordance with procedures provided by Chapter 155: (1) transfer the suit to the court of continuing, exclusive jurisdiction, if any." The Appellate Court observed that the affidavit attached to the Department's original petition stated, "The [c]ourt records reflect that the children have lived their lives in Gregg County, Texas, and each has been the subject of a suit affecting the parent-child relationship in Texas." In addition, the Attorney General's Answer specifically informed the CCL that the District Court had entered the 2010 order determining parentage. Further, the District Court's 2010 order was admitted as an exhibit at trial. The Court determined that the affidavit filed in support of the Department's petition, the Attorney General's Answer, and the District Court's 2010 order "all put the CCL on notice that the District Court has continuing, exclusive jurisdiction over the matter involving [the child]."

The Court concluded that because the District Court retained continuing, exclusive jurisdiction of the matter involving the child, Section 262.203 required the CCL to transfer the suit to the District Court on "the court's own motion." As such, the CCL lacked jurisdiction to enter the order terminating parental rights to the child. The Court held that "[t]he continuing, exclusive jurisdiction statutory scheme is 'truly jurisdictional'—that is, when one court has continuing and exclusive jurisdiction over a matter, any order or judgment issued by another court pertaining to the same matter is void." Accordingly, the Court concluded that the CCL's order terminating Mother's and Father's parental rights was void because the district court had continuing, exclusive jurisdiction at the time the order was entered. *In re J.I.M.*, 516 S.W.3d 674 (Tex. App.—Texarkana 2017, no pet.).

B. Transfer of Continuing, Exclusive Jurisdiction

On appeal, Mother and Father asserted that the trial court lacked jurisdiction to enter a final order of termination because another court retained continuing, exclusive jurisdiction. The 115th District Court of Upshur County acquired continuing, exclusive jurisdiction over suits affecting the parent-child relationship concerning the children by virtue of a 2012 final SAPCR order in a Department case. In March 2015, the Department filed a petition under TFC chapter 262 seeking protection of the children and termination of parental rights in the 307th District Court of Gregg County. The trial court also rendered temporary orders appointing the Department temporary managing conservator of the children. In July

2016, the Department filed a motion to transfer under TFC § 262.203 informing the trial court that the 115th District Court had continuing, exclusive jurisdiction, and moved to transfer the suit and jurisdiction to the District Court, alleging grounds for mandatory transfer, namely that the children had resided in the trial court's county for six months or longer.

TFC § 262.203(a) and (b) provide:

> (a) On motion of a party or the court's own motion, if applicable, the court that rendered the temporary order shall *in accordance with procedures provided by Chapter 155*:
>
> (1) transfer the suit to the court of continuing, exclusive jurisdiction, if any;
>
> (2) if grounds exist for mandatory transfer from the court of continuing, exclusive jurisdiction under Section 155.201, order the transfer of the suit from that court; or
>
> (3) if grounds exist for transfer based on improper venue, order transfer of the suit to the court having venue of the suit under Chapter 103.
>
> (b) Notwithstanding Section 155.204, a motion to transfer relating to a suit filed under this chapter may be filed separately from the petition and is timely if filed while the case is pending.

Under TFC § 155.201(b), grounds for mandatory transfer from the court of continuing, exclusive jurisdiction to another county exist "if the child has resided in the other county for six months or longer."

The trial court granted the Department's motion and ordered jurisdiction transferred from the 115th District Court to itself under TFC § 262.203(a)(2). The following month, the trial court held the final hearing and terminated Mother's and Father's parental rights.

The issue on appeal was whether the trial court had jurisdiction to enter a final order terminating parental rights—the answer depended on whether the original SAPCR proceeding in the 115th District Court was properly transferred to the trial court.

The Court of Appeals recognized, "Chapter 262 creates a limited exception to the rule that the court of continuing, exclusive jurisdiction decides all transfer motions. Namely, where the Chapter 262 court (1) enters a temporary order after a full adversary hearing, (2) determines the identity of a court of continuing, exclusive jurisdiction under Section 262.202, and (3) further determines that 'grounds exist for mandatory transfer from the court of continuing, exclusive jurisdiction under Section 155.201,' then the Chapter 262 court shall order transfer of the suit from that court of continuing, exclusive jurisdiction." TFC § 262.203(a)(2). In a footnote, the Court of Appeals explained that under the plain language of TFC § 262.203(a) and Chapter 155, "Section 262.203(a)(2) applies even if no active case is pending in the court of continuing, exclusive jurisdiction" because "under subsection (2), the suit that is being transferred to the Chapter 262 court is the Chapter 262 suit itself" and "Section 262.203(a)(2) merely creates another limited instance in which mandatory transfer from the court of continuing, exclusive jurisdiction under Section 155.201(b) can occur."

The Department argued that the trial court's August 2016 transfer order granting the Department's timely motion alleging grounds for mandatory transfer under Chapter 155 properly transferred jurisdiction because Mother and Father failed to file controverting affidavits, thereby imposing a mandatory duty on the trial court to transfer the proceeding to itself and become the court of continuing, exclusive jurisdiction.

The Court of Appeals agreed. It relied on TFC § 155.204(c), which provides:

> If a timely motion to transfer has been filed and no controverting affidavit is filed within the period allowed for its filing, the proceeding shall, not later than the 21st day after the final date of the period allowed for the filing of a controverting affidavit, be transferred without a hearing to the proper court.

The Court of Appeals followed established case law under this statute holding that where a party files a motion for mandatory transfer under TFC § 155.201(b) and the other

party fails to file a controverting affidavit, the trial court has a mandatory duty to transfer the case to the county where the child has resided for six months or longer. Thus, it held, "[b]ecause the Department filed a motion to transfer and because Mother and Father did not file controverting affidavits, 'grounds exist[ed] for mandatory transfer from the court of continuing, exclusive jurisdiction under Section 155.201.' [TFC § 262.203(a)(2)]. Accordingly, the trial court properly transferred the suit to itself and acquired jurisdiction to enter final orders."

After also rejecting Mother's challenge to the factual sufficiency of the evidence to support the trial court's best interest finding, the Court of Appeals affirmed the order terminating Mother's and Father's parental rights. *In re D.W. and K.W.*, ___ S.W.3d ___, No. 06-16-00076-CV (Tex. App.—Texarkana Mar. 31, 2017, pet. filed) (op. on reh'g.)

C. Diligence Required for Service by Publication

Father and Mother were married in 2007 and lived in California. Mother left in 2009 and gave birth to the child in Texas in 2010. The child was removed from Mother at birth due to a positive drug test. Mother told Father in early 2011 that the child was in the custody of the government until her criminal issues were resolved. In March 2011, the Department filed its petition to terminate the parents' parental rights. Father was appointed counsel. Mother provided an address to the Department for a business address for Father in California as well as a telephone number. The caseworker called the phone number and left a message. The CASA volunteer also called the number and attempted to leave a message, but related there was "a language barrier" and was unsure if the woman who answered the phone would be able to give Father a message or ask him to return the phone call. According to the caseworker's affidavit, Father was unknown to her and was a transient person. The caseworker stated that she sent notice to Father at the business address by certified mail, return receipt requested. The "green card" was returned signed by a person whose signature did not appear to be that of Father. The caseworker also stated that inquiries to the Diligent Search Unit, Google, and the Department of Public Safety databases and Department of Humans Services yielded no results. Thereafter, the Department effectuated service on Father by publication in Emory, Texas. Father's parental rights were terminated and the order was filed in July 2011. The trial court's findings of fact included statements that the address and telephone number provided for Father had "adequate connection" to Father and that the Department made "reasonable attempts" to locate Father prior to publication. In January 2016, Father filed a bill of review, contending that he was not personally served and was unaware that a court proceeding concerning his parental rights was pending.

TRCP 109 provides that in order to issue citation by publication a party to a suit shall make an oath (1) that the residence of the defendant is unknown to the affiant; or (2) that such defendant is a transient person, and that after due diligence, such party and the affiant have been unable to locate the whereabouts of such defendant; or (3) that such defendant is absent from or is a nonresident of the State, and the party applying for citation has attempted to obtain person service of nonresident as provided in Rule 108, but has been unable to do so. A trial court must inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice before granting any judgment on such service.

The Court cited to *In re E.R.*, 385 S.W.3d 552 (Tex. 2012) in stating that when a defendant's identity is known, service by publication is generally inadequate, and service by publication should be a last resort, not an "expedient replacement" for personal service. The Court stated that if personal service can be effected by the exercise of reasonable diligence, "substituted service is not to be resorted to", and "A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is measured not by the quantity of the search, but by its quality."

The Court found that although the telephone number provided for Father may have had an "adequate connection," the two efforts made by the caseworker and the CASA volunteer could not give the trial court reasonable assurance that Father would have received any messages, due to the language barrier. The Court also stated that the fact the signature on the green card did not match Father's signature should have caused the Department to make further inquiries. As to the searches by the Diligent Search Unit, Google, and other Texas agencies, the Court stated this would have been effective to locate Father only if he was still in Texas. The Court then noted that there was not support for the caseworker's statements in the affidavit that Father was unknown or transient. The Court held that "the Department's search

that included making two telephone calls, none of which were likely to have resulted in contacting [Father], sending one notice letter to a business address that may not have been [Father's] address, and checking a few websites is not the type of diligent inquiry required before the Department may dispense with actual service . . . Here, it was both possible and practicable to more adequately warn [Father] of the impending termination of his parental rights." The Court also noted that publication in Texas when Father was known to live in California was "a poor" and "hopeless substitute for actual service of notice." The Appellate Court accordingly determined that trial court's finding of fact regarding the diligence of the Department's search for Father was not supported by the evidence and citation by publication, in this case, was constitutionally inadequate. *In re E.C.Q.L.*, No. 12-16-00297-CV (Tex. App.—Tyler Apr. 28, 2017, no pet.) (mem. op.).

D. Participation Constitutes Appearance

On appeal, Father contended the trial court did not have personal jurisdiction over him because the substituted service used to serve him was improper. Father had been appointed an attorney *ad litem* on June 24, 2014. That same day the Department filed its petition to terminate his parental rights. On July 1, 2014, the Department filed a motion for substituted personal service of citation, which was granted, permitting a copy of the citation to be left at the residence where Father's mother lived, which was also the address Father had listed on his recent bail bond.

Both Father and his attorney were present on the first day of trial on January 8, 2016. Father's attorney stated he was making a special appearance on behalf of Father, asserting Father was not properly served, and announced not ready. The judge reviewed the history of the case and announced that trial would proceed. Trial commenced, and after taking the testimony of one witness, the trial was recessed. Father and his attorney were again present on the second day of trial on February 8, 2016. Father's attorney renewed Father's special appearance, but participated in trial by making numerous objections and cross-examining witnesses. During closing argument, Father's attorney referenced the improper service but also argued:

> All that being said, in summary, Judge, I would ask that you deny the State's request and you maintain some sort of contact or some sort of rights for my client. I'll leave it up to the [c]ourt's discretion of what contact that could be; or whether it's supervised or not. But I also do not think that they have met their burden of proving that it's in the child's best interest to terminate my client's parental rights today.

Citing well-established case law, the Court of Appeals reiterated that a party waives complaints regarding service of process if he makes a general appearance. Further, a party enters a general appearance when he (1) invokes the judgment of the court on any question other than the court's jurisdiction; (2) recognizes by his acts that an action is properly pending; or (3) seeks affirmative action from the court. Moreover, if a parent's attorney *ad litem* appears at a termination proceeding, announces "not ready," but participates in the hearing by seeking the court's consideration of the child's best interest or otherwise, the parent makes a general appearance and waives any complaint about service.

The Appellate Court observed that in this case both Father and his attorney appeared at trial. Additionally, although Father's attorney stated he was asserting a special appearance and announced not ready, the attorney: (1) fully participated in the hearing by objecting and questioning witnesses; and (2) sought affirmative relief during closing argument by requesting that the trial court maintain Father's parental rights and by asserting the Department failed to establish that termination of Father's parental rights was in the child's best interest. Accordingly, the Court concluded that through the actions of the attorney *ad litem*, Father entered a general appearance and waived any complaint regarding service of process. *In re K.A.M.*, No. 04-16-00093-CV (Tex. App.—San Antonio July 27, 2016, no pet.) (mem. op.); *see also In re C.C., J.C., Jr., J.J.C., and E.C.*, No. 10-16-00129-CV (Tex. App.—Waco Nov. 16, 2016, no pet.) (mem. op.) (Fathers made general appearances where attorney sought affirmative relief in the form of objections, putting on witnesses and evidence, and asking jury not to terminate their parental rights).

II. Pre-Trial Matters

A. Due Process

The child was removed from Mother due to Mother's methamphetamine use. Mother was sixteen years old at the time of the child's removal from her care. Mother's parental rights were later terminated pursuant to TFC § 161.001(b)(1)(D) and (O). On appeal, Mother argued only that the termination of her parental rights was in violation of her Due Process rights because she was under eighteen at the time of the final hearing.

Comparing her predicament to a juvenile delinquent who cannot be sentenced to death or life without parole, Mother argued on appeal that her Due Process rights were violated because the suit for the termination of her parental rights was not tolled until after she had reached the age of majority or was certified to be an adult.

The Court of Appeals noted that Mother is entitled to due process in a termination proceeding. However, the Court held that Mother was "afforded due process by the trial court's appointment of a guardian *ad litem* to oversee her interest during termination proceedings." The Court noted that Mother's guardian *ad litem* was appointed eleven days after the Department initiated termination proceedings. The Court further noted that Mother also had a court-appointed attorney *ad litem* to defend her against the Department's allegations. The Court concluded that the Mother was provided a measure of due process by having two attorneys represent her interests.

The Court went on to state that if Mother's argument that termination proceedings should be tolled until Mother reached the age of majority were accepted, a minor parent would be able to stall termination proceedings for years while the child waits for stability. The Court found this unacceptable in light of the fact that it is the child's best interest that govern termination proceedings and also that termination cases are to be resolved expeditiously.

Accordingly, the Court rejected Mother's arguments and found that her due process rights were not violated. *In re G.A.C.*, 499 S.W.3d 138 (Tex. App.—Amarillo 2016, pet. denied).

B. Standing

i. Standing to Request Genetic Testing

The child was removed and placed with the paternal grandparents after her 40-day-old sibling died while in the possession of Mother. Father acknowledged paternity despite not being married to Mother. Maternal Grandmother intervened in the Department's case and filed a motion for genetic testing, which the trial court denied for lack of standing. Maternal Grandmother subsequently entered into a partial mediated settlement agreement providing that the Department was to be named managing conservator pending adoption of the child by the paternal grandparents. The agreement also provided Maternal Grandmother was to have continued visitation with the child. Following the trial court's order terminating Mother's and Father's parental rights, Maternal Grandmother appealed, asserting, in part, that the trial court erred in denying her motion for genetic testing.

TFC § 160.602 enumerates the following persons who may file to adjudicate parentage: (1) the child; (2) the mother of the child; (3) a man whose paternity is to be adjudicated; (4) a support enforcement agency or other government agency authorized by other law; (5) an authorized adoption or child-placement agency; (6) an authorized representative of an incapacitated or deceased person or minor who would otherwise be entitled to maintain a proceeding; (7) a person closely related to a deceased mother; and (8) an intended parent.

Maternal Grandmother argued that she had standing under TFC § 102.004 which concerns standing of a grandparent to seek conservatorship of a grandchild. In denying her complaint, the Court of Appeals noted that §102.004 does not provide Maternal Grandparent with standing to seek an order for genetic testing, as that statute only addresses the standing of grandparents to seek conservatorship of a grandchild. Accordingly, the court concluded Maternal Grandmother did not have standing to request an order for genetic testing and, therefore, the trial court did not err in denying her motion for genetic testing of potential fathers. *In re D.L.D.*, No. 05-16-00523-CV (Tex. App.—Dallas Oct. 13, 2016, no pet.) (mem. op.); *see also In re J.F.S., Jr.*, No. 12-16-00255-CV (Tex. App.—Tyler Nov. 30, 2016, no pet.) (Department is not statutorily authorized to commence a proceeding to adjudicate parentage when the child's

paternity has been legally established by a valid acknowledgment of paternity).

ii. Grandmother's Standing Limited by TFC § 102.006

The Department filed suit to terminate the parental rights of the children's parents. On March 20, 2015, the trial court held a termination hearing, and at conclusion of the hearing orally rendered an order terminating the parental rights of the children's parents. On May 1, 2015, the trial court signed an order stating that the court was terminating the parental rights of the children's parents and appointing the Department the children's permanent managing conservator.

On July 15, 2015, Grandmother filed a petition requesting managing conservatorship of the children asserting standing under TFC §§ 102.004(a)(1) and 102.004(a)(2). The Department filed a plea to the jurisdiction arguing, *inter alia*, that Grandmother filed her suit more than 90 days after the trial court terminated the parents' rights pursuant to TFC § 102.006(c). After holding a hearing, the trial court granted the Department's plea to the jurisdiction and dismissed Grandmother's suit. Grandmother appealed.

TFC § 102.006 provides:

> (a) Except as provided by Subsections (b) and (c), if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by:
>
> > (1) a former parent whose parent-child relationship with the child has been terminated by court order;
> >
> > (2) the father of the child; or
> >
> > (3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child.
>
> (b) The limitations on filing suit imposed by this section do not apply to a person who:
>
> > (1) has a continuing right to possession of or access to the child under an existing court order; or
> >
> > (2) has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit.
>
> (c) The limitations on filing suit imposed by this section do not apply to an adult sibling of the child, a grandparent of the child, an aunt who is a sister of a parent of the child, or an uncle who is a brother of a parent of the child if the adult sibling, grandparent, aunt, or uncle files an original suit or a suit for modification requesting managing conservatorship of the child not later than the 90th day after the date the parent-child relationship between the child and the parent is terminated in a suit filed by the Department of Family and Protective Services requesting the termination of the parent-child relationship.

In making its determination, the Court of Appeals noted that the written order of termination from the trial court was signed on May 1, 2015, and that Grandmother filed her petition on July 15, 2015, which was less than 90 days later. However, the Department argued that Grandmother's suit was untimely because the trial court's oral rendition of termination on March 20, 2015, which was the effective date of termination, and the written order merely memorialized the trial court's previously rendered decision.

The Court of Appeals took judicial notice of the reporter's record of the March 20, 2015 termination hearing which was contained in the record of the appellate cause filed from the parents' appeal of the underlying termination. The Court of Appeals was accordingly able to review the record of the termination hearing and determine that at the conclusion of the termination hearing, the trial court evinced a present intent to terminate parental rights and appoint the Department as the permanent managing conservator of the child.

Based on its review of the record and the appellate record from the termination appeal, the Court of Appeals concluded that "the trial court's use of the present tense, "is hereby terminated," shows an intent to terminate [the parent's] parental rights immediately. Therefore, we conclude that the trial court rendered judgment terminating [the parents'] parental rights at the March 20 hearing."

Therefore, because Grandmother did not file her petition within 90 days of the March 20, 2015 hearing, "the Family Code deprives her of standing to bring this suit."

The Court of Appeals concluded that the trial court did not err in granting the Department's plea to the jurisdiction. *P.R.M. v. Tex. Dep't of Family and Protective Servs.*, No. 03-16-00065-CV (Tex. App.—Austin Aug. 26, 2016, no pet.) (mem. op.).

iii. TFC § 102.006(a) Limits Standing

Mother relinquished her parental rights of the child to Maternal Grandparents, who adopted the three-year-old child in 2006. Over the next few years, Grandparents allowed the child to live with Mother for extended periods of time.

In 2014, the Grandparents allowed the child to reside with Mother and her new husband, and executed a power of attorney to allow them to enroll the child in school. In the summer of 2016, the child returned to Grandparents' house, at which time Grandparents decided to keep the child and enroll her in school locally. Mother and her husband then filed a SAPCR seeking joint managing conservatorship with Grandparents.

In response, Grandparents filed a plea to the jurisdiction, arguing that Mother and her husband lacked standing due to the limitations imposed by TFC § 102.006(a).

The trial court rejected Grandparents' argument, finding that section 102.006(a) "did not apply" because they had "voluntarily relinquished" the child to Mother and her husband for twelve-month and twenty-four month periods, and in doing so had "conferred standing" on them.

Grandparents sought mandamus relief, arguing that even if Mother and her husband could establish standing under some other provision of the Family Code, § 102.006(a) "expressly limited, and consequently divested" them of standing. The Appellate Court agreed with Grandparents.

Mother argued that TFC § 153.002—that the best interest of the child is the "paramount consideration"—should override § 102.006(a) and invoke the trial court's jurisdiction. The Court rejected Mother's argument, noting that the Supreme Court has held that a broad best interest inquiry "may be entirely inapplicable when a different, more specific family code statute applies." Next, Mother claimed that § 102.006 should only limit the "standing of persons who were family members at the time of the adoption and who could potentially have intervened in the termination and adoption proceedings." The Appellate Court was unconvinced, finding that the "limitation on standing of those persons listed in section 102.006(a)(3) helps to promote finality in the termination process, a prime concern of the State."

In reviewing the record, the Court noted that Mother "is a former parent whose parent-child relationship with [the child] has been terminated, and [Mother's] husband, is a family member or relative by marriage of a former parent whose parent-child relationship has been terminated." Based on the "unambiguous" language of subsections 102.006(a)(1) & (3), the Court found that that Mother and her husband lacked standing to bring their SAPCR and that the trial court had failed to correctly apply the law. The Appellate Court therefore granted mandamus relief, stating that the trial court's order was "erroneous as a matter of law" and that the trial court lacked subject matter jurisdiction over the suit. *In re R.B. and J.B.*, No. 02-16-00387-CV (Tex. App.—Fort Worth Nov. 17, 2016, orig. proceeding).

C. Request for Guardian *ad Litem*

On the second day of a trial to terminate Father's parental rights before an associate judge, Father's counsel notified the trial court that Father had "fired [him] on three separate occasions," and made an oral motion to withdraw. Father's attorney also asked the court to "appoint a guardian *ad litem* for [Father] for mental deficiencies." The associate judge denied the motions, noting that guardianship proceedings were to be conducted in other courts, after proper pleadings and notice, and she did not have the authority to appoint a guardian *ad litem* for an adult. Father's parental rights were terminated at the conclusion of the trial.

Before the associate judge signed the final order, Father filed a motion for a *de novo* trial to challenge the findings supporting termination of his parental rights. The motion made no mention of the associate judge's denial of the request for a guardian *ad litem*. At the *de novo* hearing, there was no additional request for the appointment of a guardian *ad litem*. The district court terminated Father's parental rights.

On appeal, Father challenged only the trial court's refusal to appoint him a guardian *ad litem*. The Court of Appeals determined that the trial court did not abuse its discretion in refusing Father's request. The Court first observed that the oral motion for a guardian *ad litem* was made in connection with a motion to withdraw. The Court then

noted that Father's counsel represented Father through the trial before the associate judge and through the *de novo* hearing. There was no indication on the record of conflict between Father and his attorney.

The Court then stated that the discussion of the motion for the guardian *ad litem* was not contained in the record. A conference was held in chambers on the issue, but the record did not reveal what happened during the meeting. The record before the Court did "not show a reviewing court exactly what purpose counsel perceived for such a guardian in [Father's] case."

The Court noted that the Father did not cite a provision in the Family Code authorizing the appointment of a guardian *ad litem* for an adult respondent in a proceeding for termination of parental rights. The Court stated that the record was clear that the associate judge "perceived counsel's request to involve the appointment of a guardian for [Father] by the court having jurisdiction over guardianship appointments". The Court expressed that there was authority to support the associate judge's ruling, and cited to TFC 107.010, which states "The court may appoint an attorney to serve as an attorney *ad litem* for a person entitled to service of citation in a suit if the court finds that the person is incapacitated. The attorney *ad litem* shall follow the person's expressed objectives of representation and, if appropriate, refer the proceeding to the proper court for guardianship proceedings." Finally, the Court considered the fact that the issue of the guardian was not brought up again before the district judge and held this was further support for the holding that the associate judge's ruling was not an abuse of discretion. Having determined that the associate judge did not abuse her discretion in refusing to appoint a guardian *ad litem* for Father, the Court affirmed. *In re K.B. and K.R.B.*, No. 07-16-00438-CV (Tex. App.—Amarillo Apr. 12, 2017, pet. denied) (mem. op.).

D. Right to Appointed Counsel

On July 20, 2015, the Department filed a petition to terminate Mother's parental rights. Eleven days later, the trial court appointed Mother an attorney, who subsequently represented Mother at the adversary hearing. On August 31, 2015, Mother's attorney filed a motion to withdraw as counsel, citing correspondence from Mother. Mother had expressed that she was "extremely displeased" with the attorney's representation and informed the attorney that she was "hereby released from any obligation and or contract to litigate on my behalf or to represent me as legal counsel, effective immediately."

On September 9, 2015, the trial court held a hearing on the attorney's motion to withdraw. Mother did not appear at the hearing and the trial court granted the motion. The trial court did not appoint Mother another attorney. In October 2015, the trial court sent a letter to Mother that she would not qualify for another court appointed attorney in the case since she was responsible for her attorney's withdrawal.

On January 8, 2016, Mother filed another request for a court-appointed attorney, asserting her right to such appointment as an indigent parent. The trial court agreed that Mother was indigent, but ruled that she has "discharged [her first] attorney and accordingly … is not entitled to a second court-appointed attorney." The court proceeded to trial, at which Mother appeared without an attorney. Mother's parental rights were terminated.

On appeal, Mother challenged the trial court's refusal to grant her request for new counsel, which "left her without counsel in violation of Section 107.013(a)(1)." The Department responded that [M]other invited the error by: (1) attempting to release her attorney; (2) failing to appear at the motion to withdraw hearing; and (3) filing pro se motions on her own behalf.

TFC § 107.013(a)(1) states that "In a suit filed by a governmental entity […] in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney *ad litem* to represent the interests of an indigent parent of the child who responds in opposition to the termination or appointment."

The Appellate Court rejected the Department's invited error argument, noting that although Mother invited the withdrawal of her appointed counsel, she "subsequently requested replacement counsel well before the final hearing and, thus, did not invite the trial court's decision to refuse such requests." The court further found that "[M]other was indigent and expressly requested that counsel be appointed."

The Appellate Court concluded that "[b]ased upon the clear mandate of the legislature and the supreme court that an indigent parent is entitled to a court-appointed attorney *ad litem* in a case of this type, we hold that the trial court abused its discretion when it refused to grant the mother's requests for another court-appointed attorney after the

trial court permitted [the first attorney] to withdraw." The case was reversed and remanded for further proceedings. *In re. J.R. and I.R.*, No. 11-16-00203-CV (Tex. App.—Eastland Jan 17, 2017, no pet.) (mem. op.).

E. Right to Jury Trial

Mother argued on appeal that the trial court erred by denying her a jury trial after she filed a written demand for a jury trial more than thirty days before the final hearing. The Court of Appeals agreed, reversed the portion of the judgment terminating Mother's parental rights, and remanded the case to the trial court.

TFC § 105.002 authorizes jury trials in parental termination cases. TRCP 216 provides:

> No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

To be entitled to a jury trial the party must also either pay the jury fee or file an affidavit of inability to pay costs within the time for filing a written request for a jury trial. TRCP 216, 217. Once the party has made a written jury trial request and filed an affidavit of indigence, "the court shall then order the clerk to enter the suit on the docket." TRCP 217.

The Department filed its petition for termination on March 30, 2015. The trial court granted a six-month extension of the one-year statutory dismissal date under TFC § 263.401, extending it until September 30, 2016. After having already filed an affidavit of indigence, Mother filed her request for a jury trial on February 10, 2016. At a March 2016 permanency review hearing, the trial court set the case for final trial on August 31, 2016. Mother's attorney told the trial court she might withdraw Mother's jury request, but she needed to consult with Mother first. The trial court then said the trial date was for a bench trial, it was "just fine" if Mother wanted a jury trial, but Mother should tell the court "pretty soon" if she wanted a jury trial. Before the day of trial, neither Mother nor her attorney informed the court whether Mother intended to insist on a jury trial or preferred a non-jury trial. On the day of trial, Mother's counsel told the court she wanted to withdraw because Mother wanted new counsel, and requested a continuance. The court denied both requests due to the looming dismissal date. Mother's attorney told the court that if it would not allow her to withdraw, she wanted the case reset for a jury trial. The court denied that request, stating there was insufficient time to schedule a jury trial in the one month remaining before the dismissal date. The case was tried without a jury, and the court rendered judgment terminating Mother's parental rights. The termination order stated, "At the final hearing on August 31, 2016, Respondent Mother requested a jury trial which was denied by the Court as untimely."

In analyzing whether the trial court abused its discretion by denying Mother's request for a jury trial, the Court of Appeals applied the well-established rule that "[a] jury request filed thirty or more days before trial is presumed reasonable." That presumption may be rebutted "by showing that the granting of a jury trial would operate to injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the court's business."

In holding the trial court erred in denying Mother's request for a jury trial, the Court of Appeals stated that, after having filed an affidavit of indigence, Mother perfected her right to a jury trial by filing a written request for a jury trial on February 10, 2016—203 days before the trial setting. However, the trial court did not follow Rule 217 and move the case to the jury trial docket. "Instead, the trial court left the case on the nonjury-trial docket and required Mother to make a second jury-trial demand." The Court of Appeals determined that the trial court's statements at the March 2016 hearing indicated that holding a jury trial before the September 30, 2016 dismissal date "would not have disrupted the trial court's docket if the court had followed rule 217 and placed the case on the jury-trial docket at that time." Although the record showed that granting a jury trial would have disrupted the court's docket, that disruption would not have been due to the date of Mother's jury trial request, but rather, "would have been due to the trial court leaving the case on the nonjury-trial docket when the Court knew Mother had perfected her right to a jury trial."

The Court of Appeals relied on the rule that "the trial court has no discretion to deny a party's request for a jury trial when the party has requested a jury trial a reasonable time before the trial date and has paid the fee or filed an affidavit of indigency." It noted that "[a]bsent a waiver by Mother of her right to a jury trial, the court could not impose any additional burdens on Mother to secure a jury trial" after her timely written request and affidavit of indigency. Thus, the Court of Appeals held "the trial

court had no discretion to deny Mother a jury trial when she timely requested it, had not subsequently waived it, and the record showed that holding a jury trial would not have disrupted the trial court's docket if the court had followed rule 217 and instructed the clerk to enter the case on the jury-trial docket at the time it was requested."

The Court of Appeals held that the error in denying Mother's request for a jury trial was reversible error because it probably caused the rendition of an improper judgment. It applied the standard that the erroneous denial of a jury trial request is "harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified." The Court of Appeals concluded that Mother's testimony—which included testimony that at the time of trial she had been released from mental hospitalization two months earlier, her medications were working, and she had two job offers—"constitutes some evidence raising a material issue of fact" about whether termination of Mother's parental rights was in the children's best interest. Therefore, the denial of Mother's request for a jury trial was harmful error. *In re J.M.B. and T.A.D.B.*, No. 05-16-01311-CV (Tex. App.—Dallas Apr. 27, 2017, no pet. h.) (mem. op.). *But see In re K.A.H.*, No. 05-16-01067-CV (Tex. App.—Dallas Apr. 27, 2017, no pet. h.) (mem. op.) (holding jury request filed 35 days before trial setting *not filed within reasonable time* because granting jury trial would have disrupted court's docket, impeded ordinary handling of court's business, or caused injury to other parties).

III. Evidence

A. "Soft Sciences" and Expert Testimony

On appeal, Mother argued, *inter alia*, that the trial court committed reversible error by admitting psychologist Dr. James Shinder's testimony regarding parenting and psychological assessments of both Father and Mother. Mother argued that Dr. Shinder failed to establish the reliability of the methodology underlying his assessments because he "offered no specific, independent sources to support the reliability of his methodology" in light of the *Robinson* factors. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

Applying the established *Nenno* "soft sciences" factors to Dr. Shinder's evaluation and opinion, the Court of Appeals considered: (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; and (3) whether the expert's testimony properly relies upon the principles involved in that field. *See Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999).

The evidence in support of the *Nenno* factors included Dr. Shinder's testimony that he earned a Ph.D. in psychology in 1973 and a master's degree in public health in 1979. He has worked in the field of psychology on a full-time basis since 1970. Dr. Shinder noted that he was previously licensed in five areas of practice; however, he is now licensed in three areas of psychology in anticipation of retirement. Dr. Shinder provides psychological services and analysis and parenting assessments for the Department on a contract basis, which comprises approximately half of his practice.

With respect to the parents, Dr. Shinder stated that he conducted comprehensive evaluations on both parents, which involved psychological assessments and determinations of their parenting abilities. According to Dr. Shinder, it is normal practice to choose a unique set of formal tests based on the individual testing subject when conducting an evaluation. Each test is professionally manufactured and validated in the field for as many as one hundred years. Formal testing may include areas pertaining to problem-solving, anxiety, and anger. In addition, the evaluation involves taking a lengthy personal history of the testing subject.

Dr. Shinder also incorporated information gathered from other psychological services provided to the individual in his assessments. Dr. Shinder testified that he has worked with the parents in this case for approximately ten years during previous Department cases and that he previously analyzed them both in 2004. In this case, Dr. Shinder spent a minimum of ten hours with the parents in the administration of the psychological evaluation. He also taught a sixteen-hour protective-parenting course that the parents attended. Moreover, Dr. Shinder provided the parents with individual and couple's counseling sessions.

Based on the evidence, the Appellate Court concluded that the trial court did not abuse its discretion in concluding that Dr. Shinder's evaluation of the parents properly relied on principles in the field of psychology and that Dr. Shinder's experience in the field was sufficient to render a psychological opinion about the mental capacities and abilities of the parents to parent

their children. *In re J.R., S.R., C.R., and C.R.*, 501 S.W. 3d 738 (Tex. App.—Waco 2016, no pet.).

B. Denial of Expert Witness

Part of the decision to terminate Mother's parental rights to the child was based on the numerous fractures suffered by the child's older sibling in the span of approximately one month, and because of the injuries, Mother's failure to acknowledge the injuries to the sibling and recognize the risks to her children. Mother's expert sought to opine that the sibling suffered from temporary brittle bone disease ("TBBD") or metabolic bone disease, referred to by Mother's expert as multiple unexplained fractures ("MUFs") in infants. The Department sought to exclude the expert's testimony, alleging it was unreliable. Although the trial court determined the expert is an expert in genetics, it concluded that his hypothesis of TBBD or metabolic bone disease, was unreliable as it failed to meet the standards required under *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993) and *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

On appeal, Mother asserted that the trial court erred in excluding testimony from her expert.

The Court cited to the Texas Supreme Court in *Robinson* which set out six factors that would be helpful in determining whether expert testimony is reliable: (1) the extent to which the theory underlying the expert's testimony has been tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory.

The trial court conducted a *Daubert*/*Robinson* hearing. At the hearing, Mother's expert testified as to his study of MUFs in infants since 1994. He explained his research process from which he concluded that the following factors are indicative of the existence of metabolic bone disease, i.e., TBBD: (1) maternal and/or infant Vitamin D deficiency; (2) fetal bone loading; (3) gestational diabetes; (4) intruaturine growth retardation; (5) maternal use of medication; (6) premature birth; and (7) the existence of Ehlers-Danlos Syndrome. However, the Appellate Court concluded that his testimony "when considered as a whole, shows [Mother's expert] could not say for certain that Mother or [the Child] suffered from *any* of the risk factors he contended are indicative of infantile metabolic bone disease." The Court also noted that the expert was only able to opine that Mother and/or the child, might have had three of the seven noted risk factors and was unable to show his pre-determined risk factors.

In considering the *Robinson* factors, the Appellate Court found that Mother's expert's theory regarding the existence of metabolic bone disease has been negatively peer-reviewed in several publications. The Court also found that the evidence showed that his ideas are based on his subjective interpretation regarding the existence of the factors that in his opinion denote the existence of metabolic bone disease. Further, the Court found that the Department provided evidence from two experts who testified that Mother's expert's theory has not been generally accepted by the relevant community and that several articles specifically renounced the existence of such a disease. One of the articles stated that the existence of such a disease "is neither clinically validated nor generally accepted by expert professionals and should not be invoked to explain multiple fractures in an infant." The court concluded, "[b]ased on the foregoing, we hold the trial court did not err in excluding [Mother's expert's] testimony relating to metabolic bone disease and that the "Department presented sufficient evidence for the trial court to conclude, in its discretion that [Mother's expert's] theory was unreliable due to an analytical gap between the data and his conclusion under the *Robinson* factors." *In re A.A.T.*, No. 04-16-00344-CV (Tex. App.—San Antonio Dec. 28, 2016, no pet.) (mem. op.).

C. Discovery — Failure to Supplement

In February 2016, the Department stated in an answer to an interrogatory that it was not seeking termination of parental rights.

The Department subsequently changed its goal to termination but did not update its interrogatory response. At trial in March 2015, Father's attorney asked that any evidence supporting termination of Father's parental rights be excluded, as the Department had only recently informed him of its intention to seek termination, resulting in unfair prejudice. The Department asserted that there were a number of factors that played into seeking termination, including: (1) the person answering the interrogatory did not know that Father had tested

positive for drug use in August 2015; (2) a different trial judge had refused an attempt to place the child with Father and Paternal Grandmother in November 2015; (3) the home study of another relative failed; and (4) Father became incarcerated since the interrogatory was answered.

Department's counsel represented to the court that the decision to seek termination was made only two weeks earlier, although Father's counsel was not so informed until the morning of trial.

The trial court terminated Father's parental rights after allowing the Department to present its case.

TRCP 193.5(a) provides that litigants have a duty to supplement or amend discovery if necessary unless "the additional or corrective information has been made known to the other parties in writing." On appeal, Father argued that the trial court abused its discretion by determining that the Department's failure to supplement its interrogatory response to show its intent to seek termination of parental rights was either (a) by good cause or (b) resulted in a lack of unfair surprise or unfair prejudice. *See* TRCP 193.6. Father argued that the Department's failure to supplement its discovery resulted in an unfair surprise and unfair prejudice.

The Court of Appeals determined that the Department's petition, a status hearing order, and Father's service plan all put Father on notice for months prior to trial that the Department would seek termination if reunification could not be achieved. Accordingly, the Court determined this notice, coupled with the fact that reunification had been denied in November 2015, meant the trial court did not abuse its discretion in finding a lack of unfair surprise or unfair prejudice. *In re M.F.D.*, No. 01-16-00295-CV (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, no pet.) (mem. op.).

IV. Termination Grounds

A. TFC § 161.001(b)(1)(C)

Father appealed the termination of his parental rights to Child, contending the evidence was legally and factually insufficient to support the trial court's finding pursuant to TFC § 161.001(b)(1)(C), i.e. that Father voluntarily left the child alone or in the possession of another without providing for the adequate support of the child and remained away for a period of at least six months.

Voluntarily left the child with another person

Father argued that the Department failed to prove that he voluntarily left the child with another person because the maternal grandmother obtained conservatorship of the child pursuant to a court order.

The evidence demonstrated that the maternal grandmother filed a petition seeking conservatorship of the child almost four months after the child's birth, and was eventually named sole managing conservator of the child in August 2014. Father appeared in the litigation and participated in a DNA test ordered by the trial court to establish paternity. However, Father made no request to be named managing conservator of the child and did not oppose the maternal grandmother's request to be named the child's managing conservator. The Appellate Court found that Father's conduct in the conservatorship proceedings indicated his agreement that the maternal grandmother would care for the child. Accordingly, the Department established that Father voluntarily left the child in the possession of the maternal grandmother.

Failure to provide adequate support for the child

Father also argued the evidence was insufficient to show he failed to provide adequate support for the child because he made arrangements for the child's support by participating in the litigation that led to maternal grandmother being named the child's managing conservator.

The Court agreed with Father's assertion that, "under certain circumstances, a parent may make arrangements to adequately support his child by agreeing to allow another person to be named the conservator of the child"; however, the maternal grandmother did not remain in possession of the child. Instead, the Department removed the child from the maternal grandmother's care, due to a report of inadequate supervision and drug use.

Father 1) was aware by September 1, 2015 that the child was in the Department's care, but made no attempt to regain custody of the child; 2) did not provide to the Department, prior to the mediation held on May 27, 2016, the names or contact information of any family members who could potentially care for or support the child; 3) did not contact the Department about the child,; 4) did not

make any payment to the Department for Child's support,; and 5) made no arrangements for any support of the child. Accordingly, the Court of Appeals concluded that "while [the child] was in the Department's care from September 1, 2015, through May 27, 2016, a period of more than six consecutive months, Father neither personally supported [the child] nor made arrangements for [the child's] adequate support."

Remained away for a period of at least six months

Finally, Father contended that the only evidence of his "remaining away" from the child was that he was incarcerated throughout the case, and incarceration does not constitute abandonment as a matter of law.

Although the Court of Appeals agreed with Father that incarceration, standing alone, does not constitute "abandonment" of a child for purposes of termination of parental rights, it reaffirmed that the parent's incarceration can be a factor in abandonment cases.

The evidence in this case demonstrated that Father was incarcerated in February 2014, after the maternal grandmother filed her petition for conservatorship of the child and before the trial court signed the order granting the maternal grandmother conservatorship of the child. Father testified he was "briefly" released from incarceration and saw the child one time in December 2014. Father was arrested on an aggravated robbery charge on January 11, 2015, and remained incarcerated through the date of the termination trial.

The child was almost three years old at the time of the termination trial, and Father had been incarcerated for most of the child's life. There was no evidence that the child had a relationship with Father. Further, while he was incarcerated, Father made no effort to contact the child or to communicate with him in any way. The Court concluded that the evidence established that, at the time of the termination trial, Father had remained away from the child, with no attempts at communication, for a period of more than six consecutive months.

Based on the evidence the Court concluded that the evidence was both legally and factually sufficient to support the trial court's finding that Father voluntarily abandoned the child without providing adequate support and remained away for a period of six months. *In re H.S.*, No. 05-16-00950-CV (Tex. App.—Dallas Dec. 6, 2016, no pet.) (mem. op.).

B. TFC § 161.001(b)(1)(D)

Mother appealed from a judgment terminating her parental rights to the child. As part of her sufficiency challenge, Mother argued that the evidence was legally and factually insufficient to support the jury's finding that she knowing placed or allowed the child in conditions or surroundings which endangered the child's physical or emotional well-being. TFC § 161.001(b)(1)(D).

The jury was presented with evidence that the child was five years old at the time of his removal from Mother. Mother testified that her cell phone was not working because she had not paid the bill and she needed to make a phone call to request a medication refill for a prescription medication she was taking. Mother left her residence on the Texas State Technical College's campus to go to the student services building to make the phone call. Mother testified she believed that the child was very ill and so she left him sleeping at home alone while she went to make the phone call. Mother was gone for over an hour when a maintenance worker for the college entered the residence to make some repairs and discovered Child home alone.

Mother was arrested for endangering the child, pled guilty to that offense during the pendency of the Department's case, and was placed on deferred adjudication community supervision as a result of her plea. Mother's judicial confession entered in the criminal proceeding admitted that she abandoned the child "in a place under circumstances that exposed [the child] to an unreasonable risk of harm."

Mother's conduct in leaving the five-year-old child at home alone while he was sick, which she judicially admitted endangered the child during her criminal case, rendered the evidence legally and factually sufficient to show that on the date of Child's removal from Mother, Mother knowingly allowed the child to remain in surroundings which endangered his well-being. *In re Z.W.*, No. 10-16-00015-CV (Tex. App.—Waco July 13, 2016, no pet.) (mem. op.)

C. TFC § 161.001(b)(1)(E)

i. *Mother's False Allegations of Abuse Supports (E)*

In a private termination case, Mother's parental rights were terminated pursuant to TFC 161.001(b)(1)(E),

which allows a trial court to order termination if it finds by clear and convincing evidence that the parent has engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child.

Mother made numerous allegations that Father sexually abused one child and physically abused the other. The Department ruled out these allegations, but validated allegations of emotional abuse by Mother. Mother told one child that if she did not make an outcry of sexual abuse, her mother would not love her, and when the child died, she would not get her angel wings and would burn in hell. Mother subjected that child to twenty-five unnecessary pelvic examinations. Mother violated the terms of the possession order, and absconded with the children to Las Vegas, where authorities had to negotiate through the hotel door for Mother to return the children. The children were frantic and in shock, and once returned to Father's care experienced nightmares and were afraid Mother would kidnap them again.

Mother was convicted of two counts of interference with child custody, with the jury rejecting her defense of necessity. Prior to the termination trial, Mother told a psychologist that there were times "when the law is second."

In appealing the private termination, Mother asserted that one standoff with the police does not constitute an endangering course of conduct. However, in affirming the order, the Court noted that repeated instances of coaching a child to lie about abuse, and making numerous unfounded allegations of abuse, even after being told by the Department that the allegations were harmful to the child, in conjunction with the interference with child custody is sufficient to support termination under (E). *In re S.D.*, No. 02-16-00280-CV (Tex. App.—Fort Worth Jan. 5, 2017, no pet.) (mem. op.).

ii. *Father's Knowledge of Mother's Drug Use*

On appeal, Father challenged the sufficiency of the evidence to support the trial court's finding under TFC § 161.001(b)(1)(E)

In its findings of fact and conclusions of law, the trial court found that Father knowingly placed the children with Mother who engaged in conduct that endangered their physical and emotional well-being. In support of its findings, the court found that Mother told the testifying psychologist that she was bipolar, attempted suicide both as a teenager and an adult, and had used marijuana, cocaine and methamphetamine. The court determined that her psychological needs were so great that she could not focus on the children.

The Court of Appeals noted the evidence presented at trial demonstrated that Mother was diagnosed with major depression, recurrent, severe, without psychotic features, and generalized anxiety disorder, which made it difficult for her to be aware of the needs of others, including her children. Nevertheless, the evidence reflected, Father allowed the children to remain with Mother, who was also unable to grasp how her long history of drug abuse affected the children. Both children were initially removed from Father and Mother due to Mother's drug use. Following a monitored return, the children were removed a second time because Mother continued to test positive for drugs.

On appeal, Father argued that Mother "fooled" him and denied that there were any signs she was using drugs, and asserted that he could not foresee she would relapse. The Court pointed out, however, that the evidence showed Father's counselor asked him to research the signs and symptoms of drug use, and that in later sessions, Father admitted he could now see the past symptoms of Mother's drug use. Further, the counselor testified Father understood his responsibility to remove his children from the situation if he saw signs of drug use in the future. In addition, the Department caseworker discussed with Father the warnings signs indicating Mother was using drugs, how to recognize those signs, and that he could leave Mother or ask Mother to leave. The evidence also reflected that Father continued to live with Mother despite his knowledge that the children were removed both times due to her drug use, and at no time during the case did Father remove the children from Mother's presence or inform the Department that she relapsed. The trial court found that Father allowed the children to remain with Mother after she tested positive for methamphetamine multiple times.

The Appellate Court observed that the trial court found that the relationship between Mother and Father was volatile, that Father would "kick [Mother] out of the house" only to "always" allow her to return, and allowed her to stay with him after she signed an affidavit of relinquishment. In support of this finding, the Court considered Mother's testimony that she and Father have

never actually "broken up," nor had she ever completely moved out of the home. In the two weeks before the second trial date, they broke up and got back together two times. The Department caseworker also testified that Mother and Father continually separated and then got back together, and that Mother informed her that she was living with Father again right before she voluntarily relinquished her parental rights.

In affirming the (E) finding, the Court concluded that the fact finder could have formed a firm conviction or belief that Father did not remove the children from Mother's presence, or call the Department to inform them that Mother had relapsed. Further, Father did not appear to be able to ascertain if Mother was using drugs while living in the house with the children, and did not end the relationship with Mother even after she relapsed. *In re A.B. and A.A.D.*, Nos. 12-16-00275-CV & 12-16-00276-CV (Tex. App.—Tyler March 22, 2017, no pet.) (mem. op.).

D. TFC § 161.001(b)(1)(F)

Father's parental rights were terminated in a private case. One ground supporting termination was TFC § 161.001(1)(F)—that Father had failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition. The Court of Appeals reviewed whether sufficient evidence supported the jury's finding that Father failed to support the children in accordance with his ability for a one-year period during the eighteen months before Mother filed the petition—between September 17, 2014 and March 17, 2016.

Evidence that during the relevant period Father failed to pay his share of the children's unreimbursed medical expenses as required by his divorce decree supported the finding of Father's failure to support. Specifically, the evidence showed that Father owed $5,000 in arrears on these expenses when the relevant period began, and he accrued another $2,400 in such expenses during the relevant period.

The Court of Appeals stated that a showing of Father's ability to pay support each month during the twelve-month period is also "essential" under subsection (F). Despite evidence that Father was unemployed, Mother's evidence showed that Father: (1) owned one investment account containing $217,000 in both January 2014 and February 2016; (2) owned another investment account whose balance from February 2015 through March 2016 fluctuated from $26,000 to $30,000; (3) withdrew $247,000 from another investment account in January 2014 which he claimed to have spent but did not account for; and (4) made sizable credit card payments in 2015, including $1,600 in March, $600 in April, $5,100 in May, and $3,000 in November. The Court of Appeals held that this evidence of Father's investment accounts holding amounts, and credit card payments in amounts, far in excess of his medical support obligations supported the jury's findings that Father could have paid his court-ordered share of the children's unreimbursed medical expenses for twelve months during the relevant eighteen-month period, but did not do so.

The Court of Appeals also rejected Father's argument that the original allocation of unreimbursed medical expenses was unfair because his argument "misses the point", which is whether he "failed to support the children in accordance with his ability." It also held that the jury rationally could have rejected and disbelieved Father's unsupported claim to have made pre-payments that could be credited to unreimbursed medical expenses, his claim that he obtained insurance for the children that would have paid all of their medical expenses, and his claim that it was impossible for him to verify and pay the unreimbursed medical expenses. Accordingly, the Court of Appeals held that sufficient evidence supported the jury's finding that Father violated subsection (F). *In re N.G.G., N.M.G., and N.G.G.*, No. 05-16-01084-CV (Tex. App.—Dallas Feb. 17, 2017, no pet.) (mem. op.).

E. TFC § 161.001(b)(1)(H)

Father appealed the trial court's termination of his parental rights under TFC § 161.001(b)(1)(H). Subsection (H) provides that a court may order termination of a parent-child relationship if the court finds by clear and convincing evidence that a parent has: (1) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth; (2) failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child; and (3) remained apart from the child or failed to support the child since birth.

The evidence established that Father was arrested while Mother was pregnant with the child, and he was not informed of Mother's pregnancy until two months after

his arrest. However, once he was informed of the pregnancy, Father made arrangements with a family friend, who was allowing Mother to reside with her until Mother ran off. Further, Father notified the adoption agency immediately upon the child's birth that he did not consent to the adoption. After the petition to terminate was filed, Father filed numerous *pro se* pleadings in an effort to maintain his parent-child relationship, including a statement of paternity and subsequently agreeing to an order for genetic testing. Based on this evidence, the trial court held that the evidence was factually insufficient to support the termination of Father's parental rights under TFC § 161.001(b)(1)(H). *In re Baby V.*, No. 04-16-00754-CV (Tex. App.—San Antonio, Mar. 29, 2017, no pet. h.) (mem. op.).

F. TFC § 161.001(b)(1)(L)

Mother filed a petition to terminate Father's parental rights during their divorce proceedings. The trial court found that Father was convicted of aggravated sexual assault of a child younger than fourteen years old and subsequently entered an order that terminated Father's parental rights to the children under TFC § 161.001(b)(1)(L).

Pursuant to TFC § 161.001(b)(1)(L), a trial court may terminate the parent-child relationship if it finds by clear and convincing evidence that the parent has "been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under specific provisions of the Texas Penal Code. The court noted that the Family Code does not define "serious injury" but identified several sister courts that defined "serious" as "having important or dangerous possible consequences" and defined "injury" as meaning "hurt, damage, or loss sustained". *In re W.J.B.*, No 01-15-00802-CV (Tex. App.—Houston [1st Dist.] Mar. 31, 2016, no pet.) (mem. op.); *In re C.T.*, No. 13-12-00006-CV (Tex. App.—Corpus Christi Dec. 27, 2012, no pet.) (mem. op.); *C.H. v. Dep't of Family & Protective Servs.*, No. 01-11-00385-CV, No. 01-11-00454-CV, No. 01-11-00455-CV (Tex. App.—Houston [1st Dist.] Feb. 23, 2012, pet denied) (mem. op.).

At the termination trial, the following documents were admitted: (1) documents establishing Father had been placed on deferred adjudication community supervision for aggravated sexual assault of a child younger than fourteen; (2) the State's motion to revoke Father's community supervision alleging that he tested positive for marijuana on three occasions; and (3) a copy of a judgment, entered in June 2015, which adjudicated Father guilty of aggravated sexual assault of a child younger that fourteen and established that Father had been sentenced to six years' imprisonment.

On appeal, Father admitted to the conviction and instead argued that the evidence was insufficient to establish that he was criminally responsible for the death or serious injury of a child. In support of his argument Father relied on *In re L.S.R.*, 60 S.W.3d 376 (Tex. App.—Fort Worth 2001, pet. denied). In that case, the Fort Worth court relied on evidence that showed appellant had received deferred adjudication for indecency with his four-year-old cousin. The Fort Worth court held that there was no evidence to support termination under TFC subsection 161.001(b)(1)(L) because there had been "no showing that [appellant's] cousin had suffered death or serious injury as a result of his conduct." The Supreme Court denied the subsequent petition for review but stated "We deny the petitions for review but disavow any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury."

In overruling Father's complaint in this case, the Texarkana court held "in line with the Texas Supreme Court's language in its opinion denying the petition for review in *L.S.R.*, we disavow Father's assertion that the aggravated sexual assault of a child younger than the age of fourteen does not cause serious injury to a twelve- or thirteen-year-old child. Instead, given the seriousness of the offense of aggravated sexual assault of a child, and the young age of the child Father assaulted, we conclude that when viewed in the light most favorable to the trial court's findings, the evidence in this case is legally sufficient to establish that Father was convicted for being criminally responsible for the serious injury of a child under Section 22.021 of the Texas Penal Code." *In re M.A.S. and K.D.S.*, No. 06-16-00059-CV (Tex. App—Texarkana Dec. 22, 2016, no pet.) (mem. op.).

G. TFC § 161.001(b)(1)(N)

i. Second Service Plan Not Required

Mother's parental rights were terminated pursuant to TFC § 161.001(b)(1)(N) which provides that termination may occur if the parent has constructively abandoned the child who has been in the temporary managing conservatorship

of the Department for not less than six months, and: (i) the Department has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment.

The Department originally removed the child in October 2013. The Department's original petition was dismissed due to the statutory deadline, and the Department refiled its petition in April 2015. The final hearing was held in March 2016. On appeal, Mother argued that because the service plan was filed in the first case, but was not refiled in the second case, no service plan existed and therefore the Department had failed to make reasonable efforts to return the child to her.

The Appellate Court overruled her argument, finding that the trial court in the second cause specifically approved the service plan from the first cause and made it an order of the court. The Court also noted that Mother testified she had been given the service plan and knew what she was supposed to do to comply. The termination of Mother's parental rights was affirmed. *In re J.M.*, No. 11-16-00092-CV (Tex. App.—Eastland, Sept. 22, 2016, no pet.) (mem. op.).

ii. Mental Health and Constructive Abandonment

Mother appealed the termination of her parental rights, challenging, *inter alia*, the sufficiency of the evidence to support the trial court's finding that she violated TFC § 161.001(b)(1)(N).

A 2010 decree awarded the Department managing conservatorship of both children. The decree provided Mother visitation with the younger child, but ordered she have no visitation with the older child until both that child's and Mother's therapists agreed that visits would be in the child's best interest. Mother was ordered to undergo a psychiatric evaluation and continue to engage in therapy. Both children were diagnosed with mental health disorders and learning or intellectual disabilities, remained in foster care, and continued to receive services.

By early 2014, the younger child had developed significant behavior problems after beginning visits with Mother and Father, and was moved to a residential treatment facility. Visitation was suspended due to the child's negative reaction and his therapist's recommendation. The older child was diagnosed with an intellectual disability, schizophrenia, and post-traumatic stress disorder; the younger child was diagnosed with bipolar disorder and social communication disorder. At this time, Mother and Father were not involved in the younger child's treatment, failed to make their home safe, failed to demonstrate they understood the children's special needs, and were not participating appropriately in either child's care. Thus, in 2014, the Department sought to modify the 2010 decree and terminate parental rights. Mother was ordered to complete a new service plan that required her to demonstrate an understanding of the children's "severe" special needs, address her own mental health needs, seek MHMR services and follow its recommendations, participate in family therapy, and complete a Trust Based Relational Intervention class.

In upholding Mother's termination under subsection (N), the Court of Appeals held that Mother failed to visit or maintain significant contact with the children based on evidence that: (1) the younger child's admitted mental health records showed that as of early 2014, Mother was no longer involved in the child's care; (2) Department records showed "Mother would not participate in addressing [the older child's] behavioral and mental-health problems"; and (3) Mother last visited the older child one year before trial, and last visited the younger child six months before trial.

The Court of Appeals also held that legally and factually sufficient evidence supported the trial court's finding that Mother demonstrated an inability to provide the children with a safe environment. In addition to evidence of her inability to provide a safe physical environment, the Court of Appeals concluded that evidence Mother "failed to adequately address her own mental health issues" and lacked the parenting skills to provide the care the special needs children required—particularly evidence she failed to follow MHMR recommendations and failed to complete the trust-based intervention class—supported the finding that she demonstrated an inability to provide a safe environment. *In re A.K.L. and S.A.A.P.*, No. 01-16-00489-CV (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, pet. denied) (mem. op.).

H. TFC § 161.001(b)(1)(O)

Mother was fifteen years old when the child was born and sixteen at the time of trial. Mother's parental rights to the child were terminated pursuant to TFC § 161.001(b)(1)(O) , which allows termination of parental

rights where a parent: "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 child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Service for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child."

Mother was court-ordered to complete a variety of services. However, Mother attended only "some" parenting classes, left in-patient drug rehabilitation against medical advice, failed to submit to random drug screens, and admitted she chose to get high instead of visit the child. Mother admitted she failed to complete all of her court-ordered services. Nevertheless, Mother asserted the "novel argument" that the evidence was insufficient to terminate under TFC § 161.001(b)(1)(O) because, as a minor, she lacked the capacity, understanding, and ability to complete the service plan.

The Court pointed out that TFC § 161.001 does not provide any exceptions for minor parents, and also found no authority affording a minor parent special status in parental termination cases. Likewise, it found no authority prohibiting a trial court from ordering a minor parent from completing a service plan in order to be reunited with a child.

The Court determined that TFC § 161.001 does not provide any exceptions for minor parents, and affirmed the termination order. *In re L.A.M.*, ___ S.W.3d ___, No. 08-16-00157-CV (Tex. App.—El Paso Dec. 7, 2016, no pet.).

I. TFC § 161.001(b)(1)(Q)

i. *Father's Lack of Awareness of Paternity not Dispositive of Q Finding*

Father's parental rights were terminated pursuant to subsection (Q), which permits termination of parental rights if the parent "knowingly engaged in criminal conduct that resulted in the parent's (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition."

On appeal, Father argued that the evidence was insufficient to support termination of his parental rights under subsection (Q) because he had only recently learned he was the father of the child, and therefore he had no knowledge that he was a father before he was incarcerated. Evidence indicated that Father committed the criminal act that resulted in his incarceration four years before the child was conceived.

The Court disagreed that Father's criminal conduct and incarceration four years before the child was conceived rendered the evidence insufficient. The Court pointed out that (Q) "does not speak to the relationship between the time of conception of the child and the time of occurrence of the criminal conduct . . . The Supreme Court of Texas observed in *In re A.V.* . . . that the subsection 'focuses on the parent's future imprisonment and inability to care for the child, not the criminal conduct that the parent committed in the past.'" *citing In re A.V.*, 113 S.W.3d 355, 360 (Tex. 2003). The Court affirmed the termination of Father's parental rights. *In re A.O.*, No. 07-16-00331-CV (Tex. App.—Amarillo Mar. 3, 2017, pet. filed) (mem. op.).

ii. *Criminal Conduct Can Precede Child's Conception*

On appeal, Father argued the evidence was legally and factually insufficient to support the trial court's TFC § 161.001(b)(1)(Q) finding, because the criminal conduct for which he was eventually sentenced, burglary of a habitation, occurred prior to the child's conception.

The Court of Appeals noted the evidence on which the trial court relied for its subsection (Q) finding was undisputed. This evidence showed Father admittedly committed a felony offense, burglary of a habitation, and numerous violations of his community supervision. As a result, Father was sentenced to fourteen years of imprisonment, which exceeded two years from the date of the filing of the petition for termination of his parental rights. The record reflected that Father expected to be released from prison in 2020. During his testimony, he acknowledged he had never cared for, or had contact with, the child, nor had he ever made any efforts or arrangements for the child's care.

Father merely asserted that because the criminal conduct that resulted in his incarceration occurred before the child's conception, it could not provide sufficient evidence to support termination under subsection Q. In rejecting this argument, the Appellate Court noted the statute's language is unambiguous and "simply does not

speak to the relationship between the time of conception of the child and the time of occurrence of the criminal conduct." Citing to the Texas Supreme Court opinion in *A.V.*, 113 S.W.3d 355, 360 (Tex. 2003), the Court reiterated that the Legislature has been clear in section 161.001 when it intends a certain time period must elapse before a particular subsection can apply to a parent's conduct, which could also be said for the sequence of events required to prove particular predicate acts. The Court concluded "[h]ad the Legislature intended the criminal conduct required by subsection Q to post-date the conception of the child, it easily could have so provided . . . and we see no 'indication the Legislature meant anything other than what it said.'" The Court accordingly affirmed the termination of Father's parental rights under subsection (Q). *In re J.M.G.*, No. 07-16-00202-CV (Tex. App.—Amarillo Oct. 27, 2016, no pet.) (mem. op.).

V. Best Interest

A. Best Interest — Holley Factors

i. *Desires of the Child*

Father challenged the sufficiency of the evidence supporting the trial court's best interest finding. Under the factor concerning the desires of the child, the Court noted that the child was only two and a half years old at the time of trial and there was no evidence she had the ability to articulate her desires. The Court went on to say that the record reflected the paternal grandmother was providing a loving and stable environment for the child, and the child was doing well physically and emotionally. The Court related that Father was incarcerated off and on during the case, and so his contact with the child has been limited. The Court found that the evidence weighed in favor of termination under this factor and ultimately affirmed the termination of Father's parental rights. *In re G.N.*, No. 08-16-00077-CV (Tex. App—El Paso Sept. 21, 2016, no pet.) (mem. op.)

ii. *Improvements in Foster Home Supports Desires Factor*

The older children had issues like hitting and biting when they were initially placed in foster care. After a year in foster care, the older children's behaviors improved significantly. However, they had exhibited aggressive behaviors and "potty incidents" for a couple of days after visits with Mother. The behavior setbacks ended when Mother's visits were suspended.

On appeal, Mother challenged the finding that termination was in the best interest of the children. The Court noted that while the children were too young to articulate their desires, the contrast between the children's good behavior in the foster home and their poor behavior around the parents was relevant to the desires of the children. *In re G.R.*, No. 07-16-00277-CV (Tex. App.—Amarillo Oct. 25, 2016, no pet.) (mem. op.).

iii. *Mother's Parenting Ability*

The Court of Appeals held that legally and factually sufficient evidence supported the trial court's finding that termination of Mother's parental rights was in the children's best interest. Evidence that Mother exposed the children to her drug use, the children had witnessed domestic abuse, Mother had relapsed following treatment during the case, she lacked stable employment, and she lived in a homeless shelter at the time of trial, supported the best-interest finding. In addition, the Court of Appeals held that comments Mother had made to the caseworker and her mother "raised concerns about her mental state which would affect her ability to parent the children." Specifically, during her investigation interview, Mother told the Department that bugs were crawling on her and the kids, but no bugs were present. The children were placed with Maternal Grandmother during the case. While the case was pending, Mother went to Maternal Grandmother's home unannounced two times and said: (1) "people were looking for her to kill her, people were poisoning her, and people are looking for her, [Maternal Grandmother], and the children and told [Mother] they are going to stab and kill the children"; and (2) "she was in a hotel and heard [Maternal Grandmother] and [one of the children] crying in the next room." The Court determined these facts weighed in favor of termination under this factor. *In re E.K.H. and K.L.H.*, No. 04-16-00374-CV (Tex. App.—San Antonio Nov. 9, 2016, no pet.) (mem. op.).

iv. *The Stability of the Home or Proposed Placement*

The Court of Appeals noted in its analysis of the seventh *Holley* factor, the stability of the home or proposed placement, that Texas courts recognize the child's need for a stable, permanent home is a "paramount consideration" in the best interest determination. The

Court observed Mother had failed to secure stable employment or stable housing by the time of trial. At that time, Mother was living in a twelve-to-eighteen-month transitional living center (the "Center"), and was "unable to provide for the children in any manner without the Center's assistance."

Testimony from the Center's case manager established that Mother had completed their New Hope Program, and was participating in a GED program as well as an aftercare program. The case manager further testified that Mother was making progress, and that the children would be allowed to live with Mother at the Center because she had demonstrated continual progress. She also related, however, that Mother had been increasingly placed on restriction for violating Center rules, and had not been taking her medication to treat her major depressive disorder. Further, while the Center was "comfortable" with Mother's current progress, she could not guarantee Mother would be allowed to stay there.

The Court concluded that "[a]lthough the Center, for a time, could provide housing, clothing, and food for the children if they lived with Mother, there were no guarantees Mother would remain in the program or complete the program and successfully make the transition into the community." The Court concluded that this factor weighed in favor of termination. *In re A.A.B. and A.B.*, Nos. 14-16-00855-CV & 14-16-00918-CV (Tex. App.—Houston [14th Dist.] April 11, 2017, pet. denied) (mem. op.).

VI. TFC § 161.004

A. Failure to Visit Child is a Material Change of Circumstances

The children were originally removed into the Department's custody in November 2010. In May 2012, after making a finding that the appointment of a parent as managing conservator for the children would not be in the child's best interest because it would significantly impair the child's physical health or emotional development, the trial court signed an order appointing the Department the child's sole managing conservator and appointed Mother as possessory conservator. In April 2014, Mother's cousin was appointed sole managing conservator of the children and Mother remained possessory conservatory. In August 2015, the Department filed an original motion to modify conservatorship and for termination of Mother's parental rights to the child alleging the child's or other party's circumstances had materially and substantially changed since the rendition of the prior order.

In challenging the trial court's best-interest finding, Mother argued that the Department failed to prove that there was a material and substantial change in the child's circumstances since the trial court's prior order. She argued that the Department was required to plead and prove grounds in TFC 161.004 in addition to the grounds for termination under section 161.001.

TFC § 161.004 provides that:

> (a) The Court may terminate the parent-child relationship after rendition of an order that previously denied termination of the parent-child relationship if:
>
> (1) the petition under this section is filed after the date the order denying termination was rendered;
>
> (2) the circumstances of the child, parent, sole managing conservator, or other party affected by the order denying termination have materially and substantially changed since the date that the order was rendered;
>
> (3) the parent committed an act listed under Section 161.001 before the date the order denying termination was rendered; and
>
> (4) termination is in the best interest of the child.

The Court reiterated that there are no definite guidelines as to what constitutes a material and substantial change in circumstances under section 161.004. The Appellate Court noted the following evidence: (1) the trial court signed a June 2014 order denying the Department's petition to terminate Mother's parental rights; (2) Mother signed a new family service plan, which the trial court signed, requiring her to, among other things, attend all medical appoints and visit the child once per week; and (3) a placement review report filed in July 2015 noted that Mother did not attend any of the child's medical appointments despite offers for transportation and that Mother had not visited the child. As such, the Court concluded that the trial court could have formed a firm belief or conviction that Mother's failure to visit the child for over two months and failure to attend medical appointments constituted a material and substantial change as to the child's circumstances. *In re M.J.W.*, No.

14-16-00276-CV (Tex. App.—Houston [14th Dist.] Aug. 9, 2016, pet. denied) (mem. op.).

B. Failure to Comply with Services Constitutes Material Change of Circumstances

The Department removed the children from Mother's care in 2011 due to "concerns of physical neglect and failure to thrive." In February 2012, the children's maternal great-aunt was named their sole managing conservator, and Mother was named possessory conservator. Before the order confirming the great-aunt's conservatorship was entered, she returned the children to Mother.

The Department filed an emergency motion seeking to modify conservatorship. The trial court entered an order in March 2012, in response to the Department's emergency motion, naming the Department as temporary managing conservator of both children. The children were both placed in foster care.

In April 2014, the trial court entered an "Agreed Order Modifying Prior Order and Decree in Suit Affecting the Parent–Child Relationship." The order stated that circumstances had substantially and materially changed since the February 2012 order that named the children's great-aunt as their sole managing conservator. The agreed order modified that order by removing the great-aunt as conservator, naming the Department as sole managing conservator of the children, naming Mother as possessory conservator of the children, and the children's father's as possessory conservator.

In January 2015, Mother entered into a new family service plan. Four months later, in May 2015, the trial court entered an order requiring Mother to successfully complete her family service plan by January 21, 2016. The order advised that failure to complete the plan could result in termination of her parental rights. According to the trial testimony of the Department's caseworker, the deadline passed without Mother completing any of the plan's requirements. Mother presented no evidence to dispute the caseworker's testimony. After that deadline passed, the Department filed an amended motion to modify conservatorship that sought termination of all parents' parental rights. The trial was held in May 2016. The trial court terminated Mother's parental rights as to both children. Mother appealed.

In her second issue on appeal, Mother contended that the evidence was legally and factually insufficient to establish grounds to modify an order of conservatorship based on a material and substantial change of circumstances since the April 2014 agreed order.

The Appellate Court reiterated that when a parent fails to do even one service mandated by court order as a prerequisite to reunification with a child, the resulting determination by the Department that its focus must shift from reunification to adoption is in itself a material and substantial change in the parent's circumstances.

The Court of Appeals concluded that Mother's failure to complete any of her plan by the court-ordered deadline provided legally and factually sufficient evidence that there had been a material and substantial change in Mother's circumstances since the rendition of the April 2014 order. *In re J.R. & M.D.N.S.T.*, Nos. 01-16-00491-CV & 01-16-00535-CV (Tex. App.—Houston [1st Dist.] Dec. 13, 2016, pet. denied) (mem. op.).

VII. Visitation

Following a bench trial, the trial court appointed the Department as permanent managing conservator of the children and Mother as their possessory conservator. The final order stated that Mother "shall have possession of the children at times mutually agreed to in advance by the parties and, in the absence of mutual agreement, as specified in Attachment A to this order". Attachment A stated that "Visitation between [Mother] and [the children] will be pursuant to the children's counselor's recommendation."

Mother appealed, arguing that the trial court's order "falls far short of the specificity necessary to comport with constitutional strictures of due process related to possession and access [to the children]." TFC § 153.006(c) states that in an order appointing a parent as possessory conservator, the trial court shall specify and expressly state in the order the times and conditions for possession of or access to the children, unless a party shows good cause why specific orders would not be in the best interest of the child.

In analyzing Mother's argument, the Appellate Court noted that other Courts have held that a "[c]omplete denial of parental access amounts to a near-termination of a parent's rights to his child and should be reserved for situations rising nearly to the level that would call for a

termination of parental rights" and that "a complete denial of access should be rare."

The Court noted that in this situation, the trial court's order effectively gave the Department and the children's counselor "absolute discretion over [Mother's] visitation with the children" and could deny her access "for an indeterminate time." The Appellate Court found that the trial court "could not make an order that denied [Mother's] access to her children unless it decided that the children's best interest warranted such an order" and that the trial court did not make such a finding. Although the Court found that the trial court could have reasonably restricted Mother's access, "[t]here is no indication that the trial court intended to completely deny access."

In conclusion, the Appellate Court found that the trial court erred in that its order was "not sufficiently specific as to the times and conditions for [Mother's] possession of or access to [the children]." The case was reversed and remanded for further proceedings. *In re J.Y., G.Y., and B.Y., Children*, ___ S.W.3d ___, No. 06-16-00084-CV (Tex. App.—Texarkana Apr. 28, 2017, no pet.).

VIII. Post-Trial Matters

In April 2016, following a bench trial, the associate judge rendered a written order terminating Father's parental rights. Father was not present at trial. Father's attorney timely filed a request for a *de novo* hearing before the referring court.

In May 2016, the referring district court conducted a hearing on the request for *de novo* review. At the hearing the Department argued that Father had waived his right to *de novo* review because the written Order of Termination signed by the associate judge contained the following statement:

> The Court finds that all parties have waived any objections to the hearing by an Associate Judge and do hereby waive their right to de novo review pursuant to Section 201.015 of the Texas Family Code.

The Department stated that this language was contained in "all our termination orders", and that Father's trial counsel had signed the order "approved as to form." Father's trial counsel replied that his signature was an oversight, he never agreed to a waiver, and that the associate judge never orally pronounced that the parties were waiving their rights to *de novo* review. Nevertheless, the district court denied Father's request for de novo review.

TFC § 201.015(a) states that "[a] party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request not later than the third working day after the date the party receives notice of the substance of the associate judge's report […]." TFC § 201.015(f) states that the referring court "shall hold a de novo hearing not later than the 30th day after the date on which the initial request for a de novo hearing was filed with the clerk of the referring court." TFC § 201.015(g) provides that "[b]efore the start of a hearing by an associate judge, the parties may waive the right of a de novo hearing before the referring court in writing or on the record."

On appeal, Father argued that the trial court erred in denying his request for *de novo* review, as "such a hearing is mandatory when timely requested under section 201.015, and because language purporting to waive the right to a de novo hearing is not effective when the order is merely 'approved as to form.'" The Appellate Court agreed, noting that: (1) there was no waiver before the start of the hearing before the associate judge; and (2) the reporter's record from the bench trial is "devoid of any mention of an agreement to waive de novo review". Further, the Appellate Court found that "even if the right to object could be waived after the hearing [before the associate judge], the waiver language included in the associate judge's order would not have been effective in this instance" as "approved as to form" does not create a consent as to content.

The Appellate Court concluded that "[b]ecause there is no indication in the record before us that [Father] agreed to waive his right to a de novo hearing, we hold the referring district court erred in denying same." The case was reversed and remanded for further proceedings. *In re J.A.P. and B.A.R., Children*, 510 S.W.3d 722 (Tex. App.—San Antonio 2016, no pet.).