# 2019 TERMINATION CASE LAW UPDATE

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**DFPS APPELLATE UNIT**

## I. JURISDICTION

### A. No Transfer Order – Termination Court Was Not Acting on Behalf of CCJ

In April 2004, the 36th District Court of Bee County ("chapter 155 court") issued a final order in a SAPCR regarding the child. The order appointed Father and Mother as joint managing conservators of the child, established a schedule of possession and access, and ordered Father to pay child support.

In 2017, the Department filed an original petition for protection of a child, for conservatorship and for termination in suit affecting the parent-child relationship regarding the child. The petition was assigned to the 343rd District Court of Bee County ("chapter 262 court"). The chapter 262 court held the adversary, status, and multiple permanency hearings before presiding in a bench trial. During the trial, the child's attorney *ad litem* introduced the 2004 order from the chapter 155 court when questioning Father about his payment of child support. The court took judicial notice of the order. Thereafter, the chapter 262 court signed an order terminating Father's and Mother's parental rights to the child.

Father appealed arguing that the chapter 262 court lacked subject matter jurisdiction to terminate his parental rights. The Court noted "A court acquires continuing, exclusive jurisdiction over matters...in connection with a child on the rendition of a final order." *See* TFC § 155.001. The Court went on to state, "[o]nce a court has acquired continuing, exclusive jurisdiction with respect to a particular SAPCR, no other court has jurisdiction over the suit unless jurisdiction has been transferred pursuant to the exclusive transfer provisions of the family code or an emergency exists." *Id*. Relying on the exchange of benches provision in the government code, the Department asserted that the chapter 262 court could render a final order without a formal order or transfer from the chapter 155 court because it had concurrent jurisdiction. *See* TEX. GOV'T CODE § 24.003.

In rejecting the Department's argument, the Court of Appeals considered that the chapter 262 court took judicial notice of the 2004 SAPCR and retained the case, but the record failed to "explicitly" show how the chapter 262 court was acting on behalf of the chapter 155 court. As such, the Court concluded that the chapter 262 court lacked jurisdiction to issue a final order because "there was no transfer of the 2004 SAPCR to the chapter 262 court under the Texas Family Code". Accordingly, the Court vacated the order and dismissed the appeal. *In re S.H.*, No. 13-18-00240-CV (Tex. App.—Corpus Christi Sept. 27, 2018, no pet.) (mem. op.).

### B. Termination Court's Consolidation Order Did Not Transfer CCJ

In April 2016, the 62nd District Court of Lamar County, Texas entered a final divorce decree, which dissolved Mother's and Father's marriage and respectively appointed them managing conservator and possessory conservator of their minor children. In November 2016, the Department became involved because both parents were living on the same property and using methamphetamine, and two of the children tested positive for methamphetamine. The Department subsequently filed its Original Petition in the County Court at Law of Lamar County (CCL).

In December 2017, the Department filed a motion to consolidate the divorce suit and the termination suit into the same cause number in the CCL. This motion was granted by the CCL judge, who signed the consolidation order.

Following the termination of their parental rights by the CCL, the parents appealed, arguing that the CCL lacked subject matter jurisdiction to terminate their parental rights and therefore, the termination order was void.

The Court of Appeals noted that the 62nd Judicial District Court had acquired continuing, exclusive jurisdiction when it entered its final divorce decree. While the Department argued that the CCL's consolidation order was "effectively a transfer from the district court to the CCL", the Court of Appeals disagreed. It held that "[f]or the CCL to acquire jurisdiction to enter a termination order in this case, that jurisdiction had to be transferred to the CCL *from and by* the district court, because the district court had continuing, exclusive jurisdiction."

The Court of Appeals held that because the judge of the 62nd District Court did not sign the consolidation order, jurisdiction was never transferred to the CCL, which rendered its termination order void. *In re E.N., K.N., and M.N.*, No. 06-18-00019-CV (Tex. App.—Texarkana Jul. 12, 2018, no pet.) (mem. op.).

### C. Adversary Hearing Timeline Not Jurisdictional

On May 30, 2018, the Department filed three SAPCR's, each relating to one of Mother's children with different fathers. The Department sought a hearing to determine whether the children should be removed from the home.

On May 31, 2018, the trial court appointed each parent an attorney and scheduled an adversary hearing for the three cases on June 14, 2018, which was "a date not later than 30 days from the date of the filing of the petition pursuant to TFC § 262.201(b)." Subsequently, the trial court signed another order resetting the June 14 adversary hearing to July 12, 2018.

TFC § 262.201(b) states that: "A full adversary hearing in a suit filed under Section 262.113 requesting possession of a child shall be held not later than the 30th day after the date the suit is filed."

At the adversary hearing on July 12, the Mother's attorney complained that an adversary hearing was not held within 30 days of the filing of the Department's petition, to which the trial court replied: "That sounds jurisdictional." The trial court elaborated that since TFC § 262.201(b) provides that a hearing "shall" be held within 30 days, it did not have "authority to say who can have the children any longer." The trial court dismissed the case.

The Department sought mandamus relief from the Court of Appeals, asserting that the trial court committed an error of law in holding that TFC § 262.201(b) is jurisdictional and in not holding the adversary hearing.

The Court of Appeals looked at whether the Legislature intended a "jurisdictional bar by imposing the expedited hearing requirement found in Section 262.201(b)." It analyzed: (1) the plain meaning of the statute, (2) whether there were specific consequences for noncompliance in the statute, (3) the purpose of the statute, and (4) the consequences that result from each possible interpretation of the statute.

First, the Court found that under the plain meaning of the statute and the consequences of non-compliance, the statute "does not address any consequences for non-compliance" and that no clear language exists in statute that implicates the trial court's jurisdiction. The Court also noted that the purpose of the statute is "to ensure that issues relating to the health and safety of children are promptly addressed while also protecting the due-process rights of those entitled to possession"—a purpose that "does not indicate that the requirement is jurisdictional."

Further, the Court considered the consequences of the trial court's interpretation of the statute, and concluded that interpreting 262.201(b) as jurisdictional would open the door for collateral attacks for noncompliance and "could render even a judgment terminating the parent-child relationship vulnerable to attack, disrupting any achieved permanency and stability for the child." Significantly, the Court stated that the consequence here was "the trial court dismissing the SAPCR without conducting the full adversary hearing", which could potentially place the child at risk of harm.

The Court therefore conditionally granted mandamus relief, concluding that "the 30-day hearing requirement in Subsection 262.201(b) is non-jurisdictional." *In re Tex. Dep't of Family and Protective Servs.*, Nos. 01-18-00717-CV, 01-18-00718-CV, 01-18, 00719-CV (Tex. App.—Houston [1st Dist.] Oct. 2, 2018, no pet.);

*see also In re Justin M.*, 549 S.W.3d 330 (Tex. App.—Texarkana 2018, no pet.) ("The scheduling requirements of Sections 262.106 and 262.201 are procedural, not jurisdictional"; the only possible relief for failing to conduct a timely hearing "is to order the trial court to promptly hold the required hearing".).

## II. STANDING

### A. TFC § 102.003 - Actual Care, Control, and Possession

The child lived with her maternal grandparents (Grandparents) for the first twenty-three months of her life, and Grandparents served as her primary caretakers for the last eight of those months. The issue before the Texas Supreme Court was whether Grandparents, having continuously engaged in a parent-like role on a daily basis, had standing to pursue a suit affecting the parent-child relationship (SAPCR) pursuant to TFC § 102.003(a)(9) which confers standing on nonparents who have had "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." TFC § 102.003(a)(9).

Following the child's birth in January 2013, she and Mother moved in with Grandparents where the child primarily lived until December 2014. In August 2013, the trial court entered an order in a pending SAPCR which appointed the child's parents joint managing conservators, gave Mother the exclusive right to determine the child's residence, and granted Father possession of the child on alternate weekends and various holidays. Mother, who struggled with alcohol addiction, lived with Grandparents between August 2013 and March 2014, when she then moved into a sober living facility called Oxford House. Mother, Father, and Grandparents agreed that the child would continue to live with Grandparents while Mother was in recovery.

After Mother moved to Oxford, Grandparents directed, managed and controlled the child's everyday activities, and took care of her daily needs including providing her with a home, food, clothing, shelter, and daycare. They ensured that her nutritional, physical, emotional, and psychological needs were met, while providing her with a nurturing home. Grandparents also took the child for medical treatment when necessary, which both parents authorized while maintaining involvement in medical decisions. Mother scheduled some of the child's doctor's appointments but did not attend all of them. Father agreed, and the trial court found, that Grandparents served as the child's "primary caregivers" from March to October 2014.

Mother testified that while she was living at Oxford, she would spend evenings at the Grandparents' home where she would have dinner with the child, bathe her and put her to bed, and while the record was unclear as to the frequency of these visits, the trial court found they occurred "on a regular basis." Although he initially exercised sporadic visitation, the child stayed with Father about every other weekend after the first few months Mother was at Oxford. Both Mother and Father testified that they intended the agreement to be temporary while Mother was in recovery, and Mother testified she did not intend to relinquish her care and control of the child to Grandparents.

In October 2014, Grandparents filed a petition to modify the SAPCR order requesting that they be appointed the child's managing conservators, and asserted they had standing under TFC § 102.003(a)(9). Father filed a counter-petition to modify the possession order and filed a plea to the jurisdiction seeking dismissal of Grandparents' petition for lack of standing. The trial court determined that Grandparents did not establish that they had "actual care" or "actual control" over the child for the requisite period. The Court of Appeals affirmed, holding that "standing under section 102.003(a)(9) cannot be gained by a nonparent exercising care, control, and possession over a child in the absence of evidence that the child's parent is unfit or has abdicated his or her own care, control, and possession over the child to the nonparent for the statutory period."

The Supreme Court began its analysis by articulating that this case is not about whether Grandparents will prevail in their suit, but rather about whether they can bring it in the first place. Further, the dispute focuses on what is required to have "actual care [and] control" of a child for the requisite time period, as the parties agreed that Grandparents met the statute's "actual

possession" requirement. The Court discussed two lines of authority regarding what constitutes "control" over the child. The Court agreed with some lower courts' interpretations that "actual control" is "the actual power or authority to guide or manage or the actual directing or restricting of the child," "without regard to whether [the nonparent] had the legal or constructive power or authority" to do so. *See Jasek v. Tex. Dep't. of Family & Protective Servs*., 348 S.W.3d 523, 533, 537 (Tex. App.—Austin 2011, no pet.) (relative placement had standing to intervene in Department case).

The Court explained the Legislature did not use the phrase "legal custody," "legal control," "constructive control," or any other language indicating that it intended formal legal authority over the child to be a condition for standing under subsection (a)(9). Further, the Court concluded the Legislature did not require the nonparent's care and control of the child to be exclusive, reasoning that had the Legislature intended to require total "abdication" by the parent it would have done so expressly. The Court surmised that when a nonparent consistently makes the kind of decisions associated with raising a child, such as when she gets up and goes to bed, that nonparent is exercising "actual control" over the child. Thus, the Court declined to hold that a parent must generally cease exercising his or her own parental rights and responsibilities in order for a nonparent to exercise those same kinds of responsibilities and obtain standing under 102.003(a)(9). The Court also rejected the notion that the statute requires intent to make the nonparent's exercise of care, control, and possession permanent, concluding that would improperly add language to the statute.

In sum, the Court concluded that a nonparent has "actual care, control, and possession of the child" under section 102.003(a)(9) if, for the requisite six-month time period, the nonparent served in a parent-like role by (1) sharing a principle residence with the child, (2) providing for the child's daily physical and psychological needs, and (3) exercising guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children. After applying this standard, the Court held Grandparents exercised "actual care, control, and possession" of the child for the six-month statutory time period.

Accordingly, the Court concluded the Family Code recognizes that a narrow class of nonparents, who have served in a parent-like role to a child over a lengthy period, may come to court and seek to preserve that relationship over a parent's objections. The Court held that Grandparents fall into that class, but expressed no opinion on whether they are entitled to conservatorship or visitation rights with respect to the child. The Supreme Court reversed the judgment of the Court of Appeals and remanded the case to the trial court for further proceedings. *In re H.S.*, 550 S.W.3d 151 (Tex. 2018).

### B. Terminated Parent Does Not have Standing for Further Orders

In a mediated settlement agreement (MSA), the parents agreed to termination of their respective parent-child relationships based on section 161.001(b)(1)(O) of the Family Code. The Department agreed to a home study of an individual who lived in Oregon as a possible person to take custody of the children. The Department made an Interstate Compact Placement Request (ICPC) with the State of Oregon to conduct the home study. If the home study was denied or the individual withdrew their request, the Department promised to make "best efforts" to place the children in the same adoptive home. The Department also promised to use best efforts to locate an adoptive placement that would allow Mother and Father post-termination access once per year, and permit them to send cards, letters and pictures four times per year. All of the parties to the agreement, including Mother and Father, stipulated that termination was in the children's best interest. After a trial of the case, which included the prove-up of the MSA, the trial court signed an "Agreed Order of Termination" which terminated the parental rights of both parents and appointed the Department the children's permanent managing conservator.

Seventy-one days after her parental rights were terminated, Mother filed a "motion for further orders" in which she alleged the home study on the potential placement for the children was never conducted. Mother asked the court to "find that an independent

home study by an approved agency of Oregon be conducted an[d] submitted for an ICPC placement, is in the best interest of the children [sic]." The trial court denied Mother's motion on the basis that she lacked standing. On appeal, Mother argued the trial court erred by determining she lacked standing to bring the motion.

The Court of Appeals began its analysis by pointing out that Mother did not timely file a motion for new trial, notice of appeal, or restricted appeal from the termination of her parental rights, and therefore the order had become final and unappealable more than a month before she filed her motion. The Court reiterated that "An order terminating the parent-child relationship divests the parent and the child of all legal rights and duties with respect to each other". TFC § 161.206(b). Thus, the terminated parent has no standing to bring an original suit or to seek further orders regarding the conservatorship of the child, other than limited standing to seek enforcement of post-termination contact with the child. *See* TFC §§ 102.006 & 161.2061.

The Court noted Mother's motion seeks enforcement of the judgment's provisions that a home study of a certain individual be conducted pursuant to the ICPC. The Court reasoned Mother's motion concerned the future conservatorship of the children, and Mother had no standing to pursue claims concerning the children's conservatorship after the termination. The Court rejected Mother's argument that she had standing under TFC § 102.003(a) as a parent in a Department-initiated suit and retained her standing as long as the controversy existed, because the controversy ceased to exist upon the trial court's judgment becoming final when Mother did not appeal.

Mother also contended she had standing under contract law to seek enforcement of the agreement. The Court noted that the MSA stated it "is entered into pursuant to section 153.0071 of the Texas Family Code", and therefore Mother only has the rights of a signor under that section which provides that a party to a MSA has standing to seek enforcement of the agreement to the extent of requiring the trial court to enter judgment on the agreement. TFC § 153.0071(e). The Court pointed out that Mother's motion does not complain that the trial court's judgment does not comply with the MSA, and TFC § 153.0071 does not give Mother standing to seek enforcement of the terms of the termination order concerning the children's conservatorship.

Accordingly, the Court concluded the trial court did not err by denying Mother's motion due to her lack of standing. *In re S.D., J.D., and G.D.*, No. 05-18-00809-CV (Tex. App.—Dallas Dec. 7, 2018, pet. denied) (mem. op.).

### C. TFC § 102.004(b) – Substantial Past Contact

The Department placed the child with Foster Parents in July 2017. The child lived there for the next fifteen months.

In April 2018, around the child's first birthday, a great-uncle and his wife ("the Relatives"), came from out-of-state and visited the child for the first time. A week later, Mother filed a Motion to Authorize Placement, requesting that the child be placed with the Relatives. Mother executed an affidavit of relinquishment, naming the Department as the child's managing conservator. Foster Parents filed a petition in intervention in July 2018. The Relatives skyped with the child weekly until the Motion to Authorize Placement was denied at the end of July 2018. The Relatives also visited the child in person in July and August 2018.

A week prior to the original trial setting in September 2018, the Relatives filed their own petition in intervention, alleging standing pursuant to TFC § 102.004(b). The Department originally verbally objected to the Relatives' intervention, but eventually filed a motion to strike. At a hearing on the motion, the trial court held the motion to strike in abeyance while it rendered emergency temporary orders which gave the Relatives some rights of a managing conservator, including the right of visitation. Eventually the trial court signed an order denying the motion to strike.

Foster Parents filed a petition for writ of mandamus.

The Appellate Court analyzed TFC § 102.004 to determine if the Relatives had standing. Subsection (a) of this statute provides:

> In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

TFC § 102.004(a)(2). In this case, while the parents may have consented to the intervention, subsection (a) is inapplicable because: (1) this is not an "original suit" for which subsection (a) is applicable; and (2) the great-uncle is not a relative within the third degree of consanguinity.

The Court then examined subsection (b), which states:

> The court may grant [an] other person, ... deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this chapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

TFC § 102.004(b). Standing to intervene is measured from the time the petition is filed. At that point, the Relatives had three in-person visits, each lasting at most an hour and a half. They also had weekly three-minute Skype calls from April 2018 until July 2018. The Appellate Court held that on this record the trial court abused its discretion in denying the motions to strike the intervention because the Relatives had not shown that they had had "substantial past contact" with the child.

The Appellate Court also rejected the concept of equitable standing based on the Relatives' difficulties in establishing contact with the child due to ICPC delays and other issues. The Court concluded that whether the Relatives have standing must be determined under the Texas Family Code and equity cannot be used to confer jurisdiction. Mandamus was conditionally granted. *In re Schick*, No. 04-18-00839-CV (Tex. App.—San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.).

### D. Parental Consent Irrelevant Under TFC § 102.004(b)

Maternal Aunt appealed the trial court's denial of her petition in intervention. Maternal Aunt argued that she had standing under TFC § 102.004(a)(2) because Mother and Father consented to the intervention.

Section 102.004(a)(2) pertains to original suits brought by grandparents or other persons and permits such original suits if, among other things, the person bringing suit proves both parents consented to the suit. TFC § 102.004(a).

However, the Court of Appeals stated that TFC 102.004(b) governs the question whether the Maternal Aunt, as a party attempting to intervene in a pending SAPCR, established standing to do so. Under TFC 102.004(b), the trial court may grant leave to intervene to grandparents and those "deemed by the court to have had substantial past contact with the child.

The appellate court concluded that TFC 102.004(b) applies to Maternal Aunt's attempt to intervene in the underlying suit even if she may have had standing to bring an original suit. Therefore, Mother and Father's consent were not relevant to the issue of whether Maternal Aunt had standing under section 102.004(b). TFC 102.004(b). Accordingly, the Court concluded the trial court did not abuse its discretion in striking Maternal Aunt's petition in intervention. *In re A.G.*, No. 05-18-00725-CV (Tex. App.—Dallas Dec. 12, 2018, no pet.) (mem. op.).

## III. UCCJEA

### A. Lack of Jurisdiction Under UCCJEA

On appeal, Father argued that pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the Texas Trial court lacked jurisdiction to

enter a final order terminating his parental rights. The Court of Appeals agreed.

The Court stated, "Under the UCCJEA, the court that makes the initial 'child custody determination' generally retains exclusive continuing jurisdiction over ongoing custody disputes." It noted the parties did not dispute that Mother and Father's 2013 Mississippi divorce decree provided for custody of and visitation with the children and, therefore, was the initial child custody determination, placing exclusive continuing jurisdiction over ongoing custody disputes in that Mississippi court. It stated that under TFC § 152.201, "[a]bsent the Mississippi court's relinquishment of its exclusive jurisdiction, the Texas court was without jurisdiction to modify the Mississippi orders."

Because it was "undisputed that a Mississippi court made a prior custody determination for [the children]" and there were "no pleadings or proof in the record to support a conclusion that the Mississippi court relinquished its exclusive continuing jurisdiction," the Court held "the Texas trial court was without exclusive continuing jurisdiction to modify the Mississippi orders and to terminate [Father's] parental rights to [the children]." Consequently, the Court vacated the portions of the judgment that resulted in Father's termination and dismissed that part of the case for want of jurisdiction, without prejudice to the Department to pursue proceedings that comply with the UCCJEA. *In re J.T.R. and H.M.R.*, No. 13-17-00676-CV (Tex. App.—Corpus Christi May 3, 2018, no pet.) (mem. op.)

### B. TFC § 161.211 Does Not Bar Challenges to Jurisdiction

Mother and Father were married in Texas in 2007. Mother and Father then purchased a house in Massachusetts in December 2014; Father lived and worked in Massachusetts while Mother lived and worked in Texas. The child was born in Massachusetts in January 2015, and the family lived together in Massachusetts while Mother was on maternity leave. Mother returned to work, and the child began living in both Massachusetts and Texas.

Mother filed for divorce in Collin County, Texas on September 25, 2015. On October 2, 2015, Father signed an affidavit of voluntary relinquishment of parental rights and a mediated settlement agreement. The trial court signed an agreed order terminating Father's parental rights on October 21, 2015 and a *nunc pro tunc* order on October 26, 2015; in both orders, the trial court found that it had jurisdiction of the case and the parties. The agreed final decree of divorce was entered on November 25, 2015.

Father filed a petition for bill of review of the termination case on April 21, 2016. Among other issues, Father argued that Massachusetts was the child's home state on the date Mother filed for divorce, and so the trial court did not have jurisdiction to make an initial child custody determination regarding the child and the termination order was therefore void. Mother argued that Father was barred from making this argument, as TFC § 161.211(c) limits challenges to an unrevoked affidavit of relinquishment to those involving fraud, duress, or coercion.

The Court of Appeals began its analysis by stating that a trial court must have subject matter jurisdiction over a case to issue a binding judgment, and subject matter jurisdiction cannot be waived or conferred by agreement. The Court concluded that "the legislature required the trial court to have jurisdiction over a child under the UCCJEA before rendering a judgment terminating parental rights based on a voluntary affidavit of relinquishment. The statutory language in section 161.211(c) does not indicate an unambiguous intent by the legislature to override this jurisdictional requirement." The Court also pointed out that interpreting TFC § 161.211(c) in such a way to bar attacks based on jurisdiction would allow parties to deliberately bypass the requirements of home state jurisdiction, and

> [a]llowing a party to seek a termination of parental rights based on an affidavit of involuntary relinquishment in a court that does not have jurisdiction over the child under the UCCJEA would directly contravene not only the legislature's intent to prioritize home-state jurisdiction in child custody cases, but long-standing precedent that parties may not confer subject matter jurisdiction on a trial court by agreement or by waiver.

The Court accordingly held that "the legislature intended to require a party to file a petition seeking termination of parental rights based on an affidavit of voluntary relinquishment of parental rights in a court with jurisdiction over the child under the UCCJEA."

The Court of Appeals reversed and rendered judgment that the agreed order terminating Father's parental rights was void. *In re D.S.; In the Matter of the Marriage of G.S. and A.G.*, 555 S.W.3d 301 (Tex. App.—Dallas 2018, pet. filed).

## IV. HAGUE CONVENTION

The Department initiated an investigation of the children's mother in 2013. Mother informed the Department that Father, who had previously been adjudicated, was voluntarily living in Mexico and that he was the father of all three children. The Department subsequently filed its original petition to terminate Mother's and Father's parental rights to the children in 2014. On July 14, 2015, the Department filed an amended petition alleging grounds for termination against only Mother. Father was not served with the Department's petition, and the trial court terminated Father's parental rights even after finding that that he was not notified of and did not appear at the final hearing.

On July 26, 2017, the Department filed a petition asking the trial court to vacate its prior order terminating Father's parental rights "so that it could consider its new request to terminate those rights." The new petition, filed under the same cause number as prior proceedings which resulted in the void order against Father, alleged that Father's address was in "Acapulco De Juarez, Gro Mexico". Attached to the petition was an affidavit by a Department caseworker supervisor which represented that a copy of the termination order was sent to the Mexican Consulate. The caseworker supervisor acknowledged that the Father had not been served. The affidavit further stated that the Department received a letter from Father that included Father's address and email address. Father also requested an extension. Finally, the affidavit stated that since receiving Father's letter, the Department attempted to contact Father but had not received a response.

After a hearing on July 27, 2017, the trial court found void its previous order and noted the Department's representations that it had been unable to locate Father. The clerk's record established that the citation and petition were mailed twice to the wrong address.

On September 24, 2017, Father mailed a letter stating that he received a "judicial letter" with the cause number of the case notifying him "of the this situation that these minors are confronting". The Appellate Court noted that because the typewritten letter was addressed "[t]o whom it may concern" and contained no address for the addressee", it was unclear who received and filed Father's letter. Father's letter also stated that he was the children's father and he wished to be reunited. Father also provided a telephone number and an incomplete address, and asked to be notified of "any procedure to take". The letter was labeled by the clerk "as an answer" to the Department's suit. Father was appointed counsel on October 10, 2017 after the trial court made a finding that he had not been served with notice.

The clerk's record contained no return of service, showed that the citation and petition were sent to the wrong address, and did not establish the addresses used by the Department in mailing any of its letters. The record also did not contain any notices sent by the trial court informing Father of the final hearing.

Father did not appear at the final hearing. The Department asked the trial court to "take judicial notice of the answer that was filed by [Father]", which the trial court did. The Department's caseworker testified no one answered when she attempted to contact Father at the number he provided. She testified that the Department mailed the petition and the family service plan to Father by regular mail and by certified mail. There was no evidence demonstrating where the documents were mailed. The caseworker testified that the certified mail card was returned without a signature. However she testified that Father "should have known of the Department's lawsuit because he had communicated via email." There was no further evidence of the substance or date of the email communication. Finally, the caseworker testified that notice of the final hearing "on an unidentified date to an unidentified address" was mailed but that the

certified mail receipt was signed by someone other than Father.

The trial court terminated Father's parental rights on June 7, 2018. Father's counsel filed a timely motion for new trial alleging that he made contact with Father after the final hearing and that Father did not receive notice of the final hearing until after its conclusion. The motion for new trial was denied.

On appeal, Father argued that the trial erred in entering a final judgment because he was never "properly served in accordance with the Hague Convention". In response, the Department argued that Father's letter constituted an answer to the lawsuit, that he appeared through his court-appointed counsel, and that he had actual knowledge of the suit.

Service of process on a defendant in Mexico is governed by the Hague Convention and applies "in all cases, in civil or commercial matters, where there is an occasion to transmit a judicial or extrajudicial document for service abroad." HAGUE SERVICE CONVENTION, November 15, 1965, arts. 2-5, 20 U.S.T. 361. The Court of Appeals recognized that consistent with the United States Supreme Court, Texas courts have held that the Hague Convention "preempts any inconsistent methods of service prescribed by Texas law in all cases where the convention applies". Importantly, the Court of Appeals noted that the Hague Convention does permit service through alternative means such as "postal channels" but that Mexico objected to "all alternative channels of service". As such, the Court stated that "under the Hague Service Convention, a Mexican national, like [Father], can be served in Mexico with a foreign proceeding ***only*** through the Central Authority of Mexico. The Court found that "there was no evidence in the appellate record that Mexico's Central Authority was served with the Department's lawsuit." The Court held that Father was never properly served with the Department's lawsuit.

In concluding that Father's letter cannot be construed as an answer to the Department's lawsuit, the Court of Appeals found that "nothing in the letter acknowledged receipt of the citation issued by the clerk, or otherwise indicated [Father] was aware that the Department was seeking to terminate his parental rights." The Court also observed that Father's letter was typewritten, was not addressed to the clerk or the court, was in response to a letter sent by the Department, did not contain the addressee's address, and failed to contain Father's address. Instead, the Court found that Father's letter was analogous to a case where it had found that a pro se letter did not constitute an answer because there was no evidence that the father sent the letter to or filed it with the trial court, and analogous to another case where father's letter was not an answer because it "did not provide an address for notice or respond directly to the allegations in the petition for termination".

Citing opinions from the San Antonio Court and Houston First District, the Court of Appeals recognized that "[A] valid waiver of one's Hague Convention rights cannot occur without the knowledge of the mandates of the Convention" and is therefore "void", and thus "subsequent actions of the trial court in authorizing the ad litem to represent [parent's] interests at trial, and everything that flowed therefrom, are likewise a nullity." As such, the Court concluded that "the actions of court-appointed counsel in this case cannot constitute valid voluntary, knowing, and intelligent waiver of [Father's] Hague Convention rights."

Finally, the Court of Appeals disagreed that Father's letter indicated that he had actual knowledge of the Department's lawsuit because "it could have been related to the Department's prior proceedings, and the letter failed to indicate any understanding that Father knew termination of his parental rights was at issue." The Court added, "even if a father has admitted that he received notice of a Department's lawsuit by way of defective citation, 'a default judgement is improper against a [father] who has not been served in strict compliance with the law, even if he has actual knowledge of the lawsuit.'"

Accordingly, the Court of Appeals concluded that: (1) Father was not properly served; (2) Father's letter was not an answer; (3) counsel's appearance at trial did not constitute a waiver of Father's rights to be properly served; and (4) proper service was required even assuming that Father had actual knowledge of the suit. It held that because "the trial court never acquired personal jurisdiction over [Father], its order

terminating [Father's] parental rights to his three children is void." *In re T.M.E., A.J.E., and R.J.E.*, 565 S.W. 3d 383 (Tex. App.—Texarkana 2018, no pet.); *but see In re J.D., Jr., and C.D.*, No. 06-18-00105-CV (Tex. App.—Texarkana Mar. 22, 2019, no pet.) (mem. op.) (Father's letter was an answer to the Department's petition because "it did contain the parties' names, his prison address, his preferences for placement for the children, and finally, his appeal to the trial court that he be allowed to maintain his parental rights")*; see also In re J.R.*, No. 09-18-00433-CV (Tex. App.—Beaumont Feb. 28, 2019, no pet.) (mem. op.) (holding that "because Mexico has filed declarations objecting to any alternative channel of service, citation by posting to a defendant who is known to be in Mexico does not comport with the terms of the Hague Service Convention.").

## V. PRE-TRIAL ISSUES

### A. Appointment of Counsel

#### *1. Determination of Indigence*

Father and Mother began a relationship in 2013. The child was born in September 11, 2017. By this time, Father was living in Michigan. Father testified that he was not aware of the child's birth. The Department became involved after the child's birth as a result of Mother and the child testing positive for amphetamine and methamphetamine. The Department filed a suit affecting the parent-child relationship on September 26, 2017. In April 2018, the trial court established Father's paternity of the child. Father was arrested in Michigan on drug possession charges a month later.

The final hearing occurred on September 13, 2018. Mother's counsel announced it was her understanding that Father intended to appear by telephone and ask for an attorney or a continuance. The Department's caseworker stated that Father had phoned her earlier and stated that he could only call at 9:00 o'clock. The trial court stated that if Father called back during the hearing, he could appear by telephone "for as long as he's available."

The final hearing began with the Department's caseworker as the first witness. Shortly after the caseworker's testimony commenced, Father telephoned the caseworker and was permitted to speak in open court. Father told the trial court that the jail permitted him two twenty-minute calls. He asked for "an extension for participating" when the trial court asked if he wished to make a motion. The trial court deferred ruling on Father's request until later in the hearing. The Department's examination of the caseworker resumed. Later in the caseworker's testimony, a "phone beeping noise" was heard, the call disconnected, and the trial court returned the phone to the caseworker to "monitor for the next call in". Later, when the Department passed the worker for cross-examination the trial court allowed Father to proceed first. Father responded by saying, "I really couldn't hear everything that was going on just a second ago." While attempting to question the caseworker, Father again asked for an extension. Shortly thereafter, the trial court placed Father under oath and permitted him to provide his version of what should happen. Father again asked for an extension. While being questioned, another "phone beeping noise" was heard. Father did not call back and the court did not attempt to contact him. The final hearing continued without further participation from Father.

On September 18, 2018, the trial court signed a final order which terminated Father's parental rights. On September 25, 2018, Father filed a pro se notice of appeal. The trial court appointed Father appellate counsel. On appeal, Father argued that the trial court abused its discretion by failing to grant his requested "extension". The Court of Appeals interpreted Father's use of the word "extension" to mean that Father "sought postponement of the final hearing".

The Court of Appeals considered that "[a]t no time did the trial court inform the father of his right to be represented by an attorney and the right to court-appointed counsel if indigent." It also noted the trial court appointed Father appellate counsel "and in doing so necessarily found him indigent." The Court of Appeals reasoned that "[i]n father's absence there was, of course, no opportunity for cross-examination of the mother or the other witnesses or presentation of rebuttal evidence or an opportunity to counter the Department's closing argument which highlighted the mother's testimony adverse to the father." The Court concluded "[t]hat when the father appeared by telephone at the final hearing without a lawyer the trial

court immediately should have provided him the notice required by section 107.013(a-1) and continued the hearing to determine indigency, appoint counsel on a showing of indigency, and afford counsel a reasonable time to prepare for the resumption of trial." As such, the Court of Appeals held that the trial court abused its discretion by failing to continue the final hearing. *In re A.R.*, No. 07-18-00350-CV (Tex. App.—Amarillo Jan. 28, 2019, no pet.) (mem. op.).

### *2. Court's Responsibility to Inquire Further*

The children were removed from Mother in August 2017 due to allegations of drug use, domestic violence, and a lack of utilities in the home. The next week, the trial court held an adversary hearing, and admonished Mother of her right to a court-appointed attorney if she submitted an affidavit of indigency. Throughout the case, Mother was also admonished by the trial court that her parental rights were subject to termination if she did not complete her service plan.

Nevertheless, Mother never filed an affidavit of indigency during the case, did not ask for an attorney, and did not appear at the final hearing. No attorney was appointed for her during the case. In July 2018, Mother's parental rights were terminated. In August 2018, Mother appeared before the trial court to ask for the appointment of an attorney to appeal the termination order. At that point, following trial, Mother submitted an indigency application and was appointed an appellate attorney.

Mother appealed the termination of her parental rights claiming, in part, that she was wrongfully denied the assistance of counsel.

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."

In considering Mother's challenge, the Court of Appeals noted that the trial court "clearly and thoroughly" informed Mother of her right to counsel at the adversary hearing at the beginning of the case. Further, it was undisputed that Mother never filed an affidavit of indigency. Nevertheless, the Court found that "there was sufficient indication in the record that [Mother] was indigent such that the trial court should have conducted further inquiry into her status." This inquiry included evidence that Mother's home lacked running water and power when the case began, she was working at a fast food restaurant during the case, and was attempting to secure her own housing.

The Court of Appeals concluded that because Mother had appeared in opposition to termination and the "record supports that [she] was indigent", she was entitled to court appointed counsel. Therefore, the trial court erred by proceeding without appointing her an attorney. The trial court's judgment was reversed. *In re B.C.*, No. 13-18-00440-CV, (Tex. App—Corpus Christi-Edinburg Jan. 28, 2019, pet. filed) (mem. op.).

### **3. *Required Admonishment***

Father contended that he was denied procedural due process by the trial court's failure to advise him of his right to counsel prior to the beginning of his trial. The Appellate Court noted a two-part test is applied to a claim of denial of procedural due process: (1) whether the complaining party has a liberty or property interest entitled to protection; and (2) if so, what process is due. Further, at a minimum due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Noting a parent's fundamental liberty interest in the upbringing of their child, and that Father's status as a prison inmate does not strip him of his constitutional right of reasonable access to the courts, the Court concluded Father was entitled to procedural due process in the termination proceeding.

The Court then weighed the three factors articulated by the United States Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976). As to the first factor, the private interests affected by the proceeding, the Court concluded Father's fundamental liberty interest in maintaining custody and control of the child, the risk of permanent loss of the parent-child relationship between them, and Father's and the child's interest in a just and accurate decision weigh heavily in favor of providing Father an attorney before trial commences and admonishing him of his right to counsel at the statutorily mandated time.

Regarding the second factor, the Court noted the State's interest in the proceeding includes protecting the best interest of the child who has an interest in a just determination, and in an accelerated timetable and a final decision that is not unnecessarily prolonged with negative psychological effects on the children left in limbo. Because advising Father of his statutory rights to be represented by counsel before commencement of trial would not unduly prolong the family code's statutory scheme for protecting children's welfare, the Court gave less weight to the Department's interest to achieve an expeditious resolution than to the private parties' interests.

Finally, under the third *Eldridge* factor, the Court concluded there was a significant risk of erroneous deprivation of the parent-child relationship between Father and the child. In reaching that conclusion, the Court noted that as a result of the trial court's failure to admonish Father and make him aware that he had a right to court-appointed counsel if found indigent, he was prevented from asserting this right and denied the ability to be represented by counsel at all critical stages of the proceeding. Balancing the three *Eldridge* factors, the Court concluded Father was denied procedural due process.

In deciding whether the denial of due process to Father was harmful error, the Court considered the criminal standard because termination cases are quasi-criminal in nature. Discussing *Williams v. State*, the Court noted in that case the Court of Criminal Appeals concluded that the defendant's trial was fundamentally unfair and unreliable because she was denied the right to appointed counsel. *See Williams v. State*, 252 S.W.3d 353 (Tex. Crim. App. 2008). The Court concluded that like the defendant in *Williams*, Father was denied the right to appointed counsel, did not waive his right to counsel, and was effectively denied any method of meaningful participation at any of the critical stages of the case. The Court therefore concluded that the application of a harmless error analysis is not appropriate because prejudice is presumed. Thus, the Court of Appeals held that the denial of procedural due process in this case probably caused the rendition of an improper judgment.

Accordingly, the Court of Appeals concluded that Father was denied procedural due process and reversed the order of termination and remanded the case for further proceedings. *In re A.J.*, 559 S.W.3d 713 (Tex. App.—Tyler 2018, no pet.).

### B. Bench Warrant and Motion to Continue

On March 29, 2018, the trial court signed a bench warrant to deliver Father for the trial for termination of his parental rights on June 19, 2018. When trial commenced on June 19, counsel for Father made an oral motion for a continuance, stating "Judge, before we begin, I'd like to move for a continuance so my client has an opportunity to be here. I properly bench warrant [sic] him but for some reason he wasn't able to be here today. I would like to give him the opportunity to be present at trial." The trial court denied the continuance and proceeded to trial; Father's parental rights were terminated at the conclusion of the hearing.

On appeal, Father argued that his due process rights were violated as he was not afforded the opportunity to participate at trial in a meaningful manner. The Department pointed out that no written motion for continuance was filed in accordance with the requisites of Rule 251.

The Court of Appeals recognized that it had previously held that it is presumed a trial court does not abuse its discretion in denying a motion to continue where the motion does not conform to the requirements of TEX. R. CIV. P. 251. The Court declined to apply that presumption in this case, however, noting that counsel for Father stated she did not know why Father was not present, as he had been properly bench warranted. The Court also noted that the children's *ad litem* echoed this concern, when at the close of the evidence he stated that he believed it would be appropriate to allow Father to be present for trial, as a bench warrant was properly completed. The Court stated that Father could not appear at trial if the Harris County Sheriff's Office failed to comply with the bench warrant. The Court held "Father's non-appearance was clearly unanticipated, and counsel did not have personal knowledge of the possible reason for Father's failure to appear. Given these facts and the fundamental

constitutional right at issue, we decline to apply the presumption that arises from failure to comply with Rule 251." *In re L.N.C. and K.N.M.*, 573 S.W.3d 309 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

### C. No Right to Jury Trial on Timely Requested De Novo Hearing

In a Department termination suit, the trial court referred the case to an associate judge for adjudication on the merits, and the parties waived a jury trial. After a bench trial that included testimony from witnesses for both sides, the associate judge found sufficient evidence of grounds to terminate Mother's parental rights and that termination was in the children's best interest. The day after receiving the associate judge's report, Mother demanded a jury trial, and immediately after, timely requested a *de novo* hearing before the referring court on the issue of evidence sufficiency. The Department and the children's attorney *ad litem* objected to the jury demand on grounds that Mother had no right to a jury trial for the *de novo* hearing, granting a jury demand would prejudice the Department and children by requiring the difficulty and expense of recalling all the witnesses, and any delay occasioned by a jury trial would result in turmoil and uncertainty for the children. Mother argued that: 1) TFC § 201.015 grants the right to a jury trial in a *de novo* hearing as long as it is the first jury trial in the case; 2) it was possible to hold a jury trial within the 30 days that TFC § 201.015 allows for holding a de novo hearing; and 3) the expense of litigating the case to a jury after a bench trial is irrelevant to whether a jury trial is required when timely requested.

The referring court denied the jury request and set a de novo hearing within the statutory deadline. At the hearing, transcripts and exhibits from the associate judge proceedings were admitted, but no witnesses were called. The referring court terminated Mother's parental rights. Mother appealed, arguing the trial court abused its discretion by denying her jury demand and that the evidence was factually insufficient to support the best-interest finding. The court of appeals affirmed. As to the denial of Mother's jury demand, the court of appeals assumed, without deciding, that Mother had a right to demand a jury trial at the de novo hearing and that her request was made within a reasonable time before trial. However, the court of appeals held the trial court was not required to honor the jury request due to the expense the Department would incur to relitigate the case to a jury and the harm the children could suffer if permanency were delayed.

On petition for review, Mother challenged only the denial of her jury demand. She argued the Family Code protects her constitutional rights by guaranteeing that parties can demand at least one jury trial at any stage of the trial court proceedings, and asserted that a first-time jury trial is available in a de novo hearing as a matter of right. The Supreme Court disagreed.

The Court analyzed the statutory scheme for referral to an associate judge. It stated that although the trial court may refer termination cases to an associate judge for several purposes, including adjudication on the merits in either a bench or jury trial, "[t]rial on the merits before an associate judge is not compulsory under our civil referral statutes and may be avoided if a party objects." *See* TFC § 201.205(a), (b). Under TFC § 201.205(c), a party who wants a jury trial before the referring court only needs to object to the referral to the associate judge and timely demand a jury trial under TEX. R. CIV. P. 216. In this case, the Court concluded that "by failing to object to the referral, Mother declined the opportunity to have a jury trial before the referring court in the first instance. She then elected to waive her statutory right to a jury trial in the associate-judge proceedings." The Court stated that "[d]espite these choices, Mother claims section 201.015 of the Family Code guarantees a third opportunity to demand a jury trial in a 'de novo hearing' before the referring court."

The Court recognized that section 201.015 applies in child-protection cases. If timely requested under section 201.015, under subsection (b), a de novo hearing is limited to the issues specified in the de novo hearing request. Under subsection (f), the referring court must conduct the de novo hearing within thirty days of the request. Under subsection (c), the parties may present witnesses at the de novo hearing, and the referring court also may consider the record from the associate judge's hearing, including the jury charge and verdict. Under subsection (i), a party may not demand a second jury trial in a de novo hearing if the

associate judge's proposed order resulted from a jury trial. Significantly, the Court stated, "Neither section 201.015 nor any other provision of the Family Code expressly confers a right to a jury trial in a de novo hearing", in contrast to "the statutes authorizing referral to an associate judge, which explicitly refer to jury trials."

The Court rejected Mother's argument that based on the prohibition against a "second" jury trial in a de novo hearing and the term "de novo" modifying "hearing", section 201.015 provides for "an entirely new and independent proceeding in which she may try her case anew to a jury so long as she previously tried her case to the bench." Instead, it agreed with the Department's position that "section 201.015 permits, but does not require, a referring court to grant a first-time request for a jury trial in a de novo proceeding." "Construing Chapter 201 as a whole," the Court concluded that between two alternative inferences raised by section 201.015's prohibition against "second" jury trials, inferring that a first jury trial is a available as matter of right in a de novo hearing is not a reasonable construction, but inferring that the trial court is not prohibited from granting a first jury trial request in a de novo hearing, and thus, has discretion to allow one, "is a reasonable construction of the statute."

The Court concluded that a de novo hearing under Chapter 201 "cannot reasonably be equated to a 'trial de novo'" in "word" or "attribute." It reasoned that a "'trial de novo' is a new and independent action in the reviewing court with 'all the attributes of an original action'" treated as if no trial has occurred below, whose defining characteristic, as used in statutes and rules, is that "it is a complete retrial on all issues on which the judgment was founded" and "the judgment of the first tribunal is ordinarily vacated." In contrast, Chapter 201 distinguishes between hearings and trials, both jury and non-jury; however, section 201.015's de novo hearing procedures apply to all associate judge rulings, without similar distinctions, and describe the procedure as a hearing, not a trial—a word choice the Court found "compelling with regard to legislative intent." Significantly, a de novo hearing is not entirely independent of the associate judge proceeding. The Court noted that under the de novo hearing procedures: (1) the associate judge's proposed order is not vacated, but pending review, is in full effect and enforceable as a judgment of the referring court; (2) a de novo hearing is not a complete retrial on all issues, rather parties must specify issues for review; (3) witnesses may be presented only on the specified issues, but the referring court may consider the record from the associate judge *sua sponte*; and (4) participating in, or waiving, a de novo hearing does not prejudice a party's right to file any post-trial motion. The Court stated that "a de novo hearing is not an entirely new and independent action, but instead, is an extension of the original trial on the merits."

The Court also concluded that the express thirty-day deadline in which to conduct a de novo hearing is incompatible with inferring a statutory right to jury trial in a de novo hearing. It reasoned the Legislature did not intend to grant such a statutory right considering that: (1) the thirty-day deadline for holding a de novo hearing is expressed in mandatory language; (2) the statute does not expressly authorize an extension of any length under any condition; and (3) no right to a jury trial is expressly stated. The Court stated that construing the statute as a whole, "an expectation that referring courts would be able to accommodate first-time jury demands in de novo hearings does not comport with the overall statutory scheme."

The Court held, "Considering section 201.015's 'de novo hearing' requirement and 'second jury' prohibition in harmony with the statute in its entirety, we conclude that Chapter 201 neither prohibits nor grants a right to a first-time jury trial in a de novo hearing, but permits the referring court to grant one in its discretion."

The Court explained that when there is a statutory right to a jury trial, a timely request is presumed reasonable and ordinarily must be granted absent evidence that doing so would injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the court's business. Because the Court held section 201.015 does not grant a right to a jury trial in a de novo proceeding, no such presumption arose. The Court stated, "Though injury, disruption, and impediment remain useful factors guiding the court's decision to grant or deny a first-time jury demand, no presumption tips the scale one way or the other,

leaving the ultimate decision within the trial court's sound discretion."

The Court agreed with the court of appeals that the referring court did not abuse its discretion in denying Mother's demand for a jury at the de novo hearing. First, Mother merely identified a three-day period before the mandated de novo hearing expired that would be available, theoretically, for a jury trial, but the record contained no evidence those dates actually were available or when the next available jury setting would be. Additionally, the jury request was opposed, and because there were only ten days between the hearing on the jury demand and the de novo hearing deadline, the Department asserted that presenting the merits of the case would be hampered by the difficulty and expense of recalling witnesses to testify live before the jury. The Court stated that although section 201.015(c) allows the referring court to consider the record from the hearing before the associate judge, "it is silent about whether prior testimony from those proceedings could be considered in a jury trial." It held, "Even assuming it could, and even assuming a case prepared for presentation to the bench would be adequate for a jury, the referring court could reasonably conclude the Department would be unfairly prejudiced if forced to rely on the cold written word in lieu of live testimony before the jury."

The Court concluded that Chapter 201 meets the statutory right to a jury trial on demand by allowing a jury trial in either the referring court or before the associate judge. "[W]ith a timely objection, parties can choose to have the referring court adjudicate the merits following a bench or jury trial. But once the parties elect a bench trial before the associate judge, Chapter 201 does not confer a right to demand a jury trial in a de novo hearing. If a de novo hearing is requested, the referring court has discretion to grant a first-time jury request, but the statute cannot reasonably be read as affording the parties a right to a jury trial at that juncture. Agreeing that the trial court was not required to grant Mother's jury demand under the circumstances, the Supreme Court affirmed the judgment of the court of appeals. *In re A.L.M.-F., A.M., J.A.-F., N.A.-F, and E.A.-F.*, __S.W.3d __, No. 17-0603 (Tex. May 3, 2019)

### D. TFC § 263.401 – Commencement

On appeal, Mother and Father argued that the Department's case should have been dismissed pursuant to TFC § 263.401(a) because the trial court did not timely commence trial within the one-year statutory deadline. TFC § 263.401(a) provides, in pertinent part:

> Unless the court has commenced the trial on the merits . . . on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court's jurisdiction over the suit affecting the parent-child relationship filed by the department that request termination of the parent-child relationship . . . is terminated and the suit is automatically dismissed without a court order.

The trial court signed a temporary order, appointing the Department as temporary managing conservator on February 11, 2016; therefore trial needed to commence by February 13, 2017 or the case would be subject to dismissal. Although Mother and Father asserted that the trial on the merits did not commence until June 18, 2018, the Court of Appeals found that trial commenced on January 17, 2017.

The record demonstrated that on January 17, 2017: (1) the case was called to trial; (2) witnesses were then sworn; (3) all of the parties announced they were "ready" to proceed; (4) the trial court addressed a preliminary issue related to an intervention; and (5) the Department called its caseworker, who briefly testified before the trial court recessed. The Court of Appeals rejected the parents' argument that an "equivocal" statement from the intervenor's attorney that the intervenors were not present as they were instructed the hearing on January 17, 2017 would involve only the attorneys demonstrated that it was never intended that the January 2017 hearing was to commence the final hearing. The Court found that this statement made by a non-party's attorney was not dispositive when weighed against the other actions taken on January 17, 2017. Based on the foregoing, the Court of Appeals concluded that the record contained sufficient information to establish that trial on the

merits commenced on January 17, 2017. *In re R.J.*, 568 S.W.3d 734 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

## VI. EVIDENCE

### A. TRE 605

TRE 605 provides that the presiding judge may not testify as a witness at the trial. *See* TEX. R. EVID. 605.

On appeal, Mother argued that the trial court abused its discretion by introducing evidence in violation of TRE 605. Specifically, Mother argued that the trial court violated TRE 605 by "(1) taking judicial notice of evidence not in the record or offered by the parties, and (2) in ordering a drug test." Mother relied on *In re M.S.*, 115 S.W.3d 534, 538 (Tex. 2003), in which the Supreme Court likened a violation of rule 605 to an impermissible comment on the weight of the evidence.

The Court of Appeals explained that in analyzing a complaint under TRE 605, "[t]he question should be whether the judge's statement of fact is essential to the exercise of some judicial function or is the functional equivalent of witness testimony." The Court noted that the underlying proceeding was before the trial court, rather than a jury, "in which the harm from the judge commenting on the evidence would be much greater." The Court of Appeals determined that the judge's questioning of the witness and statements did not have the effect of conveying factual information not in evidence. Further, the Court reasoned as to the trial court's taking of judicial notice of Mother's prior theft conviction, Mother admitted the conviction in court. The Court also determined that the trial court's *sua sponte* order for drug testing was not testimonial. As such, the Court concluded that the trial court's actions did not constitute a violation of TRE 605. *In re M.M. and C.M.*, No. 14-18-00881-CV (Tex. App.—Houston [14th Dist.] March 28, 2019, no pet.) (mem. op.).

### B. TRE 803(8)

On appeal, Father argued, *inter alia*, that the trial court erred in admitting certified copies of Father's charging instruments—including arrest warrants, criminal complaints, and an indictment. The Court of Appeals rejected this contention, holding that he failed to preserve error with a blanket hearsay objection. Further, the Court held that even if error had been preserved, the trial court did not abuse its discretion in admitting the evidence. The Court concluded that "[c]ertified copies of charging instruments fall within the public-records exception to the hearsay rule in Texas Rule of Evidence 803(8)" and were therefore admissible. Accordingly, because the charging instruments qualified under the public records hearsay exception, the court did not abuse its discretion by overruling the objection. *T.W. v. Tex. Dep't. of Family and Protective Servs.*, No. 03-18-00347-CV (Tex. App—Austin Aug. 29, 2018, no pet.) (mem. op.).

## VII. TERMINATION GROUNDS

### A. 161.001(b)(1)(C)

On appeal, Father argued the evidence was legally and factually insufficient to support the trial court's TFC § 161.001(b)(1)(C) finding, arguing that the Department did not prove he failed to provide adequate support for the children.

Under subsection (C), a trial court may order termination if it finds by clear and convincing evidence that the parent has voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months. Father contended that the law allowed him to "arrange for the children's support by another person," and the Department did not prove that Mother lacked sufficient resources to support them.

At trial, the CASA supervisor testified that she spoke with Father in July 2017 through a video chat, and he did not ask about the children's welfare or state that he was financially supporting them. Mother told the CASA that Father moved away, first to Dallas and then to Mexico, when she was pregnant with her third child and he never saw them again thereafter. According to the CASA, Father knew that he had been ordered to pay child support but he did not ask her about any way in which he could support the children. Although Father paid $3,000 in child support for the oldest child before March 2015, he made no payments after that

month and owed $14,000 in back support at the time of trial. In a questionnaire which asked what financial support Father had provided the children since leaving Texas, Father responded he had not provided any support because he had "no way." According to the Department caseworker, Father never explained why he failed to support the children. The Court of Appeals concluded that based on this evidence, the trial court could have found by clear and convincing evidence that Father did not "on his own accord" provide adequate support for the children.

Father, however, also argued that "adequate support" may include "making arrangements for adequate support rather than personally supporting the children" and that the Department did not prove that he did not do so when he left the children with Mother. Citing *Holick v. Smith*, the Court noted a parent may provide for a child's support by making arrangements for their support rather than by personally providing support. *Holick v. Smith*, 685 S.W.2d 18, 21 (Tex. 1985). Therefore, a trial court cannot terminate a parent's parental rights under subsection (C) for failing to provide support when the caregivers of the child do not expect a parent's support and are themselves providing support. *Id*.

The Court concluded, however, that in this case there was no evidence that after Father left, Mother was able to support the children or expected to do so without his assistance. Rather, the trial court heard evidence that Mother never held a full-time job, which the court could reasonably infer Father knew from his three-year relationship with her. Further, the evidence established that Father was ordered to pay child support to Mother before he abandoned the children, indicating that Mother expected support. While Father argued the evidence did not disprove that Mother provided adequate financial support in his absence, the Court concluded the evidence proved that Father did not either make arrangements for the children's adequate support or personally support them, which is what subsection (C) requires. Further, the Court reasoned the "court order to provide support for one of the three children is a judicial finding that no such arrangement existed as to that child", even before the birth of an additional child created the need for more support.

Accordingly, the Court held that the evidence was legally and factually sufficient to support the trial court's "abandonment" finding under subsection (C). *In re A.R., A.R. and A.R.*, No. 02-18-00311-CV (Tex. App.—Fort Worth Mar. 14, 2019, no pet. h.) (mem. op.).

### B. TFC § 161.001(b)(1)(E)

#### *1. Lack of Concern*

Father challenged sufficiency of the evidence supporting termination of his parental rights under subsection (E), which allows termination if the trial court finds by clear and convincing evidence that Father "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."

The child was removed after Mother bonded out on a murder charge pertaining to one of her other children. The deceased child suffered multiple significant injuries of varying ages which could only be attributable to non-accidental blunt force trauma. An expert in children's safety testified that she was involved in a different case involving Mother's other children. She testified that Mother had a pattern of abusing those children and that Father knew about those other children, and yet Father had no concerns about Mother caring for this child.

During the case, Father failed to attend two hearings and the termination trial, and the record did not show that he took any substantial or proactive steps to inform the trial court or his attorney of the reasons for these failures. Further, Father did not maintain any contact with the child or the Department and avoided the Department's attempts to communicate with him. He also did not reach out to Child Advocates and did not respond to their attempts to contact him.

The Court of Appeals held that, in addition to his other endangering activity, Father's lack of concern for the Child's well-being constituted endangering conduct. *In re Z.J.B.*, No. 14-18-00759-CV (Tex. App.—Houston [14th Dist.] Jan. 29, 2019, pet. denied) (mem. op.).

#### 2. *Unwillingness to Seek Prenatal Care*

The evidence showed that Mother refused to seek prenatal care and declined offers to drive her to medical appointments. She also refused to share prenatal medical information about the child with the adoptive couple. Her irregular prenatal care resulted in Mother not knowing the child's actual due date. The Court of Appeals concluded Mother's unwillingness to seek prenatal care supported the trial court's endangerment finding pursuant to TFC § 161.001(b)(1)(E). *In re Z.Q.N.*, No. 14-17-00434-CV (Tex. App.—Houston [14th Dist.] Feb. 21, 2019, no pet. h.) (mem. op.).

#### *3. Not Guilty Conviction Not Dispositive*

In conducting its endangering conduct analysis pursuant to TFC 161.001(b)(1)(E), the trial court was free to consider the evidence that Father was found not guilty by reason of insanity of burglary of a habitation and aggravated robbery with a deadly weapon charge as part of the Father's "many acts of violence". The Court of Appeals noted that "[a] judgment of not guilty by reason of insanity does not mean [Father] did not commit those acts only that he cannot be held criminally responsible for them." *In re A.C.S. and T.R.L., Children*, No. 14-18-00890-CV (Tex. App.—Houston [14th Dist.] Mar. 21, 2019, no pet. h.)(mem. op.).

### C. TFC § 161.001(b)(1)(L)

Father appealed the termination of his parental rights, challenging the legal and factual sufficiency of the evidence supporting the trial court's finding under TFC § 161.001(b)(1)(L). Subsection (L) allows a trial court to terminate parent rights 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. Under Penal Code § 22.021(a)(1)(B), "a person who engages in a sexual act with a child less than 14 years of age commits an aggravated sexual assault."

The trial court was presented with evidence that in 2001, Father was convicted of aggravated sexual assault of a child. He was 20 years old at the time he committed the offense against a 13 year old girl. Although Father was initially placed on deferred adjudication for the offense, he was later incarcerated until 2008 after violating the terms of his community supervision. Another condition of his conviction is that he is required to register as a sex offender for the rest of his life.

In appealing the sufficiency of the evidence supporting the trial court's (L) finding, Father claimed that the sexual encounter was consensual and that there was no evidence presented that she suffered a "serious injury". The Court of Appeals rejected this contention, stating that Father's "victim's age categorically precluded consent" based on the longstanding judgment that "children under fourteen lack the capacity to understand the significance of agreeing to sex."

The Court also rejected the assertion that Father's offense did not cause "serious injury" as "[s]exual activity is always accompanied by a possibility of important or dangerous consequences, including emotional or psychological hurt, and the possibility of realizing these consequences is magnified where children under the age of 14 are concerned due to their inability to meaningfully apprehend the nature of sex and its possible outcomes."

Father also argued that his conviction for aggravated sexual assault occurred 18 years prior to trial and was therefore "too distant or remote in time" to constitute sufficient evidence under (L). The Court of Appeals also rejected this argument, pointing out that Father was required to register as a sex offender for life. The Court noted that in creating a lifetime sex offender registry, "the Legislature has made a policy decision that the crime for which [Father] was convicted will never be so remote that it will no longer be a matter of legitimate public concern." Accordingly, Father's termination order was affirmed. *In re S.G. and D.D.-G.P.*, No. 01-18-00728-CV (Tex. App.—Houston [1st Dist.] Apr. 2, 2019, pet. filed) (mem. op.).

### D. TFC § 161.001(b)(1)(N)

#### *1. No Reasonable Efforts*

On appeal, Father argued the evidence was legally and factually insufficient to support the trial court's TFC § 161.001(b)(1)(N) finding. Under subsection (N), a trial court may order termination if it finds by clear and convincing evidence that the parent has constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services or an authorized agency for not less than six months, and: (i) the department or authorized agency has made reasonable efforts to return the 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. Specifically, Father challenged, *inter alia*, the first element of subsection (N).

The Department initially became involved with this family after Mother was stopped by police with the children in the car and a child safety alert was prompted. After locating Mother, the Department performed an "instant" drug test which was positive for methamphetamine, but subsequent testing showed the drug screen was negative. In August 2017, the Department received another report alleging that Mother had left the children in a motel room in the presence of methamphetamines with two people who had outstanding felony warrants. In between the first and second reports, Father became incarcerated for burglary of a building. The day after receiving the second report, the Department filed an original petition for conservatorship and to terminate Father's and Mother's parental rights to the children.

The Court noted that three caseworkers worked on the case. The first caseworker handled the referrals but never had any personal contact with Father. She did send a "courtesy worker" to the jail where he was incarcerated to interview him but the record was silent as to whether he was actually interviewed. The second caseworker handled the conservatorship component of the case. She did not meet with Father, despite making two visits to the jail, as she was sent away the first time for lack of a reservation and the jail was on lockdown during her second visit. The second caseworker sent Father's service plan to the jail but she did not know if he actually received the plan, and she received no information regarding Father's participation in services. She also mailed letters to Father informing him of case updates. The third caseworker, assigned shortly before trial, made no attempt to visit with Father during the case.

At trial, the testimony of the caseworkers established Father was incarcerated throughout the case. The third caseworker testified, in very general terms, that Father had not to her knowledge complied with the family service plan. Father testified he received paperwork from the Department but it all pertained to Mother. He described that he received one letter in March 2018 which mentioned the family service plan and instructed him to follow up with the Department in June. Father testified he never received his family service plan, but voluntarily took classes while he was incarcerated to better himself.

The Court began its analysis by quoting case law which established that implementation of a family service plan by the Department is generally considered a reasonable effort to return a child to its parent if the parent has been given a reasonable opportunity to comply with the plan. The Court pointed out that none of the caseworkers met with Father in person to discuss the family service plan. Further, although the second caseworker testified she mailed Father's family service plan to the facility where he was incarcerated, there is no evidence that Father actually received the plan. The second caseworker also failed to provide the date that she mailed the family service plan to Father. Finally, the Court pointed out that while Father testified he received correspondence addressed to him on March 26, 2018, this date was less than two months before trial.

Accordingly, the Court concluded the Department's actions did not constitute reasonable efforts to return the child to Father, and found the evidence legally and factually insufficient to support the trial court's finding under subsection (N). *In re M.A.S.L. and K.J.L.*, No. 04-18-00496-CV (Tex. App.—San Antonio Dec. 19, 2018, no pet.) (mem. op.).

### *2. Reasonable Efforts*

Father, incarcerated at the time of trial, challenged the termination of his parental rights for constructively abandoning the child under TFC § 161.001(b)(1)(N).

Father only challenged the finding that the Department made reasonable efforts to reunify the child with him.

The Court of Appeals observed that normally the creation and administration of a service plan would constitute reasonable efforts. The Court noted, however, that here the evidence of a service plan for the Father is scant, if nonexistent, and no plan was admitted into evidence or filed with the court. Further, there was no testimony of the services Father was to work while incarcerated and the caseworker did not know what services were available in prison. The caseworker also made reference in her testimony to the service plan for "these parents", but could have been referring to the mother and the father of another child.

The Court pointed out, however, that the scant evidence of implementation of a service plan is not the only evidence showing the Department's efforts to "encourage [Father] toward responsible parenthood." Moreover, there was evidence to support a finding of reasonable efforts. The Court noted that the Department caseworker attempted to locate Father after he had been served, and began writing Father after she found him in prison. On eight separate occasions, the caseworker sent parenting packets to Father, which the Court agreed constituted "efforts to implement services." She also sent Father updates on the child's welfare and articles on parenting a child of the appropriate age, which she asked him to summarize and to return the summaries in prepaid envelopes. The Court observed that when asked how Father responded to her contact with him, the Department caseworker said, "[h]e didn't." The Court noted the Department even "took the uncommon step" of mediating the case six months early. The Court concluded that all of this supported the determination that the Department had made reasonable efforts to return the child to Father. *In re K.C.*, No. 07-18-00282-CV (Tex. App.—Amarillo Dec. 21, 2018, pet. denied) (mem. op.)

### E. TFC § 161.001(b)(1)(Q)

#### *1. Naming Mother Last Minute Insufficient for Ability to Care*

Incarcerated Father challenged the legal and factual sufficiency of the evidence to support the termination finding that he violated TFC § 161.001(b)(1)(Q). Subsection 161.001(1)(Q) provides that termination may occur if the parent has "knowingly engaged in criminal conduct that has resulted in the parent's: (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition."

The Court of Appeals stated that to terminate parental rights under subsection (Q), after the petitioner establishes the parent engaged in conduct that resulted in his conviction and imprisonment for a period of at least two years following the date the petition was filed, the parent must then produce some evidence showing he made arrangements for the care of the child during his imprisonment. "The care must be offered by a person who agrees 'to assume the incarcerated parent's obligation to care for the child' during the incarceration." But "[s]imply leaving the child with another who agrees to take the child in is not enough; the parent must show that another is willing to assume the parent's duties and act on his behalf." If the parent produces evidence he has arranged for such care, his rights still may be terminated if the petitioner "establishes that the arrangements do not satisfy the parent's duty to the child."

The Department's petition was filed in 2016. Father was convicted in 2015 and sentenced to serve 24 years in federal prison for conspiracy to commit drug trafficking. His projected release date was not until May 2038. The Department attempted to contact Father by mail, but received no response. The caseworker testified that no one contacted the Department before trial offering to care for the child on Father's behalf during his incarceration, or suggesting the name of another who was willing to assume Father's parental obligations. At trial, Father testified that the child could live with his mother out-of-state. He also testified he was not aware the child had serious emotional needs for which he sees a therapist, and did not know what other services or needs the child has. Father's mother testified by telephone that she was willing to take the child if he needed a place to live, she has a two-to-three-bedroom home, could go back to work if necessary, and planned to provide the child with care, shelter, food, and education. However, she had not seen the child in eleven years and was not aware of any abuse he may have suffered. She had "no idea" what the child's needs are and had not set up any

counseling. Although she testified she would "take care of" counseling if the child needed it, "there was no evidence that she was willing and able to provide the emotional support, speech therapy, and trauma therapy he needs."

Father argued he met his burden through his mother's testimony at trial that she would care for the child. He also contended that his and his mother's lack of knowledge of the child's needs and the Department's inability to determine whether his mother's home is a suitable placement are due only to the Department's failure to make any efforts to find him or any of his family until long after filing suit.

The Court disagreed, stating:

> As a parent, [Father] had the duty to know where his son was and to ensure his needs were being met. Father was [the child's] father when he was sentenced in 2015 and sent to prison. Yet he did not arrange for his mother or anyone else to assume his parental responsibilities. And he did not do so in June 2017, when he admits he received the petition seeking termination of his and [Mother's] parental rights. He did not even posit a suggestion until trial in February 2018, eighteen months after suit was filed. Although [Father] blames the caseworker and the Department for lack of communication, there was evidence [Father] was in regular communication with his mother, his lawyer, and [Mother]. Not one of them contacted the Department regarding a plan for [Father's] mother or anyone else to assume [Father's] responsibility for [the child]. [Father's] mother's offer to care for [the child], made eighteen months after the petition was filed and made without having learned about or having made any arrangements for [the child's] special emotional and therapeutic needs, is insufficient.

Consequently, the Court affirmed the termination order, holding the Department established by clear and convincing evidence that Father will be imprisoned for far more than two years after the date the petition was filed and that he "did not make arrangements for someone else to assume his parental obligations to [the child]". *In re D.L.A. Jr., D.L.A.R., B.B.R., B.L.A.R., and J.R.*, No. 04-18-00182-CV (Tex. App.—San Antonio Sept. 18, 2018, pet. denied) (mem. op.).

### *2. Department Did Not Establish Parent's Arrangements Insufficient*

Father's parental rights were terminated pursuant to TFC 161.001(b)(1)(Q). On appeal Father challenged the trial court's finding that he was unable to provide support for the children for at least two years. He argued that after the Department met its initial burden to show that he will be incarcerated for the requisite period, that he then carried his burden to produce some evidence that his mother agreed to support and care for the children on his behalf for the next several years. The Court of Appeals agreed

At trial, Father's mother testified that prior to Father's incarceration, she helped Father care for the children while he worked, and viewed her role as Father's "support network." Father voluntarily placed the children with his mother when the case began, and at trial, Father requested that the grandparents be named the children's temporary managing conservators while he is incarcerated. According to the Court, the grandparents "arguably" joined in Father's request. Thus the Court concluded that Father met his burden to produce "some evidence" as to how he would arrange to provide for care for the children during his incarceration: through the Grandparents caring for the children on his behalf.

Once the Father met his burden of production, the burden then shifted back to the Department to show by clear and convincing evidence that Father's arrangement would not satisfy the parent's duty to the children. The Court found that in this case, the Department did not challenge Father's proposal but rather "advocated for the very same placement." The Court noted that "[i]f the purpose of subsection Q is to protect children from neglect, the Department's own evidence effectively established that the children would face no risk of neglect under the grandparent's supervision" and concluded that "no reasonable factfinder could form a firm believe or conviction that Father's proposed arrangement would not satisfy his

obligation to care for the children." *In re I.G.*, No. 13-18-00114-CV (Tex. App.—Corpus Christi June 21, 2018, no pet.) (mem. op.).

### F. TFC § 161.001(b)(1)(R)

In challenging the legal and factual sufficiency of the trial court's subsection 161.001(b)(1)(R) finding, Mother argued that "the trial court could not have found that she caused the child to be born addicted to a controlled substance because there was no evidence that the drugs she admitted to taking before the child's birth were controlled substances." Under subsection (R), a trial court may order termination if it finds by clear and convincing evidence that the parent has been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription.

The record showed that the child was born drug-positive at birth and suffered from "withdrawal symptoms including tremors and violent shaking". The child was required to remain in the hospital for an extended period of time to treat the withdrawal symptoms. There was also evidence that Mother admitted to the Department investigator that she used heroin and methamphetamine a few days prior to the child's birth.

The Court of Appeals noted that heroin and methamphetamine are identified in the Texas Health and Safety Code as controlled substances. TEX. HEALTH & SAFETY CODE § 481.102. The Court also "took judicial notice of the facts that heroin and methamphetamine are controlled substances." As such, the Court concluded that Mother was the cause of the child being born addicted to a controlled substance that she had not legally obtained by prescription. *In re A.M.S.*, No. 04-18-00650-CV (Tex. App.—San Antonio Jan. 9, 2019, no pet.) (mem. op.).

### G. TFC § 161.001(d)

#### *1. Affirmative Defense Must Be Shown for Each Failed Task*

Mother's parental rights were terminated pursuant to TFC § 161.001(b)(1)(O). Mother argued that she proved the defense available under 161.001(d) because she had demonstrated that she was unable to comply with certain services. A court may not order termination under Subsection (b)(1)(O) based on the failure by the parent to comply with a specific provision of a court order if a parent proves by a preponderance of evidence that: (1) the parent was unable to comply with specific provisions of the court order; (2) the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent. TFC § 161.001(d). Mother argued that she did not complete substance abuse counseling due to a lack of transportation. However, the Court noted that Mother was ordered to complete other services, and Mother presented no argument as to why she failed to comply with many of her other court ordered tasks, such as remaining alcohol-free during the pendency of the case. The Court held "[e]ven if she had proven the defense with respect to the failure to complete substance abuse counseling, Mother has nonetheless not attempted to invoke the defense as to her failure to remain alcohol-free during the case and thus has not challenged all possible grounds supporting the court's judgment." The Court accordingly determined that Mother had failed to carry her burden under 161.001(d). *In re N.W.L.T. and J.A.C.*, No. 14-18-00497-CV (Tex. App.—Houston [14th Dist.] Nov. 29, 2018, pet. denied) (mem. op.).

#### *2. Court May Disbelieve Mother's Excuses*

Mother contested the sufficiency of the evidence sufficient to support termination of her parental rights for failing to complete her service plan under subsection (O). Mother failed to complete her service plan by failing to: (1) attend all court hearings and all visitations; (2) submit to random drug testing; and (3) complete parenting classes or counseling as recommended by the drug and alcohol assessment.

Mother admitted that she did not fully comply with her service plan, but argued that she proved that she was entitled to the defense for termination under TFC § 161.001(d).

Mother argued that the failure to meet all the requirements of the family service plan is excused by her lack of transportation and inability to pay for certain services. Mother claimed that she missed drug

tests, court hearings and some visitations because she did not have a working car or money for bus fare. One of Mother's relatives, however, testified that she had agreed to drive Mother to her appointments and would have given Mother bus fare if she had asked. The Department, likewise, would have helped had Mother communicated her difficulty with transportation.

The Court of Appeals held that the trial court was entitled to believe the relative and the Department caseworker, and could have disbelieved Mother. Therefore, the evidence was sufficient to support termination under TFC § 161.001(b)(1)(O). *In re B.L.H.*, No. 14-18-00087-CV (Tex. App.—Houston [14th Dist.] Jul. 12, 2018, no pet.) (mem. op).

#### *3. Father May Not Use Incarceration As Excuse*

Father challenged the termination of his parental rights pursuant to TFC § 161.001(b)(1)(O). On appeal, Father contended that the trial court erred in terminating his parental rights because he established the affirmative defense set forth in TFC § 161.001(d).

Father relied on his testimony at trial that no services were offered at the jail where he was incarcerated during the pendency of the case. The Court of Appeals rejected this argument, stating, "[t]his reliance disregards that [Father's] incarceration is attributable to his fault in committing criminal offenses." The Court noted that before the affirmative defense provision was enacted, appellate courts had held that incarceration is not a valid excuse for failure to complete court-ordered services under subsection (O). The Court then stated, "By requiring a parent to prove the failure to comply with the court ordered service plan is not attributable to any fault of the parent, we believe the Texas Legislature did not intend to make the affirmative defense available to parents who are unable to complete service plans because they are incarcerated through their own fault." The Court accordingly held that Father failed to provide the affirmative defense under 161.001(d). *In re L.L.N.-P.*, No. 04-18-00380-CV (Tex. App.—San Antonio Nov. 21, 2018, pet. denied) (mem. op.).

## VIII. BEST INTEREST

### A. Desires of the Child – Sufficient Maturity

In February 2016, the trial court denied termination of Mother's rights to her three children at trial on the basis that the Department had not proven that termination was in the children's best interest. The Department was named permanent managing conservator of the children. In November 2017, the Department filed a motion to modify the final order, again seeking termination of Mother's parental rights. Her parental rights were terminated as to the three children in August 2018.

Mother appealed, arguing that the evidence was legally and factually insufficient to support the trial court's best interest findings. The Court of Appeals found the evidence sufficient to support the best interest findings regarding the younger two children and affirmed Mother's termination as to those children.

Regarding the mother's oldest child, the Court found that "more than merely express[ing] love for her Mother, a well-adjusted sixteen year old child expressed her desire to have a mother and not to be adopted by anyone. The only rational view of this evidence is that [the child] did not want Mother's parental rights terminated." Further, the Court noted that the Department respected the child's wishes regarding adoption, changing the Department's goal from "relative/fictive kin adoption" to "independent living" with the plan for the child to "age out" of the system. Therefore, the Court concluded that this evidence demonstrates that the child was "sufficiently mature for her wishes to be afforded respect".

Because undisputed evidence established that there was no plan for the child to be adopted "now or in the future", the Court held there is "no evidence that termination would further the need for permanence through the establishment of a stable, permanent home." The trial court reversed the order of termination regarding the oldest child. *In re*

*F.M.E.A.F., A.A.F.H., and A.J.F.H.*, 572 S.W.3d 716 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

#### *2. Children Desire to Stay Together*

Under the first *Holley* factor, the children's desires, the Court of Appeals considered that although there was testimony that the children loved Mother, "the children were more concerned with the siblings staying together than with their return to Mother." The oldest two children told the caseworker that they desired to return home, but both also stated "they would be okay not being returned to Mother as long as they remained together or with" their other sibling. The Court held that "[t]he children's bond was with each other and less so with Mother. Their requests to stay together shows what they felt was more important. Being reunited with Mother was not their main concern." *In re J.T.T.J., K.A.T., and R.D.R.T.*, No. 13-18-00319-CV (Tex. App.—Corpus Christi Nov. 1, 2018, pet. denied) (mem. op.).

### B. Emotional and Physical Needs and Emotional and Physical Danger – Child's Improvements While in Care

Mother challenged the sufficiency of the evidence to support the trial court's determination that termination of her parental rights was in the child's best interest. The two-year-old child was removed after his two-month-old sibling was hospitalized from injuries caused by Father's violent shaking. The two-year-old had developmental delays when he first entered care, was nonverbal, and did not exhibit age-appropriate motor skills, although some of the delay was related to his premature birth. The Court of Appeals concluded, however, that the degree to which he improved while in the Department's care and received therapy supports the factfinder's determination that the child's physical needs were not being met previously. Further, this supports the determination that Mother's past inability to meet child's developmental needs is indicative of her inability to provide for his physical needs in the future. *In re J.D.G.*, 570 S.W.3d 839 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

### C. Parenting Abilities

The Court of Appeals noted in its analysis of the fourth *Holley* factor—the parenting abilities of the parties seeking custody—that while evidence showed Mother had completed a parenting class, there was also evidence demonstrating that Mother continued to engage in criminal conduct since taking the class. The Court pointed out that within one year of the children's return to Mother after the initial removal, the Department received allegations of neglectful supervision and Mother was arrested on drug-related charges.

Testimony from Department caseworkers established the children were previously removed from the home based on allegations of frequent incarcerations, unsanitary home conditions, and prescription drug abuse. One caseworker testified about a jail visit with Mother at the time of that removal. He related that Mother was being held in a detox cell for public intoxication where she was banging her head against the wall and unable to speak coherently. The children were returned after Mother completed her services and passed drug tests. When the children were removed in the present case, Mother was incarcerated on three felony drug charges. At the time of trial, Mother was again incarcerated. She admitted the charges resulting in her incarceration included failure to identify, having an unrestrained child under the age of five in a vehicle, possession of controlled substances, and assault by threat. Mother did not know when she would be released from jail.

The Court concluded that "[w]hatever parenting abilities Mother may have acquired in the class have not transferred to her day-to-day living and interactions." *In re C.W., D.T., J.T., and A.T.*, No. 14-18-00427-CV (Tex. App.—Houston [14th Dist.] Nov. 13, 2018, no pet.) (mem. op.).

### D. Other Considerations – Parent Has to "Confess"

Mother turned on two of the back burners of the stove for warmth when the heater in her home was not working. One of the children, seven years old at the time of trial, blew the fire out from those burners. The house smelled of natural gas. In an effort to discipline this child, and ostensibly teach the child that it is dangerous to play with fire, Mother placed the child's

hands near the heat from a hair straightener. Mother claimed she never intentionally had the straightener touch the child's hands. She claimed that when she realized his hands were burned, she immediately dropped the device, ran cold water over his hands, and applied burn cream. The child suffered second-degree burns on both his hands. There was no evidence that the child suffered any long-term pain, scarring, impairment, or any psychological harm from his injuries.

Afraid that the Department was going to remove her children, Mother did not immediately seek medical attention for the burns, and lied to the school and later a health clinic about the injuries. Mother also created a fake doctor's note to conceal the truth.

The investigating law officer later determined that the injuries were intentional. On advice of her criminal counsel, Mother never discussed the details of the event prior to the termination trial. Mother was eventually charged with felony child abuse.

The case was originally assigned to family based safety services, but turned into a removal when the agreed placement fell through. The original permanency goal was family reunification.

The Department's caseworker originally documented that Mother completed her services. However, after the original conservatorship supervisor was replaced, the permanency goal was changed to unrelated adoption with a concurrent goal of related adoption. The supervisor admitted that the permanency goal was changed without talking to the earlier-assigned Department employees, law enforcement, the service providers, or the child. She admitted the change was not based on changes in the facts of the case, but directly related to the change in case staffing.

Mother eventually entered into a pretrial diversion agreement which did not contain a plea of guilty or no-contest. Under the agreement, the case would be dismissed if she successfully completed a form of probation.

The Court of Appeals held that the trial court was free to disbelieve Mother's testimony and conclude that she intentionally clamped the child's hands on the device. A parent's past dangerous behavior indicates the potential for future dangerous behavior. However, there was other evidence—like the successful completion of therapy—mitigating the likelihood of future harm.

The Department argued that Mother needed to confess to successfully remediate the Department's concerns. The Court rejected this position for four reasons: (1) the Department cannot keep a parent in the dark about the need to confess in order to reunite with the children; (2) the Department affirmatively misled Mother about the completion of services absent a confession; (3) the Department had previously admitted that mother had completed services; and (4) if the Department is going to require a parent to sacrifice the right to remain silent in order to keep the right to be a parent, it should at least inform the parent of this requirement and explore whether there are steps to avoid this "constitutional dilemma."

Given the lengthy steps Mother had taken to achieve family reunification, in addition to the children's desires to return to Mother and their difficulties in foster care, the Court held that the evidence was legally insufficient to support the trial court's best interest determination. *In re J.I.T.*, No. 01-17-00988-CV (Tex. App.—Houston [1st Dist.] June 27, 2018, pet. denied) (mem. op).

### E. Other Considerations - Each Child's Best Interest Is Different

The Court of Appeals held the evidence legally and factually sufficient to support the finding that termination of Mother's parental rights was in the children's best interest. Three of Mother's children—ages thirteen, five, and one—were removed into the Department's care following investigations of referrals alleging physical and sexual abuse. The case regarding the thirteen-year-old was severed, and the Department did not seek termination of Mother's parental rights to that child. Rather, it sought permanent managing conservatorship to continue providing the sexual offender treatment he needed, determine whether in the future Mother obtained the help she needed to reunify, and because, as a teenager with behavioral issues, the child was not likely to be adopted.

The trial court terminated Mother's parental rights to the two younger children, and she challenged on appeal the sufficiency of the evidence to support the best interest finding. Mother argued that because the Department was not seeking termination of her parental rights to the older child, it "'clearly believes that [Mother] is capable of parenting a child who has more special needs than either of the two children involved in this case . . .' and that '[t]he only real difference is that the agency wants to move these children on to adoption and cut the mother's time off in this case.'"

In rejecting Mother's argument, the Court of Appeals stated, "[e]ssentially, Mother is arguing, without authority, that the Department can never terminate parental rights as to some of Mother's children without terminating as to them all. That is clearly not the case; we must determine best interest as it applies to each child and his particular circumstances." The Court noted the record showed: (1) the older child was not living with Mother and the Department did not plan to return him to her in the near future; (2) the Department obtained managing conservatorship so it could continue to provide him sexual offender services he needed; (3) the child is much older than the other two children and is in a residential treatment facility, not placed in a foster home that was meeting his needs; and (4) because of the child's age and history, he is unlikely to be placed with an adoptive family. Further, although the Department was not seeking immediate termination of Mother's rights to the older child, it "did not foreclose that possibility for the future." The Court held, "Because [the older child's] 'best interest' is not necessarily the same as [the younger children's] 'best interest,' the evidence is not legally and factually insufficient simply because the Department is not presently seeking termination of Mother's rights in [the older child's] case."

The Court held the evidence establishing that: (1) Mother exposed the children to physical abuse (her admitted "'whoppings,' which left bruising and marks"), drug use, neglect, housing instability, domestic violence, and men with criminal records; and (2) the two younger children spent little time with Mother during the case due to her inconsistent visitation, and are bonded and thriving with foster parents who want to adopt them, supported the finding that termination was in the best interest of the two younger children. *In re T.R. and P.H.*, No. 01-18-00834-CV (Tex. App.—Houston [1st Dist.] Feb. 14, 2019, pet. dism'd w.o.j.) (mem. op.).

### F. Other Considerations - MSA and Stipulations Supported Best Interest Finding

In a termination suit brought by the Department, the parties reached a mediated settlement agreement (MSA), which was signed by Mother, the putative fathers, the parents' respective attorneys, the children's guardian and attorney ad litem, a Court Appointed Special Advocate (CASA) supervisor, and the Department's representatives and counsel. In the MSA, the parents stipulated that their parental rights would be terminated under TFC § 161.001(b)(1)(N) as to the youngest child, subsection (O) as to the other children, and best interests. In two places, all parties agreed the MSA's terms were in the children's best interest. The MSA provided for the Department's appointment as permanent managing conservator with the right to consent to adoption. The MSA included permanency plans for the children providing for specific relative and non-relative placements for each child and, "absent unforeseeable circumstances," required the Department to consent to adoption by the designated individuals, and if adoption was not viable, required the Department to transfer permanent managing conservatorship to the designated individuals. The parents' termination stipulations were not contingent on either the children's placement with individuals named in the MSA or the parents' consent to an alternative placement. The MSA was signed by each party and each party's attorney, stated that it was entered into pursuant to TFC § 153.0071, was binding on the parties, and was not subject to revocation, and expressly entitles a party to judgment on the MSA.

Shortly after the MSA's execution, two of the children were returned to the Department's care due to a material change in the circumstances of the fictive kin designated as anticipated adopters. Mother filed a motion to invalidate and modify the MSA, but only as to the agreed placement for those children, and requested a new placement and the right to designate suitable relatives or fictive kin for those children.

Mother affirmatively requested that "the MSA's conditions of termination of [her] parental rights, including the legal grounds . . . be kept in place with the new placement." The trial court denied Mother's motion, noting the MSA provided for the Department's consent to adoption and did not preclude the Department from looking for substitute placements.

The case proceeded to a prove-up hearing, at which, on request, and without objection, the trial court took judicial notice of the MSA which had been filed. A Department worker also testified to the MSA's contents, including the parent's stipulations regarding the grounds for termination, and that termination was in the children's best interests. No other witnesses were called or evidence offered. Forgoing an opportunity to testify, Mother appeared only through counsel. Her counsel advised the court she was not present but had signed the MSA. The children's ad litem asserted, without objection, that the MSA's specified relief was in the children's best interests, and the CASA agreed. No contrary evidence was offered. The trial court approved the MSA and incorporated it into the final termination decree. No post-judgment motions were filed.

Mother appealed, challenging the legal and factual sufficiency of the evidence to support the best-interest findings. The Court of Appeals affirmed. It held that the stipulations and placement plans in the MSA were sufficient evidence of several factors relevant to the best-interest determination.

On petition for review to the Texas Supreme Court, Mother asserted that the clear and convincing evidence standard negated the evidentiary value of her best-interest stipulations in the MSA and the best-interest testimony at trial, which she characterized as conclusory and lacking factual support. The Supreme Court stated that Mother did not assert the MSA was invalid and should be set aside, and she conceded the evidence was sufficient to support termination under subsections (N) and (O). It identified the only issue as "whether any evidence supports the trial court's best-interest findings under the clear-and-convincing-evidence standard." The Court held "Mother's stipulations in the MSA and the reasonable inferences arising therefrom are, under the rationale articulated in *In re K.S.L.*, evidence from which a factfinder could form a firm conviction or belief that termination is in the children's best interest."

The Court stated that the MSA met and exceeded the requirements under TFC § 153.0071(c), (d) which made it binding on the parties—it prominently stated it was not subject to revocation, was signed by each party, and was signed by the parties' attorneys who were present when it was signed. The Court also stated that TFC § 153.0071(e) provides that a statutorily compliant MSA is also binding on the court, subject to narrow exceptions not alleged in the case. It acknowledged that following its holding in *In re Lee* that section 153.0071(e) requires trial courts to enforce a properly executed MSA without conducting a broad best-interest inquiry, some intermediate appellate courts have held that subsection (e) does not apply in Chapter 161 termination proceedings and thus neither forecloses a best-interest inquiry, nor renders an MSA conclusive proof that termination is in the child's best interest. The Court noted that the trial court made express best-interest findings, the court of appeals reviewed those findings for legal and factual sufficiency, neither lower court afforded conclusive weight to the MSA under subsection (e), and the parties did not argue to the contrary before the Court. Thus, it concluded "the interplay between section 161.001(b)(2)'s best-interest requirement and section 153.0071(e) [was] not presented."

The Court clarified that the question in the case was not whether the trial court was required to afford conclusive weight to the MSA's stipulations regarding the children's best interests, but whether a factfinder is permitted to give any weight to those stipulations under the elevated burden of proof. It found instructive the rationale in *In re K.S.L.*, in which it held that a statutorily compliant affidavit of voluntary relinquishment is ordinarily sufficient to support a best-interest determination by clear and convincing evidence—not necessarily conclusive, "but certainly ample to clear the elevated evidentiary standard." The Court found the affirmations in the *K.S.L.* affidavit substantively indistinguishable from the MSA stipulations, except that the former affirmed the parents were advised of their parental rights and the latter admitted to statutory termination grounds and affirmed Mother was advised by counsel. Significantly, as in *K.S.L.*, Mother voluntarily gave up

her children, agreed it was in the children's best interest, and did not recant or oppose the admission of the stipulations into evidence. The Court perceived "no legally cognizable distinction in the evidentiary value between Mother's stipulations here and those in *K.S.L.*"

Additionally, the Court reasoned that the grounds for termination Mother stipulated to—(N) and (O)—require acts and omissions bearing on several of the factors that guide the best-interest determination, creating a reasonable inference that Mother was unable to meet the children's emotional and physical needs; the children were endangered physically or emotionally; Mother lacked adequate parenting abilities such that the existing parent-child relationship is improper; and Mother was unwilling or unable to seek out, accept, and complete available services or to effect positive environmental and personal changes within a reasonable period of time. The record bears no evidence of any excuse for Mother's acts or omissions, and the MSA includes primary and alternate plans for placement, to which Mother unconditionally assented.

Thus, consistent with *K.S.L.*, the Court held "Mother's stipulations in the MSA are sufficient to produce a firm belief or conviction that termination of the parent-child relationship is in the children's best interest."

In affirming the court of appeals's judgment which affirmed the termination order entered on the MSA, the Supreme Court held that "a parent's voluntary and affirmative statements that termination of parental rights is in the child's best interest in a mediated settlement agreement binding on the parties under section 153.0071(d) of the Family Code can satisfy, and does here, the requirement that a best-interest finding be supported by clear and convincing evidence." *In re A.C., J.Y., J.Y Jr., L.B., and E.B.*, 560 S.W.3d 624 (Tex. 2018).

## IX. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. Attorney Not Present to Prove-up MSA

In a termination of parental rights suit initiated by the Department, the parties along with their attorneys entered into a mediated settlement agreement (MSA) pursuant to TFC § 153.0071. In the MSA, Father agreed that his parental rights would be terminated under TFC § 161.001(b)(1)(O) (failure to comply with court-ordered services). The MSA also provided that the Department would conduct home studies of the children's grandfathers, and if the children were placed with one of the grandfathers, then Father would be entitled to visitation with the children on at least a quarterly basis. The agreement stated that it was in the best interest of the children.

At the final hearing to "prove-up" the MSA, Father was present but his appointed trial counsel did not appear. The record is unclear as to whether Father's appointed trial counsel filed a motion to withdraw prior to the prove-up hearing. Nevertheless, at the hearing, the Department's caseworker testified to Father's failure to complete his court-ordered services and she also testified that the home studies on the grandfathers had not been approved. The CASA supervisor also testified to Father's failure to complete his court-ordered services. Both the Department caseworker and the CASA supervisor requested that the trial court adopt the MSA. Father, who was present at the hearing, and who had no attorney representation, was not offered the opportunity to examine the witnesses, nor was he offered the opportunity to testify or present a case in chief. The trial court entered judgment on the MSA and terminated Father's parental rights pursuant to TFC § 161.001(b)(1)(O) and a finding that termination of his parental rights is in the children's best interest.

On appeal, Father argued that he was deprived of effective assistance of counsel because his appointed trial counsel did not appear at the final hearing. The Department conceded that Father was deprived of effective assistance of counsel; the Court of Appeals agreed.

The Court applied the two-pronged standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel under *Strickland*, a parent has the burden to show (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense in a manner so serious as to deny the parent a fair and reliable trial.

The Court determined that:

> Father was denied counsel when his appointed attorney did not appear at the final hearing presenting the mediated settlement agreement. It was at this hearing that the merits of the State's case was presented. Counsel's failure to appear was not mere strategy; it left Father unrepresented at the hearing that would determine whether his parental rights would be terminated.

The Court concluded that because Father had no representation at the final hearing, a critical stage of the litigation to terminate his parental rights, the second prong of the Strickland standard was met as prejudice may be presumed when a defendant is denied counsel at a "critical stage" of the litigation. *In re B.H.*, No. 05-18-00291-CV (Tex. App.—Dallas Sept. 18, 2018, no pet.) (mem. op.).

### B. Attorney Not Present On First Day of Trial

The Department's case was called to trial in January 2018. Father was incarcerated but appeared by phone. His attorney was present as well as the children's ad litem. The trial court noted that the case had been set multiple times, had been pending nearly eighteen months, and stated "We are going forward today." Mother arrived at the hearing an hour and a half after it began and was called to testify by the state. Her attorney did not make an appearance that day. At the close of testimony, the trial court terminated Father's parental rights and entered an interlocutory order. The trial court then appointed "co-counsel" for Mother and recessed the trial to March 2, 2018.

Mother's trial proceeded in March 2018. Mother did not appear. The Department rested its case without presenting additional evidence due to Mother's absence. Mother's attorney called Mother's aunt to testify. In closing, Mother's attorney argued against termination but admitted that she was unaware of the evidence presented against Mother because "I was not present at the last hearing". The trial court announced he was incorporating the entire testimony from the January 2018 hearing and ordered termination of Mother's parental rights.

Mother appealed, but her attorney filed a brief indicating there were no arguable issues for appeal. The Court of Appeals abated Mother's appeal, concluding that there was at least one arguable issue for appeal due to "the absence of Appellant Mother's court-appointed counsel at the first day of trial". Mother's new appellate counsel filed a brief on her behalf arguing that Mother was denied effective assistance of counsel. In response, the Department filed a brief conceding that Mother was denied effective assistance of counsel. The Court of Appeals agreed and reversed the portion of the order terminating Mother's parental rights. *In re G.N.H.*, No. 04-18-00154-CV (Tex. App.—San Antonio Nov. 14, 2018, no pet.) (mem. op.).

### C. Attorney Failed to Appear for Most of Trial

Father was appointed counsel during the course of the Department's case. On the day of trial, Father was not present because he was incarcerated and his trial counsel appeared and announced "not ready." The trial court overruled this announcement and proceeded to trial. Shortly after the Department began to examine the caseworker as its first and only witness, Father's trial counsel asked to be excused.

Father's trial counsel stated: "Judge, pardon me. I have a[n] actual client in a termination hearing in 306. May I be excused and come back here very shortly?" The court allowed Father's attorney to leave. He did not return until after the Department had rested its case, while the attorneys were making closing arguments. Father's counsel interrupted and asked for permission to "ask one or two questions", which involved a "brief cross-examination of the Department caseworker". Father's trial counsel called no other witnesses and rested.

On appeal, Father contended, *inter alia*, that his trial counsel was ineffective because he "wholly failed to appear and fully participate at a critical stage of litigation—the trial". While the Court of Appeals noted that Father's counsel did not "wholly fail" to show up for trial, it also found that he "was not present for virtually all of the Department's case, including ***all of its evidence in support of terminating [Father's] parental rights***, as well as cross-examination of the

Department's sole witness by [the other attorneys in the case]" (emphasis in original). The Court concluded that because Father's counsel was not present for a critical stage of litigation, "i.e., the entirety of the Department's case in support of terminating [Father's] parental rights." Accordingly, because Father received ineffective assistance of counsel, the order of termination was reversed as to Father. *In re J.A.B.*, 562 S.W.3d 726 (Tex. App.—San Antonio 2018, pet. denied).

## X. CONSERVATORSHIP

On appeal, Mother argued the trial court erred by appointing her as possessory conservator of the child but decreeing that she have no contact or visitation. Citing TFC § 153.193, the Court of Appeals noted the terms of an order limiting a parent's access to her child may not exceed those that are required to protect the child's interest. Thus, complete denial of visitation is seldom appropriate because such denial of parental access is "tantamount to the termination of parental rights." Therefore, the Court reasoned visitation should be denied only in extreme cases of parental unfitness which would almost rise to a level that would warrant parental termination. Accordingly, a parent is generally entitled to periodic visitation.

The evidence reflected that Mother adopted the ten-year-old child when she was a year old, but there was no indication that the child had resided with her adoptive mother before the Department was appointed her temporary managing conservator, or that she had participated in raising the child. The Department caseworker testified that Mother, her sister, and the child each confirmed that the child had lived with her aunt after her adoption. The child came into the Department's care after she made a credible allegation that her aunt's boyfriend had sexually abused her.

Mother testified that her sister tried to adopt the child but was unable to do so due to marital separation, but she did not intend for the child to live with her sister on a permanent basis. She denied stating that the child had never lived with her, but conceded that the child had alternated between living with her and her sister throughout the child's life. Mother claimed she saw the child on an almost daily basis after adopting her, but acknowledged that her own divorce decree did not name the child as one of her children. Mother stated that the family had not had contact with the person alleged to have committed the abuse since its discovery.

During the case, the Department ultimately placed the child in a residential treatment center, which is where she resided at the time of trial. The child was "not doing well" at the treatment center. The child had diagnoses of attention deficit hyperactivity disorder and regulatory disruptive mood disorder, and suffered from mood swings, depression, and suicidal and homicidal tendencies. The Department caseworker conceded that the child's therapist believed Mother should have visitation, and that the visitation should occur regularly because in the past it had been inconsistent and disappointed the child's hopes. Mother visited the child while she was in the Department's care and spoke with her by telephone weekly.

A court-appointed special investigator who testified as an expert witness stated that she was "not real favorable about visitation," because of the reports of abuse, including "a medical finding of confirmed sexual abuse on this child during a medical examination," and because Mother told her that the child had never lived with her. She opined that the child required time "to try to heal therapeutically."

In its analysis, the Court noted that while the trial court appointed the Department as sole managing conservator, it appointed Mother as a possessory conservator. The Court concluded in so doing, the "trial court implicitly found that the mother's appointment to this more limited role was in the child's best interest and that the mother's access to the child would not endanger the child's physical or emotional welfare." Further, the record contained no evidence that appropriate restrictions or limitations on parental access, such as supervised visitation, would be inadequate to safeguard the child. The Court held that in cases like the present one, where there has not been a showing of parental unfitness so extreme as to render even limited parental contact or visitation against the child's best interest, the "total and indefinite denial of parental access is improper."

The Court rejected the Department's argument that the trial court properly considered the allegations of sexual abuse pursuant to TFC § 153.004(c) in deciding to disallow supervised visitation, because the evidence at trial demonstrated Mother's sister's boyfriend abused the child, not Mother. The Department also contended that the trial court's decree may be revisited at future permanency hearings. The Court concluded that the "possibility that the trial court might enter a different order at a later point in time does not, however, cure the infirmity in the evidence to support the present order." *In re C.L.J.S.*, No. 01-18-00512-CV (Tex. App.—Houston [1st Dist.] Nov. 29, 2018, no pet.) (mem. op.); *see also In re P.M.W. and J.A.J.*, 559 S.W.3d 215 (Tex. App.—Texarkana 2018, no pet.) (finding that order allowing parent "supervised visitation under the terms and conditions agreed to in advance by" the Department after a negative drug test or series of tests was not sufficiently specific because the terms of the order allowed the Department complete discretion over Mother's possession and was not enforceable by contempt as the Department had sole authority over when and where Mother may have access to the child).

## XI. ICWA

### A. Expert Witness

Father claimed that the termination of his parental rights in an ICWA case should be reversed because no one expressly designated as a qualified expert witness testified against him. Under 25 U.S.C. § 1912(f), a court may not terminate the parental rights to an Indian child unless it finds beyond a reasonable doubt that the evidence, including the testimony of a qualified expert witness, demonstrated that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

The Choctaw Nation of Oklahoma intervened in this case. The notice of intervention was filed by Penny Drinnon, who was identified as a "Choctaw Nation ICWA Specialist." Ms. Drinnon participated in trial via Skype. She stated she was employed by the Choctaw Nation Child and Family Services, Indian Child Welfare. The trial court questioned her about both her and the tribe's involvement. She indicated she had worked with the Department throughout the case. Ms. Drinnon testified that the Department had complied with ICWA, and that continued custody with the parents would likely result in serious emotional or physical damage to the child.

The trial court never expressly designated Ms. Drinnon as a qualified expert witness, but did indicate in its order of termination that its decision was based on the testimony of a qualified expert witness.

The Court of Appeals noted that ICWA does not define "qualified expert witness", but the Bureau of Indian Affairs has created guidelines. Under those guidelines, qualified expert witnesses include a member of the tribe who is recognized by the trial community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices. 80 Fed. Reg. 10146-02, 10157 at D.4. (b)(1) (Feb. 25, 2015).

The Court of Appeals held that the trial court could have determined that Ms. Drinnon was a qualified expert witness even though the Department did not specifically designate her and the trial court did not expressly certify her as a qualified expert witness. *In re D.E.D.L.*, 568 S.W.3d 261 (Tex. App.—Eastland 2019, no pet.).

### B. 1912 Findings Not Required in Temporary Orders

The subject child was a registered member of the Ysleta Del Sur Pueblo Tribe. Mother's parental rights were terminated under TFC § 161.001(b)(1)(D), (N), and (O). The final order also made findings beyond a reasonable doubt in accordance with 25 U.S.C.A. § 1912 (d) and (e) that: (1) the Department made active efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that these efforts proved unsuccessful; and (2) the evidence, including testimony of qualified expert witness, demonstrated that the continued custody of the child by Mother is likely to result in serious emotional or physical damage to the child. Mother argued on appeal that because these findings were not included in the emergency orders, temporary order, status order, and permanency orders entered during the case, the termination order must be reversed.

The Court first looked to section 1922 of ICWA, which provides that "Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child . . . in order to prevent imminent physical damage or harm to the child." The Court stated that although there was not a transcript of the emergency hearing, the order included the following findings:

> [T]here is an immediate danger to the physical health or safety of the children or the children have been victims of neglect or sexual abuse and that continuation in the home would be contrary to the children's welfare; and
>
> There is no time, consistent with the physical health or safety of the children for a full adversary hearing, and reasonable efforts consistent with the circumstances and providing for the safety of the children, were made to prevent or eliminate the need for removal of the children.

The Court then held that "[g]iven Section 1922's directive that nothing in ICWA shall prevent the emergency removal of an Indian child when necessary to prevent imminent physical damage or harm to the child, we conclude that the requirements of Section 1912(a), (d), and (e) did not apply to the emergency removal of the child."

The Court then turned to Mother's argument that the final order must be reversed because each of the temporary orders failed to make ICWA findings supported by the testimony of an Indian expert. The Court rejected Mother's argument and determined that "the alleged defects in the temporary orders do not invalidate the final termination order. The final termination order is supported by expert witness testimony and it includes the necessary ICWA findings." *In re A.M.*, 570 S.W.3d 860 (Tex. App.—El Paso 2018, no pet.).

## XII. APPELLATE ISSUES

### A. TFC § 161.211(c)

Father executed a voluntary relinquishment of parental rights. The affidavit was admitted into evidence, the court admonished Father in open court, and his rights were terminated based on the relinquishment. Father then filed a motion for new trial claiming the affidavit was obtained by undue influence and coercion. The trial court denied the motion, and Father appealed, based in part on his claim of undue influence and coercion.

Father argued that the affidavit was not signed voluntarily "due to the existence of undue influence and coercion unintentionally caused by" the Department. Father asserted he was experiencing "emotional difficulties" during the trial. Father also pointed out that at the time of trial, he was serving deferred adjudication community supervision and there was a motion to revoke pending at the time of trial, which could have resulted in Father being sent to jail for two to twenty years. Father claimed this was sufficient evidence to prove undue influence and coercion, and his affidavit of relinquishment should be set aside.

The Court of Appeals rejected Father's argument. The Court cited to the language of TFC § 161.211(c), which limits the grounds of attack for affidavits of relinquishment to fraud, duress, and coercion. The Court held that Father cannot attack the voluntariness based on undue influence, as that is not included as an available avenue of attack under TFC § 161.211(c). The Court went on to state that to the extent Father challenged the voluntariness of his affidavit due to coercion, he had failed to satisfy his burden of proof, as Father was represented by counsel, he stated in open court that he understood that he would lose all rights to the child if the trial court approved the affidavit, he stated he had not been coerced into signing the document, he agreed termination of parental rights was in the child's best interest, and also that he was not influenced to sign the affidavit based on the motion to revoke his community supervision. The judgment of the trial court was affirmed. *In re J.M.*, No. 12-18-00157-CV (Tex. App.—Tyler Oct. 10, 2018, no pet.) (mem. op.)

### B. Mother with Limited Mental Abilities

Trial was held nearly a year after the Department filed suit for protection of the child. Mother did not attend trial. Mother's attorney announced that Mother had

been in the courthouse earlier that day, at which time she executed an irrevocable affidavit of relinquishment of her parental rights. Mother's attorney told the court that she explained the affidavit to Mother and she understood and had no questions. The trial court admitted the affidavit into evidence without objection. The Department's caseworker testified about the child and his placement. The trial court found that (1) Mother "executed an unrevoked or irrevocable affidavit of relinquishment her parental rights, and (2) termination of Mother's parental rights was in [the children's] best interest."

Mother, through new counsel, filed a motion for new trial alleging "newly discovered evidence" that she "reportedly suffers from bipolar disorder, depression, and other mental health conditions and had not taken her prescribed medication for six years." As a result, Mother claimed that her affidavit was involuntary. After a hearing, the trial court denied Mother's motion for new trial.

On appeal, Mother argued that her "diminished mental capacity rendered her relinquishment involuntary." The Court of Appeals distinguished Mother's circumstances from those in *In re K.M.L.*, 443 S.W.3d 101, 113 (Tex. 2014), noting it was "considerably different" than this case. First, the Court stated that in *K.M.L.*, the issue of voluntariness was "fully litigated" at trial, whereas in this case, Mother signed her affidavit on the day of trial and alleged the affidavit was involuntary two months after signing it.

Second, the Court explained that the record in *K.M.L.* contained "several" pieces of evidence about the mother's mental abilities "around the time she signed the affidavit", including, testimony from the mother's psychiatrist and counselor regarding her "comprehension challenges" and that the mother was found incompetent to manage her own affairs by another court. In contrast, in this case, most of the evidence of Mother's mental abilities came from an evaluation from "MHMRA" records six years before her relinquishment. The Court noted that "the only" evidence of Mother's "current" mental ability was Mother's own account and testimony from her relatives.

Lastly, the Court of Appeals recognized that in *K.M.L.*, there was "absolutely no evidence in the record, other than the language of the affidavit itself," that the mother understood the consequences of signing the affidavit of relinquishment. Here, the Court noted that there was evidence that Mother understood the effect of the affidavit: (1) Mother's trial attorney stated at trial that she had explained the affidavit to Mother and that Mother understood it; (2) the caseworker testified that Mother brought someone for the Department to evaluate as placement, which the fact finder could reasonably have inferred Mother "understood she would be giving up her rights to the children and wanted the Department to appoint someone she knew as their managing conservator."; (3) the children's guardian ad litem testified in detail about Mother's execution of the affidavit, noting that Mother appeared to understand; and (4) Mother engaged in a long discussion with the trial judge in which she confirmed that she understood, both when she signed the affidavit and at the hearing, the benefits of relinquishment over termination on another ground.

Accordingly, the Court of Appeals concluded that Mother did not establish that her affidavit of relinquishment resulted from fraud, duress, or coercion, termination of parental rights was affirmed. *In re Z.M.R. and Z.D.B.*, 562 S.W.3d 783 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

### C. Court Must Review Sufficiency of TFC § 161.001(b)(1)(D) or (E)

The trial court terminated Mother's rights based on its findings under subsections TFC § 161.001(b)(1)(D), (E), and (O) and its best-interest finding. On appeal, Mother challenged each of these findings. The Court of Appeals did not address the findings under (D) or (E) because there was sufficient evidence to support the trial court's (O) and best-interest findings.

Mother's petition for review presented the following issues: (1) whether a parent, whose parental rights were terminated by the trial court under multiple grounds, is entitled to appellate review of the sections 161.001(b)(1)(D) and (E) grounds because of the consequences these grounds could have on their parental rights to other children—even if another ground alone is sufficient to uphold termination; and

(2) whether the Court of Appeals erred in failing to address whether the trial court's order was sufficiently specific to warrant termination under TFC § 161.001(b)(1)(O).

With regard to the first issue, the Supreme Court first looked at TFC § 161.001(b)(1)(M) which provides that parental rights may be terminated if clear and convincing evidence supports that the parent "had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state." The Court noted that because only one ground is required to terminate parental rights—and therefore a TFC § 161.001(b)(1)(M) ground based on a prior termination would be sufficient to terminate parental rights to another child in another termination proceeding—the collateral consequences of terminating parental rights under section 161.001(b)(1)(D) or (E) are significant

The Court then applied the factors the Supreme Court of the United States used in *Santosky v. Kramer* and the Supreme Court of Texas used in *In re J.F.C. See Santosky v. Kramer*, 455 U.S. 745, 759–68, 102 S. Ct. 1388, 1398–1402, 71 L.Ed.2d 599 (1982); *In re J.F.C.*, 96 S.W.3d 256, 273–274 (Tex. 2002). Balancing these factors, and considering that the risk of error would mean significant consequences for future parental rights, the Court concluded that a parent's fundamental liberty interest in the right to parent outweighs the state's interest in deciding only what is necessary for final disposition of the appeal. Therefore, the Court decided that allowing (D) and (E) findings to go unreviewed on appeal when the parent has presented the issue to the appellate court violates the parent's due-process and due-course-of-law rights.

The Court concluded that because TFC § 161.001(b)(1)(M) alone provides a sufficient basis to terminate parental rights based on a previous TFC § 161.001(b)(1)(D) or (E) finding, the due process concerns, coupled with the requirement for a meaningful appeal, mandate that if a court of appeals affirms the termination on either of these grounds, it must provide the details of its analysis. The Court held that "due process and due course of law requirements mandate that an appellate court detail its analysis for an appeal of termination of parental rights under section 161.001(b)(1)(D) or (E) of the Family Code." As to the second issue, Mother argued that that the evidence was legally insufficient to support the first prong of (O) and that the lower courts are required to review whether the order was sufficiently specific for Mother to follow.

In the court of appeals, Mother argued that "the evidence was legally and factually insufficient to show that she 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." The Court found that because a trial court must necessarily decide that a court order is sufficiently specific for the parent to comply before terminating a parent's rights under TFC § 161.001(b)(1)(O), a trial court cannot terminate parental rights for failure to comply without first considering the order's specificity. Here, the court of appeals noted that Mother did not argue the service plan itself was not sufficiently specific, characterizing her challenge as to the specificity of the order only. Because the trial court incorporated the service plan into the order, however, the Court concluded that Mother's challenge encompassed the specificity of the service plan. Ultimately, the Court held that the court of appeals erred in failing to address the specificity of the order, which included the service plan. *In re N.G.*, 18-0508 (Tex. 2019).

*See also In re Z.M.M.*, No. 18-0734 (Tex. May 17, 2019) (per curiam) (SCOTX characterized the *N.G.* opinion as standing for the proposition that "due process requires an appellate court to review and detail its analysis as to termination of parental rights under [ (D) or (E) ] when challenged on appeal."); *In re P.W.*, No. 14-18-01070-CV (Tex. App.—Houston [14th Dist.] June 4, 2019, no pet. h.)(mem. op.)(Mother concedes N and best interest and challenges only (D) and (E), appeal would not undo the termination of mother's parental rights but would prevent termination under (M)—court of appeals did not address failure to challenge (D) or (E)).