Termination Case Law Update

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34th ADVANCED FAMILY LAW COURSE
August 14, 2008
San Antonio, Texas

ANNOTATED TABLE OF CONTENTS

PRE-TRIAL

TRIAL

Best Interest

Evidence Sufficient

In re A.C. (7th COA)
In re B.L.H. (1st COA)
Dowell v. Dowell (8th COA)
In re E.A., et al. (13th COA)
In re J.A.B. (2nd COA)
In re J.D.B. and G.N.B. (2nd COA)
In re J.E.H. (2nd COA)
In re J.J. and J.G. (5th COA)
In re J.O.A., T.J.A.M., T.L.M., and C.T.M. (7th COA)
In re J.S., M.N.S.C., and T.S. (2nd COA)
Mikowski v. TDFPS (1st COA)
In re M.R. and W.M. (2nd COA)

Summary Judgment Denied

Dowell v. Dowell (8th COA)

Evidence

Admission of Drug Tests

In re C.R. (5th COA) (State of Mind Exception)

Admission of Child Hearsay Statement (TEX. FAM. CODE § 104.006)

In re M.R. and W.M. (2nd COA)

Appointment of Psychologist

Lopez v. Kushner (3rd COA)

Trial Court's Interview of Child

Lopez v. Kushner (3rd COA)

Judicial Admission of Paternity

In re G.A.G., III (4th COA)

Parental Presumption Not Rebutted

In re J.O. (4th COA)

Recantation of Outcry

In re Jesse Vernon Jochims v. State (13th COA)

Telephonic Appearance

Lopez v. Kushner (3rd COA)

Grandparent Access

Banta v. TDFPS (13th COA)
In re B.S.G. (4th COA)

Jury

Broad Form Question Submission

In re D.S.A. and P.J.A. (11th COA)\

Right of Inmate to Participate in Hearing

Lopez v. Kushner (3rd COA)
S.K.A., M.A., and S.A. (6th COA)

Sibling Access

In re S.L.M. (4th COA)

Termination Grounds

TEX. FAM. CODE § 161.001(1)(D)

In re J.D.B. and G.N.B. (2nd COA)
In re J.E.H. (2nd COA)
In re J.J. and J.G. (5th COA)
In re J.K.H. (2nd COA)
In re J.M., L.M., and K.M. (10th COA)
In re J.O.A., T.J.A.M., T.L.M., and C.T.M. (7th COA)
In re J.P. (2nd COA) (Evidence Insufficient)
In re M.R. and W.M. (2nd COA)
In re S.K.A., M.A., and S.A. (6th COA)

TEX. FAM. CODE § 161.001(1)(E)

In re C.R. (5th COA)
In re J.A.B. (2nd COA)
In re J.D.B. and G.N.B. (2nd COA)
In re J.E.H. (2nd COA)
In re J.M., L.M., and K.M. (10th COA)
In re J.O.A., T.J.A.M., T.L.M., and C.T.M. (7th COA)
In re J.P. (2nd COA) (Evidence Insufficient)
In re M.R. and W.M. (2nd COA)
In re S.K.A., M.A., and S.A. (6th COA)

TEX. FAM. CODE § 161.001(1)(K)

Duenas v. Duenas (13th COA)
In re L.K.M. (2nd COA)

TEX. FAM. CODE § 161.001(1)(N)

In re B.S.G. (4th COA)
In re S.K.A., M.A., and S.A. (6th COA)

TEX. FAM. CODE § 161.001(1)(O)

In re A.A. (5th COA)
In re A.A.A. (1st COA)
In re C.R. (5th COA)
In re J.E.H. (2nd COA)
Mikowski v. TDFPS (1st COA)

TEX. FAM. CODE § 161.001(1)(Q)

Dowell v. Dowell (8th COA)
In re D.S.A. and P.J.A. (11th COA)
In re J.K.H. (2nd COA)

TEX. FAM. CODE § 161.002

In re G.A.G., III (4th COA)

TEX. FAM. CODE § 161.003

In re B.S.G. (4th COA)

TEX. FAM. CODE § 161.004

Material Change in Circumstances

In re B.L.H. (1st COA)

POST-TRIAL

263.405

Constitutionality of

In re A.S. (9th COA) (263.405(d))
In re D.M. and W.M. (9th COA) (263.405(i))
In re D.W., T.W., and S.G. (2nd COA) (263.405(i))
In re K.C. and W.C. (2nd COA) (263.405(g))
In re M.D. (7th COA) (263.405(b) and (i))
In re S.K.A., M.A., and S.A. (6th COA) (263.405(i))

Denial of Free Record – TEX. CIV. PRAC. & REM. CODE § 13.003

In re B.G., C.W., E.W., E.B.W., and J.W. (12th COA)

Frivolous Finding

In re A.R. (4th COA)
In re A.S. (9th COA)
In re J.K.H. (2nd COA)
In re J.M., L.M., and K.M. (10th COA)
In re K.C. and W.C. (2nd COA)

Indigence Determination

In re L.K.M. (2nd COA)

Issues Reviewed Though Not in Statement of Points

Ineffective Assistance of Counsel

Bermea v. TDFPS
In re J.O.A., T.J.A.M., T.L.M., and C.T.M. (7th COA)

Issues Precluded From Review

In re A.R. (4th COA) (Ineffective Assistance of Counsel)
In re D.L.G. (5th COA)
In re J.M.L.W. (7th COA)
In re J.M., J.J., J.J., and J.J. (12th COA)
Mikowski v. TDFPS (1st COA) (Ineffective Assistance of Counsel)
In re R.M. (4th COA) (Ineffective Assistance of Counsel)

Mailbox Rule Applies to Filing Statement of Points

In re A.C. (7th COA)

Presentment of Statement of Points Not Required

In re J.A.B. (2nd COA)

***Pro Se* Requirement to File Statement of Points**

In re J.M.L.W. (7th COA)

Specificity of Statement of Points

In re A.R. (4th COA) (not specific enough)
In re J.A.B. (2nd COA) (specific enough)

Fifteen-Day Deadline for Statement of Points Not Arbitrary

In re M.D. (7th COA)

Bill of Review

In re J.C.C. (5th COA)

APPEAL

Appeal of Conservatorship Appointment
- *In re D.N.C.; In re T.L.J., and T.B.J.; In re T.J.C. and T.D.C.; In re E.D.C.; In re J.D.M.* (S. Court)
- *In re J.A.J.* (S. Court)

Harmless Error
- *Bermea v. TDFPS*

Lack of a Reporter's Record
- *In re L.K.M.* (2nd COA)

Supplementation of Record
- *In re K.C.B.* (S. Court)

Waiver of Issues – TEX. R. APP. P. 33.1
- *In re B.G., C.W., E.W., E.B.W., and J.W.* (12th COA)

INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel Not Ineffective
- *In re A.A.* (5th COA)
- *In re D.R.D.* (2nd COA)

SUPREME COURT CASES

In re D.N.C.; In re T.L.J., and T.B.J.; In re T.J.C. and T.D.C.; In re E.D.C.; In re J.D.M.,
252 S.W.3d 317 (Tex. 2008)

TEX FAM. CODE § 153.131
TEX FAM. CODE § 161.001(D)

In five separate cases, the Department requested termination of mother's seven children. The trial court found that mother endangered her children and granted termination under (D) ground and appointed the Department as sole managing conservator of all the children. Mother appealed and the Houston First District Court of Appeals reversed the trial court's termination order on factual insufficiency grounds. It also reversed the appointment of the Department as sole managing conservator as no independent finding was made under Family Code section 153.131 that the appointment of them as managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development. The Supreme Court distinguished this case from *In re J.A.J.* 243 S.W.3d 611 (Tex. 2007), where such finding was included. The Supreme Court denied the Department's Petitions for Review.

In re J.A.J.,
243 S.W. 3d 611 (Tex. 2007)

TEX FAM. CODE § 153.105
TEX FAM. CODE § 153.131
TEX FAM. CODE § 263.404
TEX FAM. CODE § 161.001(D)
TEX FAM. CODE § 161.001(E)

The trial court terminated mother's rights to her child and appointed the Department as sole managing conservator. The trial court specifically found that the appointment of mother as managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development. Mother appealed and the Houston Fourteenth District Court of Appeals reversed the trial court's termination order, finding the evidence insufficient under grounds (D) and (E), and reversed the appointment of the Department as sole managing conservator. The Supreme Court reversed the court of appeals' reversal of the appointment of the Department as sole managing conservator. Texas Family Code section 263.404 allows the court to render a final order without terminating parental rights upon certain conditions. Mother argued that 263.404 only applies where the Department **does not seek** termination, not in cases where termination is sought but reversed on appeal. Mother argued that the Department's appointment was solely as a consequence of the termination proceeding. The Supreme Court disagreed with mother's contention. Recognizing that the Department's request for conservatorship was based upon independent grounds (TEX. FAM. CODE §§ 153.105 and 153.131), that the standard of proof is by a preponderance of the evidence in conservatorship decisions, and that other appeals courts require a separate challenge

to conservatorship decisions, the Supreme Court concluded that the conservatorship appointment was not subsumed by 263.404 (a)(2).

In re K.C.B.,
251 S.W. 3d 514 (Tex. 2008)

TEX. FAM. CODE § 263.405(b)
TEX. FAM. CODE § 263.405(i)
TEX .R. APP. P. 34.5(a)(13)
Supplementation of Record

Mother's parental rights were terminated in trial before an associate judge. Mother filed *de novo* appeal and timely filed a statement of points. After the presiding judge signed a termination order in *de novo* hearing, mother filed a second statement of points which was not included in the appellate record. At oral argument, when mother's attorney was questioned about second statement of points, he indicated that a second statement of points **had not** been filed. The Amarillo Court of Appeals concluded that mother had failed to file a statement of points after the final order (*de novo* order) and affirmed the trial court's judgment without addressing the merits. After the court of appeals issued its decision, mother's attorney produced a second statement of points which had been filed in the trial court but was not included in the appellate record. Mother's attorney filed for rehearing and for leave to supplement record. Both requests were denied. The Supreme Court reversed and remanded for further consideration. The Department argued against two separate omissions in mother's first statement of points. The Supreme Court reasoned, however, that because the Department failed to argue against **all** assigned error, it could have led mother's counsel to reasonably believe that the second statement of points was filed. The court held that mother's omission was based upon "confusion and misunderstanding", not purposeful omission. *See Worthy v. Collagen Corp.*, 9677 S.W.2d 360, 365-66 (Tex. 1998) and *Silk v. Terrill*, 898 S.W. 2d 764 (Tex. 1995).

***In re TEXAS DEP'T OF FAMILY AND PROTECTIVE SERVS., RELATOR*,**
___ 3d ___ 2008; No. 09-0391, 2008 Tex. LEXIS 510; 51 Tex. Sup. J. 967, May 29, 2008

TEX FAM. CODE § 262.201(b)(1)
TEX FAM. CODE §§ 105.001(a), 262.205
TEX FAM. CODE § 105.001(a) (4)
TEX FAM. CODE § 262.1015
TEX FAM. CODE §§ 161.303(a)-(c); 261.3032

The Department filed a petition for writ of mandamus seeking relief from a conditional mandamus granted by the Austin Court of Appeals. The mandamus directed the trial court judge to vacate the temporary orders entered following an adversary hearing in which the Department was appointed as temporary managing conservator of approximately 117 of the 468 children brought into the Department's care from the YFZ Ranch in Eldorado, Texas. *See In re Steed* ___S.W.3d___, 2008, Tex. App. LEXIS 3652 (Tex. App.–Austin 2008). The Supreme Court denied the Department's request for mandamus relief. After reviewing the evidence at the adversary hearing, and other evidence, the Supreme Court concluded that it was "not inclined to

disturb the court of appeals' decision finding that the Department's removal of the children was "not warranted". (The Austin Court of Appeals found that the Department did not meet its burden under TEX FAM. CODE § 262.201(b)(1)). Further, the Supreme Court was not convinced by the Department's argument that the decision of the court of appeals left the Department "unable to protect the children's safety." In reaching its conclusion, the Supreme Court illuminated many provisions of the Family Code that give the Department "broad authority to protect children short of separating them from their parents and placing them in foster care." Those provisions include:

- The court (trial court) may make and modify temporary orders for the safety and welfare of the child. TEX. FAM. CODE § 105.001(a); 262.205;

- The court may enter an order restraining a party from removing the child beyond a geographical area identified by the court. TEX. FAM. CODE § 105.001(a)(4);

- The court may enter an order removing an alleged perpetrator from the child's home. TEX. FAM. CODE § 262.1015; and

- The Supreme Court identified other provisions of the Family Code that afford the Department with authority to protect children such as the provisions prohibiting interference with an investigation and the punitive sanctions for a person who relocates a residence or conceals a child with the intent to interfere with an investigation. TEX. FAM. CODE §§ 161.303(a)-(c); 261.3032.

While denying mandamus relief, the Supreme Court held that the court of appeals' decision **does not** conclude the SAPCR proceedings.

Justices O'Neill, Johnson, and Willett, dissented in part and concurred in part. They reasoned that although the trial court abused its discretion by awarding custody of the male and pre-pubescent children, the trial court **did not** abuse its discretion "as to the demonstrably endangered population of pubescent girls."

In re TEXAS DEP'T OF FAMILY AND PROTECTIVE SERVS., RELATOR
No. 09-0403, 2008 Tex. LEXIS 511; 51 Tex. Sup. J. 970, May 29, 2008

This is a companion case to *Steed.* The Texas Supreme Court issue the same opinion as in No. 08-0391. *See In re Bradshaw* ___S.W.3d___, 2008, Tex. App. LEXIS 3746 (Tex. App.–Austin 2008).

COURT OF APPEALS CASES

In re A.A., No. 05-07-01698-CV, 2008 Tex. App. LEXIS 4643 (Tex. App.–Dallas June 25, 2008, no pet. h.) (mem. op.)

TEX. FAM. CODE § 161.001(1)(O)
Ineffective Assistance of Counsel

Trial court terminated mother's parental rights under 161.001(1)(O). Mother did not appear for trial. Mother's counsel attempted to reach her, and informed the court that she had not filed a written continuance because counsel expected mother to appear for trial. Mother had not informed counsel that she would not appear at trial. Mother had a history of non-attendance at previous hearings. New counsel for mother filed a motion for new trial, claiming that prior counsel was ineffective as mother was too ill to attend the hearing. On appeal, mother argued that her counsel was ineffective for failing to file a written motion for continuance and supporting affidavit. To prove ineffective assistance of counsel, appellant must show: 1) that trial counsel's performance was deficient and fell below an objective standard of reasonableness; and 2) a reasonable probability that but for counsel's errors, the result of the proceeding would be different. Mother did not meet the first prong of ineffective assistance, because counsel did not file a written motion for continuance, because she had no personal knowledge that mother would not appear and there could be no affidavit because there was no personal knowledge of where mother was. The court went on to state that the second prong of ineffective assistance was not met either, as the granting of a continuance is within the discretion of the court and the statutory dismissal deadline was close and had already been extended once. Further, the statutory termination ground was met by two witnesses who testified regarding mother's failure to complete services. There is nothing to indicate that had mother testified, the outcome would have been different.

In re A.A.A., No. 01-07-00160-CV, 2008 Tex. App. LEXIS 4842 (Tex. App.–Houston [1st Dist.] June 16, 1008, no pet. h..) (mem. op.)

TEX. FAM. CODE § 161.001(1)(O)

The court of appeals withdrew its prior judgment of reversal, affirming the trial court's order of termination on rehearing. On appeal, mother challenged the sufficiency of the evidence supporting the statutory termination grounds and best interest. The child and mother were living in a shelter. Mother was arrested after shoplifting cough medicine for the child. After mother did not return to the shelter, the Department was contacted. After the Department could not find mother, or reach anyone on her contacts card at the shelter, it removed the child. Mother was released from jail a day later. Among other grounds, the trial court found that mother failed to comply with court-ordered services. Mother argued that the Department did not meet (O) ground, because it did not establish that the child had been removed from mother as a result of abuse or neglect. Mother argued that she was arrested and unable to return to the shelter. The issue is one of statutory interpretation, which a court reviews *de novo*. The plain language of 161.001(1)(O) requires that the court consider whether the Department proved by clear and

convincing evidence that the child was removed from mother for abuse or neglect. The court rejected the Department's contention that mother's leaving the child at a shelter while she went to commit a crime was sufficient to show neglect. There was no evidence that mother knew or reasonably should have known that the child would not be taken care of when she left the shelter. In addition, the Department did not prove whom the child was left with and whether any instructions were given. Mother actually provided contact information for emergencies. However, the evidence was sufficient as the Department proved that upon mother's release from jail, she did not make any efforts to find or locate the child for over a day. Regarding best interest, evidence showed that mother and the child had little interaction at visits, because the child did not know her mother. The child was bonded to relatives and was thriving in their home. The goal of establishing a stable, permanent home for a child is a compelling state interest. Despite mother's testimony of stability, competing evidence weighed against her ability to provide a safe and stable home. Mother moved and changed jobs frequently. Mother failed to complete her services and only attended six out of a possible twenty-four visits with the child. The evidence supporting best interest was sufficient as the trial court could have formed a firm belief or conviction that termination of the parent-child relationship was in the child's best interest.

_In re A.C._, No. 07-07-0354-CV, 2008 Tex. App. LEXIS 2718 (Tex. App.–Amarillo Apr. 16, 2008, no pet. h.) (mem. op.)

TEX. FAM. CODE § 263.405(b) – Mailbox Rule Applies
Best Interest

The trial court terminated mother's and father's parental rights. The court was precluded from considering father's issues, because he failed to timely file a statement of points. Mother's statement of points, though filed late, was found to be timely as the court applied the mailbox rule, finding that the statement of points was timely filed as counsel complied with the requirements of timely filing under the mailbox rule. Only one predicate statutory termination ground and a finding of best interest are necessary to support termination. Here, mother failed to challenge all the termination grounds found by the trial court. The evidence was sufficient to support the best interest finding as mother: 1) was mentally retarded and had been raised in a home where she was abused and neglected; 2) lived with the child's father while he physically abused her; 3) continued to see the child's father when she was not supposed to; 4) could not care for the child who had meningitis and RSV; 5) had to be reminded to care for the child; 6) ran away from placements; 7) drove while drunk with a different child in the vehicle; 8) failed to complete services; 9) lacked the ability to parent and place the child's needs above her own; 10) was jailed for truancy at the time of trial; and 11) had another child by another man whom she planned to live with. The child was doing well in his placement. Neither mother's nor father's family passed a home study. Evidence that a mother cannot provide a stable, safe, and secure environment supports a finding that it is in the child's best interest to terminate a mother's parental rights. "The litany of evidence itemized above established [mother's] inability to provide such an environment." The order of the trial court was affirmed.

***In re A.R.*, No. 04-07-00292-CV, 2007 Tex. App. LEXIS 9229 (Tex. App.–San Antonio Nov. 28, 2007, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(O)
TEX. FAM. CODE § 263.405(b) – Specificity of Statement of Points
TEX. FAM. CODE § 263.405(d) Frivolous Finding

On appeal, mother challenged the trial court's finding that her appeal was frivolous. The court may only consider issues brought in a timely filed statement of points on appeal. Mother raised two issues that were not included in her statement of points: 1) issues of ineffective assistance of counsel and 2) the trial court's failure to grant her request for a continuance. Because they were not included in her statement of points, the court could not consider them. The trial court terminated mother's parental rights, finding that mother had failed to comply with court-ordered services. The statute requires that the child has been in the Department's conservatorship for not less than nine months. The child was only six months old at the time of trial. However, mother's statement of points read: "The evidence is factually insufficient to support the trial court's finding that Respondent failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the children who have been in the temporary or managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the children's removal from the parent under Chapter 262 for the abuse or neglect of the children. **Namely that Respondent failed to complete her Plan of Service set forth by the Department of Family and Protective Services**." Although the issue tracked the statutory language of 161.001(1)(O), it failed to specifically challenge the time the children had been in the conservatorship of the Department. Therefore, the court was barred from considering the issue. *See* TEX. FAM. CODE § 263.405(b) (2007). The court considered mother's challenge to the frivolous finding. Mother did not complete her parenting classes, was late to visits with the children, failed to take sign language to communicate with the child who was deaf, did not pay any court-ordered child support, failed to complete recommended counseling, failed to complete court-ordered homemaking and family violence courses, and failed to obtain stable and consistent housing. The trial court did not abuse its discretion in finding mother's appeal frivolous.

***In re A.S.*, 239 S.W.3d 390, 392**
(Tex. App.–Beaumont 2007, no pet.)

Constitutionality of TEX. FAM. CODE § 263.405(d)
TEX. FAM. CODE § 263.405(d) - Frivolous Finding

In *A.S.*, father alleged that due process required that a full reporter's record be prepared before the appellate court considered the issue of frivolousness. The Department argued that father had waived the issue as same was not included in his statement of points for appeal. The *A.S.* court disagreed, finding that: "the statement of points for appeal required by Section 263.405(b) refers to the merits of the appeal, not to issues relating to the hearing required by Section 263.405(d)." As father challenged the constitutionality of 263.405(g), rather than the merits, the court considered his complaint. Father's counsel argued that 263.405(d) was unfair, because she did not attend the trial. The court disagreed, holding: "The Legislature created a process in which

the terminated parent, with benefit of counsel, may identify the issues for appellate review and identify the evidence supporting the issues." The court looked to the *Mathews v. Eldridge* test in framing the issue as "whether limiting the scope of our review to the record of the hearing held under Family Code § 263.405(d), as clearly contemplated by the legislature, deprives the parent of due process, particularly when new counsel has been appointed since trial." The court found that father's due process rights were not violated. It looked to the fact that father's counsel acknowledged that she had spoken with trial counsel, who advised her on the issues for appeal, and with father, who testified at the post-trial hearing. The court reasoned: "Thus, [father's] counsel was not compelled to blindly guess what issues to include in the statement of points and what evidence had been developed at trial, but could determine the potential issues and describe for the record the evidence germane to the stated issues." The court went on to affirm the trial court's finding of frivolousness as "From the record on the hearing on the statement of points, we can discern both the State's allegations and evidence supporting the grounds for termination and the evidence supporting [father's] arguments on his appellate issues."

***Banta v. Tex. Dep't of Family and Protective Servs.*, No. 13-06-548-CV, 2007 Tex. App. LEXIS 5888 (Tex. App.–Corpus Christi July 26, 2007, no pet.) (mem. op.)**

TEX. FAM. CODE § 153.433 - Grandparent Access
Plea to the Jurisdiction – Inclusion of Party

On appeal, grandfather challenged the trial court's denial of grandparent access to the child. The child's mother executed a voluntary affidavit of relinquishment. In a supplemental pleading after intervening, grandfather sought grandparent access to the child. At the termination trial, grandfather abandoned his pleadings for custody and proceeded only on his request for access. The trial court denied grandfather's request for access. The child's *ad litem* argued that because the adoptive parents were not a party to the appeal, the court was without jurisdiction to proceed. She did not raise this issue before the trial court. The failure to join parties, even those who are necessary and indispensible, is not jurisdictional. As the issue was not jurisdictional, the court did not need to address it. Further, the issue was waived as counsel failed to object to the non-joinder at the trial level. The court disposed with the first requirement of *Troxel v. Granbury*, namely the "fit" parent presumption, because both parents were terminated. The court thus considered grandfather's second issue, which was that the trial court abused its discretion in denying him access. Access to the child pursuant to Family Code section 153.433 is subject to the trial court's determination of the best interest of the child. A trial judge has wide latitude in determining the best interest of the child. The judge's decision on access is reviewed for an abuse of discretion. Grandfather presented evidence that the child lived with him for a year, that they spent time together, that he was a competent caregiver, and that they had a loving relationship. The court noted that despite grandfather's testimony of the relationship, he failed to present any evidence of how discontinuing the relationship would harm the child. At trial, however, grandfather admitted that the child was removed while in his home, that the child received a burn while in his home, that the house was dirty when the child was removed, and that he had weapons "all over the house". The child's foster mother testified that the child was scared of grandfather and did not want to see him. Due to the visitations, the child was acting out and was taking Zantac for stress. Considering the evidence, the CASA reports, and therapist reports, the trial court did not abuse its discretion in denying grandfather access to the child.

Grandfather also argued that the trial court's ruling was contingent as it left open the possibility of visitation to the child's caretakers. The trial court's order specifically denied grandfather's requested relief in its order. The trial judge's "note" was akin to a suggestion that the parties act in the child's best interest in the future.

***Bermea v. Tex. Dep't of Family and Protective Servs.*, No. 01-07-00699-CV, 2008 Tex. App. LEXIS 2444 (Tex. App.–Houston [1st Dist.] Apr. 3, 2008, pet. filed) (mem. op.)**

TEX. FAM. CODE § 263.405 – Ineffective Assistance of Counsel
Only One Statutory Termination Ground Necessary to Support Termination

On appeal, mother argued several issues, including the sufficiency of the evidence supporting termination, the court's refusal to consider her statement of points violated her right to due process, and her counsel was ineffective for failing to file a statement of points. The court stated that it was barred from considering mother's issues, because she failed to file a statement of points. However, the court considered mother's claim that her counsel was ineffective for failing to file a statement of points, writing: "We hold that a person whose parental rights have been terminated may raise for the first time on appeal a claim for ineffective assistance of counsel for counsel's failure to file a statement of points for appeal." To prevail on an ineffective assistance of counsel claim, the claimant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. Mother satisfied the first prong, because her counsel's failure to file a statement of points constitutes deficient conduct. However, counsel's failure to file a statement of points did not harm mother. Only one predicate statutory termination ground and a finding of best interest are necessary to support termination. Here, mother failed to challenge all the termination grounds found by the trial court and did not challenge the best interest determination. "Because [mother] could not have prevailed on her legal and factual sufficiency arguments, we cannot say that the result of the proceeding would have been any different if she had effective counsel." As no harm resulted from counsel's deficient conduct, the judgment was affirmed.

***In re B.G., C.W., E.W., B.B.W., and J.W.*, Children, No. 12-06-00295-CV, 2007 Tex. App. LEXIS 7614 (Tex. App.–Tyler Sept. 19, 2007, pet. filed) (mem. op.)**

TEX. CIV. PRAC. REM. CODE 13.003 - Denial of Free Record
TEX. R. APP. P. 33.1 - Waiver of Issues

This opinion was substituted for the original. Father appealed the trial court's order denying him a free record in a termination suit. He complains that the trial court violated his due process rights under the U.S. and Texas Constitutions when it denied him a free record. Through appointed appellate counsel, father sought a free record based on his indigent status. Under Civil Practice and Remedies Code section 13.003, the trial court denied his request for a free record. Father did not assert his constitutional complaints in the trial court at the hearing regarding his request for a free record. Therefore, he did not properly preserve the issue for appellate review. Further, such error, if any, was not fundamental. Father argued that his raising the issue in his motion for reconsideration before the trial court complied with Texas Rule of Appellate Procedure 33.1. Father filed his motion sixty-four days after the final judgment was signed.

Therefore, when the motion for reconsideration was filed, the trial court had no power to reconsider its ruling. Further, there is no evidence that the Department either consented to or requested that the trial court reconsider its ruling. Finally, simply because the section 13.003 hearing occurred does not provide the trial court with the necessary additional jurisdiction for a subsequent reconsideration upon motion.

***In re B.G.S.*, No. 04-06-00562-CV, 2007 Tex. App. LEXIS 6859 (Tex. App.–San Antonio May 9, 2007, pet. denied) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(N)
TEX. FAM. CODE § 161.003
Best Interest

Trial court terminated mother's parental rights in accordance with the jury verdict, finding she had constructively abandoned the child, she has a mental disability that renders her incapable of caring for the child, and termination is in the child's best interest. To terminate under subsection 161.001(1)(N), the Department must prove that it has made reasonable efforts to return the child to the parent; the parent has not regularly visited or maintained contact with the child; and the parent has demonstrated an inability to provide the child with a safe and secure environment. At trial, Department witnesses testified that mother: 1) was provided a service plan and told that her parental rights could be terminated if she did not comply; 2) failed to complete most of her services; 3) loved her child but missed half her visits with him; 4) admitted to abuse of multiple drugs; 5) had been evicted from her home, had no money, and had no job; and 6) the child's grandmother was in the process of adopting his sibling. This evidence was sufficient to meet (N) ground. The evidence was also sufficient to support the mental disability finding. Mother suffered from bipolar disorder with antisocial and narcissistic tendencies. Although mother's condition was highly treatable with medication, she refused to take it. Mother did not complete assignments given to her by her psychologist, often arrived late to sessions, and became angry when her psychologist questioned her as to why she would not take her medication. A mental health therapist testified that mother appeared to have a mental illness marked by paranoia and delusions. Mother told the caseworker that she would take medication but never did. She also told the caseworker that taking medication was against her civil rights. The evidence "overwhelmingly" showed that mother had a mental illness. However, a mental illness is not enough. The Department must also prove that mother cannot care for the child until his eighteenth birthday. Even though mother's condition could be controlled by medication, she steadfastly refused to take it. Given this refusal, and failure to show a willingness to control her condition in the years since the child's birth, the evidence was sufficient to support the trial court's findings of termination under 161.003. Regarding best interest, the child has special emotional and physical needs that mother cannot meet while unmedicated. At the time of trial, mother had not seen the child in two months. She had moved to Las Vegas and had no plans to return to San Antonio. She had been evicted from her apartment and did not have a place to live. Considering the entire record, the evidence is sufficient to support the trial court's finding that termination is in the child's best interest.

_In re B.L.H._, No. 01-06-00817-CV, 2008 Tex. App. LEXIS 2212 (Tex. App.–Houston [1st Dist.] Mar. 27, 2008, no pet.) (mem. op.)

TEX. FAM. CODE § 161.004 – Material and Substantial Change in Circumstances
Disqualification of Attorney
Best Interest

The trial court terminated mother's parental rights to the child. Through a mediated settlement agreement, Amy M. was appointed the child's managing conservator and has cared for the child most of his life. On appeal, mother argues that the trial court erred in: 1) denying her request to call Amy's adoptive mother Sharon, who was also Amy's attorney, as a witness; 2) denying mother's motion to disqualify Sharon from acting as Amy's attorney; and 3) terminating mother's parental rights based on evidence that was factually insufficient to support the trial court's finding that circumstances had materially and substantially changed; and 4) granting termination, as the evidence was factually insufficient to support the best interest finding. The admission and exclusion of evidence is committed to the trial court's sound discretion. Evidentiary rulings usually do not cause reversible error unless an appellant can demonstrate that the judgment turns on the particular evidence that was admitted or excluded. Mother presented no evidence that the exclusion of Sharon's testimony was harmful. In her brief, mother claims that she would have asked Sharon about day-to-day activities and about a domestic violence incident that occurred between Sharon and her mother-in-law. However, mother did not include these in her bill of exception. No questions asked of Sharon in mother's bill of exception presented issues that could not be answered by another witness or were essential to mother's case. The exclusion of the evidence, if error, did not in reasonable probability, cause the rendition of an improper judgment. Mother's next claim regards disqualification of Sharon as Amy's attorney. The standard of review for the denial of a motion to disqualify an attorney is abuse of discretion. Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct has been recognized by courts as providing relevant guidelines for disqualification determinations. Attorney disqualification is a severe remedy. It is only appropriate to disqualify an attorney when the attorney's "testimony" is "necessary to establish an essential fact." Simply because a lawyer acts as a witness and advocate, does not necessarily mandate disqualification. Even if a lawyer violates disciplinary rules, the party moving for disqualification must show actual prejudice due to the lawyer's dual role of advocate and witness. A motion to disqualify cannot be used as a tactical maneuver. Despite Sharon's relationship to the facts of the case – lawyer, mother, grandmother, *etc*. – mother failed to show that Sharon's testimony was "necessary to establish an essential fact." Various other sources could have provided the same information mother sought from Sharon. The trial court could have disregarded Sharon's statements that may have suggested personal knowledge rather than a comment on the evidence in the case. Finally, mother's late filing of the motion to disqualify (the night before trial) suggests that the motion was a tactical maneuver. Courts have a strong desire to discourage parties from using motions as tactical maneuvers. Under 161.004, a court may not terminate unless it finds that: 1) the instant petition is filed after the date the order denying termination was rendered; 2) the circumstances of the child, or another party affected by the order of termination have materially and substantially changed; 3) the parent committed an act under section 161.001 before the date the order denying termination was rendered; and 4) termination is in the child's best interest. Mother first challenges the factual sufficiency of the evidence concerning the trial court's finding

that circumstances have materially and substantially changed. Mother claimed that she was not sent to prison on new charges after the termination was denied, had stopped using drugs, had attempted to set up visitation with the child, and caught up her child support payments. Amy responds that mother returned to prison after being released because she violated the terms of her probation, that mother continued to use drugs, and that mother made no effort to contact the child. No definite guidelines exist as to what constitutes a material and substantial change in circumstances. However, here, the facts in the record supporting the trial court's determination include: 1) the trial court could have concluded that mother's return to jail due to a probation violation was a material and substantial change in circumstances; and 2) the trial court could have reached the conclusion that mother abused illegal drugs after her release from prison, and after the prior termination denial, because evidence was produced that mother arrived at a funeral smelling of marijuana, she admitted to being "all messed up", and mother admitted that she was under the influence of drugs to a relative. Finally, the evidence is sufficient to support the trial court's finding that termination is in the child's best interest. Although mother seemed to understand the child's needs, there was no evidence that she has provided for those needs for most of the child's life. Mother did not have steady employment. Although she claimed to have employment, she did not produce any documentation to support it. The trial court could have disregarded her testimony as not credible. The child needed glasses and regular vision exams, but mother did not know what steps to take to get the child enrolled in Medicaid. Mother placed the child in danger for most of his life through her drug use, beginning while pregnant with the child, causing him to be born with cocaine and Xanax in his blood. She also admitted to using marijuana everyday for nine years. Although mother "purports to love B.L.H., her conduct throughout his life, with few exceptions, demonstrates that she does not have the parental ability to care for B.L.H." Amy has demonstrated an ability to care for the child. Mother testified that she did not have a car, did not pay rent, and relies on the financial assistance of family, friends, and the government. There was evidence of mother's transient living. The record showed that mother had an inadequate relationship with the child due to her commission of crimes and violations that resulted in repeat incarcerations, continued drug use even after receiving treatment, failure to pay child support consistently, and failure to interact with the child consistently.

***In re C.R.*, No. 05-07-00503-CV, 2008 Tex. App. LEXIS 3269 (Tex. App.–Dallas May 7, 2008, no pet. h.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(E)
TEX. FAM. CODE § 161.001(1)(O)
Admission of Drug Tests

Mother testified to using "pseudophedrine", an admitted illegal drug. She had been incarcerated for drugs, refused to take seven of nine drug tests, admitted to the caseworker that one test would be positive, admitted extensive drug abuse history in a drug assessment, and invoked her Fifth Amendment right against self-incrimination when questioned about a friend who purchased drugs for her. The child was removed due to mother testing positive for methamphetamines. On appeal, mother challenged the sufficiency of the evidence supporting termination and argued that the trial court erred in admitting a drug test. The admission of evidence is reviewed for an abuse of discretion. A complainant must show that the admission was error and that it probably caused

the rendition of an improper judgment. The trial court admitted the drug tests only for the purpose of establishing the Department's and mother's state of mind. The record did not establish that the trial court relied on the test results to establish that mother failed the test or was using drugs. Further, there was extensive evidence of mother's drug use. Even if the test results were considered for anything other than state of mind, they were cumulative and the effect harmless. Mother did not complete any drug rehabilitation. The court held: "A reasonable fact finder could have formed a firm belief or conviction that [mother's] long history of using illegal drugs, minimal motivation to quit using drugs, continued use of drugs after C.R. was removed, and allowing C.R. to be around [father] when [father] was under the influence of drugs was a course of conduct that endangered the physical and emotional well-being of C.R." Mother argued that she substantially complied with court-ordered services and that transportation issues and scheduling difficulties hindered her ability to participate. Section 161.001(1)(O) does not make any provision for excuses. The evidence was legally and factually sufficient to support termination under 161.001(1)(O). The evidence was sufficient to support the best interest finding because: 1) the fact finder could give "great weight" to mother's extensive drug use; 2) mother never expressed an interest in obtaining full time employment; 3) she failed to complete parenting classes; 4) the child did not want to visit his mother; 5) the child had improved educationally; and 6) the foster parents wanted to adopt the child.

_In re D.L.G._, No. 05-07-00787-CV, 2007 Tex. App. LEXIS 9779 (Tex. App.–Dallas Dec. 17, 2007, pet. filed) (mem. op.)

TEX. FAM. CODE § 263.405

The trial court terminated mother's parental rights to the child. On appeal, mother raised three issues: 1) she had the right to appointed counsel prior to signing her affidavit of relinquishment; 2) the evidence was factually insufficient to support the trial court's finding that termination was in the child's best interest; and 3) the evidence was legally and factually insufficient to support the trial court's statutory termination ground findings. An appellate court may not consider any issue that is not raised in a timely filed statement of points on appeal. Mother failed to file a statement of points. "Therefore, we are precluded from considering any of her issues on appeal."

***In re D.M. and W.M.*,**
244 S.W.3d 397 (Tex. App.–Waco 2007, no pet.)

TEX. FAM. CODE § 263.401 – Denial of Dismissal Deadline Extension
TEX. FAM. CODE § 263.405(i)

Opinion on rehearing. Mother was not appointed appellate counsel within the fifteen-day period of 263.405(b). On appeal, she argued that subsections 263.405(b) and (i) violated her right to due process. After engaging in a *Mathews v. Eldridge* balancing test, the court of appeals found section 263.405(i) unconstitutional as applied. The court listed several possible procedural safeguards, including: 1) the fact that section 109 of the TEXAS FAMILY CODE could be amended to point parents to section 263.405; (2) the appellant was without appellate counsel within the fifteen-day window; (3) the statute could be amended to provide notice in the judgment to the parents of the statutory requirements; (4) the recent enactment of 263.405 causes a risk that

parents will be denied meaningful appeals; and (5) the Legislature could permit a fifteen day extension of the time to file a statement of points. The court considered mother's claim that the trial court erred in not granting her request for a 180-day extension under Family Code section 263.401(b). The trial court's decision whether to grant an extension is reviewed for an abuse of discretion. Mother argued that the trial court's use of a "good cause" standard in deciding whether to grant her extension request was improper. However, she offered no explanation as to how the trial court's ruling would have been any different if the trial court had made a finding regarding the "extraordinary circumstances" as required by the statute. A court does not abuse its discretion if it makes a correct ruling for the wrong reasons. The court overruled mother's issue. *Dissenting Opinion (Gray, C.J.)*. Mother's notice of appeal was late. Her explanation for an extension, that the late filing was due to the date the client communicated her desire to appeal, was not reasonable as it did not explain why the decision to appeal was not made earlier. An extension is not simply to allow more time to make a decision about whether to appeal. To accept this reason allows any party an extension of time in which to file their notice of appeal because they are tardy in communicating their desire to appeal to their attorney. The appeal should be dismissed. The dissent also noted that mother's due process claim should not have been sustained.

***Dowell v. Dowell*, No. 08-06-00180-CV, 2008 Tex. App. LEXIS 903 (Tex. App.–El Paso Feb. 7, 2008, no pet.) (mem. op.)**

Summary Judgment on Best Interest

Private termination case. In a sole issue, father complained that the trial court erred in terminating his parental rights, because the summary judgment evidence did not establish that termination is in the best interest of the child. A summary judgment is reviewed *de novo*. The movant carries the burden of showing that there is no genuine issue of material fact. All evidence favorable to the non-movant must be taken as true and all reasonable inferences, including any doubts, must be resolved in the non-movant's favor. Father concedes that the evidence is sufficient to support termination under subsection 161.001(1)(Q). The summary judgment evidence included: 1) father was serving time in the federal penitentiary for drugs; 2) he is in arrears in child support; 3) his projected release date is 2012; 4) he has failed to support his children in accordance with court orders; 5) he has failed to provide the children with medical support; and 6) he engaged in conduct under subsection 161.001(1)(Q). Mother also presented an affidavit wherein she stated that father used drugs while her son was in the home, broke her arm and threatened to kill her, and his failure to exercise visitation harmed the child emotionally. The court of appeals reversed the trial court. Here "the summary judgment evidence of [father's] non-support, incarceration, and limited visitation with the children is inadequate to establish as a matter of law that termination is in the best interest of the child." First, mother's affidavit was largely conclusory with little factual specificity. Second, "and more troublesome", is her failure to segregate pre-divorce and post-divorce conduct. The court rejected mother's argument that the record showed a clear pattern of violence. The pre-divorce conduct could not be considered. Evidence of pre-divorce is admissible to show a continuing course of conduct. However, the final decree is *res judicata* as to the best interest of the children at the time of divorce. "If, as [mother] contends, [father] attacked her and threatened to kill her during the marriage, she nevertheless agreed to a joint managing conservatorship and a standard possession order."

***In re D.R.D.*, No. 2-07-238-CV, 2008 Tex. App. LEXIS 2404 (Tex. App.–Fort Worth Apr. 3, 2008, no pet.) (mem. op.)**

Ineffective Assistance of Counsel

At trial, mother admitted that she is addicted to methamphetamines, that she has been dealing and using drugs for the past four years, that she uses methamphetamine almost every day, that she stays high for long periods of time, that she only associates with drug users, and that she does not work. Her parental rights had been terminated to two other children and one of her children (one year old) died when he choked on a screw. The jury found that termination of mother's parental rights was in the children's best interest and that she had engaged in conduct under subsections 161.001(1)(D) and (M). Mother's sole complaint was that her trial counsel was ineffective because he "failed to contest any assertions of [the Department] or provide a legal defense by engaging in a trial strategy that was impossible." Trial counsel's strategy was to argue that mother's brother should receive custody of the child. Mother believed that this was impossible as her brother had not intervened and was not included in the jury charge. The court affirmed because trial counsel contested the best interest prong. To prove ineffective assistance of counsel, appellant must show: 1) that trial counsel's performance was deficient and fell below an objective standard of reasonableness; and 2) a reasonable probability that but for counsel's errors, the result of the proceeding would be different. The issue is whether counsel's assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error. Review of counsel's representation is highly deferential. In this case, "the record unequivocally demonstrates that counsel's trial strategy was to convince the jury that it was not in D.R.D.'s best interest to have her parent-child relationship with [mother] terminated." Considering mother's self-admitted extensive drug history, trial counsel could have believed it to be "disingenuous" to contest the statutory termination grounds. The failure of mother's brother to intervene did not render ineffective assistance, because the jury was still required to find that termination was in the child's best interest. Trial counsel's strategy was "sound".

***In re D.S.A. and P.J.A.*, No. 11-06-00219-CV, 2008 Tex. App. LEXIS 1836 (Tex. App.–Eastland Mar. 13, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(Q)
Broad Form Jury Questions

In his sole issue on appeal, father argued that the trial court erred in submitting a broad form question to the jury, because one of the grounds for termination was not supported by the legal and factual sufficiency of the evidence. Specifically, father asserted that the evidence was not sufficient to support termination under 161.001(1)(Q), namely that he had engaged in criminal conduct that resulted in the conviction of an offense and confinement or imprisonment and inability to care for the children for not less than two years from the date of the filing of the petition. The court of appeals affirmed. The Department filed its petition to terminate on July 22, 2005. Subsection 161.001(1)(Q) is applied prospectively. Father's projected release date was September of 2009. Thus, he is sentenced to serve at least two years from the date the Department filed its petition.

***In re D.W., T.W., and S.G.*, 249 S.W.3d 625**
(Tex. App.–Fort Worth 2008, pet. filed)

Constitutionality of TEX. FAM. CODE § 263.401
Constitutionality of TEX. FAM. CODE § 263.405(i)
Separation of Powers

Mother challenged the constitutionality of sections 263.401 and 263.405, claiming that they violate the separation of powers clause and violate her due process. Mother's trial counsel filed a timely notice of appeal and statement of points. The statement of points alleged insufficiency of the evidence grounds only. Six days later, outside the fifteen-day deadline for filing a statement of points, appellate counsel filed a motion for new trial and a supplemental statement of points which raised her constitutional claims. The court found that mother's challenge to the constitutionality of 263.401 was waived, as it was not raised in the trial court. The court found 263.405 unconstitutional under the separation of powers doctrine, because it "forecloses our power to review issues properly preserved for appeal because the statute unduly interferes with our substantive power as an appellate court to rehear and determine issues on the merits that were decided in the court below." The court considered mother's claim that the trial court erred in not granting her a 180-day extension, "because section 263.405(i) is void, we are not barred by that statute from considering points that were not listed in a statement of points so long as they were properly preserved for appellate review." An extension of the dismissal date is reviewed for an abuse of discretion. There was no record of the initial hearing regarding mother's extension request. As such, the court was required to presume that the evidence supported the trial court's ruling. Mother presented no evidence supporting her request for an extension the second time she urged it. Thus, the trial court's denial of her motion was not arbitrary or unreasonable. The trial court's judgment was affirmed. *Concurring Opinion (McCoy, J.).* "I concur only with the majority's affirmance of the trial court's final order terminating parental rights. Because I would hold that it was not necessary to reach the constitutional question concerning section 263.405(i) of the Texas Family Code, I do not join with either opinion's analysis of the constitutionality of that statute." *Dissenting and Concurring Opinion (Cayce, C.J., Holman, J.)* The majority's opinion regarding the constitutionality of 263.405(i) is dicta. Mother failed to produce a record about which she complained. Consequently, the majority affirmed the trial court's ruling without reaching the merits. It was therefore unnecessary to pass on the constitutionality of 263.405(i). The statute does not violate the separation of power clause, because "unlike the statutes in three inapposite criminal law cases in which the majority misplaces its reliance, section 263.405(i) does not tell us how to perform our judicial function or 'how we must rule on issues brought before us.' It simply limits appellate review of termination orders to issues that are preserved in accordance with the procedures provided by statute. This limitation is well within the Legislature's constitutional power to regulate and restrict the right to appeal a termination order."

***Duenas v. Duenas*, No. 13-07-089-CV, 2007 Tex. App. LEXIS 5622 (Tex. App.–Corpus Christi July 12, 2007, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(K)

Private termination case. On appeal, father raised issues concerning the trial court's refusal to accept his relinquishment of parental rights, denial of his right to a jury trial, and awarding of more of the community estate to mother. At trial, father agreed that he was the presumed father through DNA testing, but sought to relinquish his parental rights "for the love that was lost and the abuse of the kids..." Father and the children do not have a good relationship. Father stated that termination was best as the children did not want to see him and had physically abused him. Mother stated that father does not participate in decision making for the children and does not see them, but that the children love him and want a relationship with him. Father paid the jury fee and made a timely request, but did not object at trial to proceeding without a jury. Father argued that the trial court erred in not accepting his relinquishment, because he had the right to determine the best interest of his children under *Roe v. Wade*. A trial court may grant the termination of parental rights if it is in the best interest of the child. A parent may not "blithely walk away" from his/her parental responsibilities. The court of appeals affirmed the trial court, writing: "Hurt, anger, and disappointment, however, should not be enough to legally destroy a parent-child relationship. To reverse the trial court's ruling would be "condoning [father's] abandonment of his personal responsibility to support his biological offspring and opening the door for other angry and disappointed parents to do the same." The court also affirmed the trial court's award of martial property and denial of jury trial. (A party waives its request for a jury trial if there is no objection when the trial court begins a nonjury trial. *In re D.R.*, 177 S.W.3d 574, 580 (Tex. App.–Houston [1st Dist.] 2005, pet. denied).

***In re E.A., et al.*, No. 13-06-503-CV, 2007 Tex. App. LEXIS 7159 (Tex. App.–Corpus Christi Aug. 31, 2007 no pet.) (mem. op.)**

Best Interest

The Department removed E.A. after mother attempted to commit suicide. The child was returned to mother, but removed again because of drug use history and mother's boyfriend running over the child's leg with a vehicle while mother was present. Mother completed some services and E.A. was returned. However, E.A. was again removed after mother became homeless and tested positive for drugs. Mother was pregnant at the time. Mother failed to complete any of her court-ordered services. Mother admitted to the caseworker that she had used drugs in the past and used drugs while pregnant with K.A. Mother failed drug tests, did not visit the children regularly, and had been convicted of theft after the children's removal. The Department's caseworker testified that termination was in the children's best interest and that the possibility for adoption was high. At trial, mother claimed the child being run over was an accident. She also denied taking drugs while pregnant with K.A. Mother began to use methamphetamine, because she was severely depressed after E.A.'s removal. Mother testified that she ceased taking drug tests because the results were false. Mother's employment was sporadic and she had been in a home for only three weeks at the time of trial. Mother admitted that she had a second theft charge pending, but claimed she was not using drugs, she was taking

her medication regularly, and she was not depressed. The trial court terminated mother's parental rights under 161.001(1)(D)(E)(N)(O) and (P) and best interest. On appeal, mother challenged only the factual sufficiency of the evidence supporting the best interest determination. The Department presented evidence establishing mother's history of unstable housing, unstable employment, unstable relationships, mental health issues, and drug abuse. The evidence was factually sufficient. Mother's presentation of evidence that the conduct and circumstances that prompted the children's removal did not exist at the time of trial did not overcome the Department's evidence.

In re G.A.G., III, No. 04-07-00243-CV, 2007 Tex. App. LEXIS 8960 (Tex. App.–San Antonio, November 14, 2007, no pet.) (mem. op.)

TEX FAM. CODE § 161.002(b)(1)

Alleged father was never served. Due to incarceration, he failed to appear at trial. Father's counsel, however, filed an answer on his behalf with a "judicial admission" that he was the father of the child. Nevertheless, the trial court terminated father under TEX FAM. CODE § 161.002(b)(1), based upon a perceived distinction between a judicial admission signed by counsel and a verified pleading signed by father himself admitting paternity. The San Antonio Court of Appeals reversed and remanded. The court held that the pleading, which was signed only by counsel, but contained a judicial admission of paternity, was sufficient to preclude termination under TEX FAM. CODE § 161.002(b) (1). The appeals court found that the Department would have to seek termination under 161.001.

_In re J.A.B.,_ No. 2–06–404–CV, 2007 Tex. App. LEXIS 8294 (Tex. App.–Fort Worth Oct. 18, 2007, no pet.) (mem. op.)

TEX. FAM. CODE § 161.001(1)(E) – Drug Use
TEX. FAM. CODE § 263.405 – Presentment of Statement of Points
Best Interest

The court declined to follow the rationale of the *R.J.S.* case out of the Dallas Court of Appeals which held that "presentment" of the statement of points under 263.405(b) meant an actual presentment to the trial court through a hearing. "We decline to follow *R.J.S.* because we can find no evidence in section 263.405 that the legislature intended that a hearing be conducted to present the statement of points, and the State directs us to none." Termination cases are civil cases. In civil cases, the mere filing of a timely motion for new trial preserves legal and factual sufficiency points. The court also found that although mother's statement of points "were not models of specificity", they were sufficient to inform the trial court of the nature of the complaint so that it may correct its findings, if appropriate. *However, see In re S.J.G., 124 S.W.3d 237 (Tex. App.–**Fort Worth** 2003, pet. denied) ("The obvious purpose of subsection (b)'s statement of points is to enable the trial court to determine whether under subsection (d) an appeal from a judgment terminating an individual's parental rights is frivolous"; "A trial court would have no way of complying with subsection (d)'s requirement to 'hold a hearing not later than the 30th day after the date the final order is signed to determine whether…the appeal is frivolous' except by reviewing the statement of points filed by the appellant"; "Thus, viewing*

section 263.405 as a whole, the apparent legislative intent behind the statutory statement of points requirement is to give the trial court some way to determine whether an appeal is frivolous and thereby eliminate unmeritorious parental–termination appeals."). The evidence supporting termination under 161.001(1)(E) is sufficient. There was substantial testimony of mother's drug abuse. She tested positive five times for methamphetamines during her pregnancy with the child, the child required hospitalization after birth to stabilize from the drugs. The child had medical problems. Mother also refused drug tests, did not complete drug rehabilitation, and had previously hid and secreted another child from the Department who was later found "extremely" dirty, starved, and with lice. Regarding best interest, the child required daily physical therapy and would likely encounter additional medical problems in the future. Mother endangered the child through her drug use. Mother was a poor parent to the instant child and to her other children. Mother did not have a steady home or steady job. The foster family wanted to adopt the child. Although mother complained that transportation issues hindered her ability to complete services, the trial court could have believed the caseworkers who testified that they offered her transportation. Mother argued that "she is not as bad as some parents who have had their parental rights terminated for drug use. While this may be true, it does not excuse [mother's] acts and omissions as detailed above." The evidence was sufficient to support the best interest finding.

_In re J.C._, 250 S.W.3d 486
(Tex. App.–Fort Worth 2008, no pet.)

TEX FAM. CODE § 107.013(a)(1)

The child tested positive for phencyclidine (PCP) at birth and was removed by the Department. The foster parents attempted to intervene in the termination suit but their intervention was stricken. Contemporaneous with the Department's non-suit, the foster parents independently filed an original petition for termination. Mother proceeded *pro se* at trial and her parental rights were terminated under grounds (D), (E), (F), and (R). Mother appealed but failed to file a reporter's record and claimed she was entitled to court-appointed counsel due to indigence. The Forth Worth Court held that because the suit was not brought by a governmental entity, she was not entitled to court-appointed counsel. TEX FAM. CODE § 107.013(a)(1). Mother's failure to file reporter's record precluded the court's review of other substantive grounds.

_In re J.C.C._, No. 05-07-00401-CV, 2008 Tex. App. LEXIS 3119 (Tex. App.–Dallas April 30, 2008, no pet.) (mem. op.)

Bill of Review

In a private termination action, mother terminated father's parental rights under ground (C). Father's attorney had withdrawn and father defaulted at trial. Father complained that mother had deliberately caused notice of the termination order to be sent to the wrong address and had resumed a relationship with him and allowed him to see the child post-termination. Father claimed the foregoing satisfied the three grounds for granting bill of review: 1) meritorious defense; 2) which he was prevented from making by official mistake or fraud, accident or wrongful act of opposing party; and 3) unmixed with any fault or negligence of his own. The

Dallas Court of Appeals affirmed the trial court's judgment holding that father failed to satisfy the elements of proof for a bill of review. *See also* TEX. CIV. R. P. 360a and 329b.

***In re J.D.B., and G.N.B.*, No. 2-06-00451-CV, 2007 Tex. App. LEXIS 6193 (Tex. App.–Fort Worth August 2, 2007, no pet.) (mem. op.)**

TEX FAM. CODE § 161.001(1)(D)
TEX FAM. CODE § 161.001(1)(E)
TEX FAM. CODE § 161.001(1)(O)
Best Interest

Children were removed due to unsanitary conditions and mother's arrest for methamphetamine possession. Mother had a history of mental illness. The children were exposed to unsanitary conditions and domestic violence. Mother failed to do services. At trial, she offered "difficult life events" as her excuse for not completing them. Mother's parental rights were terminated on grounds (D), (E), and (O) and best interest. On appeal, mother complained that evidence was legally and factually insufficient to support termination on best interest and (O) ground. The Fort Worth Court affirmed.

***In re Jessie Vernon Jochims v. State*, No. 13-06-285-CR, 2007 Tex. App. LEXIS 5905 (Tex. App.–Corpus Christi July 26, 2007, no pet.) (mem. op.)**

Recantation of Outcry

The Department received a referral based upon sexual abuse. The child made an outcry to the Department investigator and then to a SANE nurse. At the SANE exam, the child accurately identified the male and female private parts and indicated that her "dad" touched her "butt", her "private part", and he touched her with his "private part." However, in the criminal trial, the child recanted by responding "no" when asked if daddy ever touched her on her private part. Appellant complained that the evidence was factually insufficient to support his conviction for indecency of a child based upon the child's recantation at trial. The Corpus Christi Court disagreed, affirming the conviction. The court held that outcry testimony is considered substantive evidence of guilt in an indecency case and contradictory testimony does not render the evidence insufficient. In cases involving recantation, as the trier of facts and credibility of the witnesses, the jury is entitled to accept or reject all or any portions of a witness's testimony.

***In re J.E.H.*, No. 2-07-00137-CV, 2008 Tex. App. LEXIS 1349 (Tex. App.–Fort Worth February 21, 2008, no pet.) (mem. op.)**

TEX FAM. CODE § 161.001(1)(D)
TEX FAM. CODE § 161.001(1)(E)
TEX FAM. CODE § 161.001(1)(O)
Best Interest

Mother had a history of illegal drug use: marijuana, methamphetamine, LSD, and cocaine. When J.E.H. was almost five, mother became romantically involved with a boyfriend who broke

her collarbone and used illegal drugs with her. They committed a burglary together. Mother received eight years probation. Mother made considerable progress with her service plan and the Department was considering a monitored return when mother was involved in a pedestrian hit and run accident and was arrested for DWI. She entered and left a drug treatment program. She used marijuana, mushrooms, and methadone. Her probation was revoked and she was sentenced to two years in TDCJ. The Fort Worth Court affirmed on (E) ground and best interest, holding mother's past criminal conduct and illegal drug use supported an endangerment finding under (E) ground. Further, continuous drug use poses an emotional and physical danger to a child now and in the future which supports the best interest finding.

***In re J.F., J.J. AND J.J.*, No. 2-07-007-CV, 2007 Tex. App. LEXIS 8108 (Tex. App.–Fort Worth October 11, 2007, no pet.) (mem. op.)**

TEX FAM. CODE § 262.114(a)

Mother entered into a safety plan due to sexual abuse of the child by the maternal grandfather and mother's positive drugs tests. Father had criminal history and periodic incarceration throughout relationship. Mother admitted violating the safety plan "every single day." The children were removed. While in foster care, the children related witnessing domestic violence between the parents. A home study was requested on paternal grandmother but was never conducted by the Department. The trial court sanctioned the Department by denying termination but appointed the Department as sole managing conservator of the children. The Department appealed. The Fort Worth Court held that statute was silent on sanctions. A death penalty sanction was disproportionate and did not consider that the safety of the child is paramount. The appeals court reversed the trial court's order and remanded for further proceedings on termination.

***In re J.J. AND J.G.*, No. 05-06-01472-CV, 2008 Tex. App. LEXIS 602 (Tex. App.–Dallas January 28, 2008, no pet.) (mem. op.)**

TEX FAM. CODE § 161.001(1)(D)
Best Interest

Mother, who was three months pregnant, heard from "people" that the father tested positive for AIDS. Fearing that she would test positive as well, mother ingested cocaine and phencyclidine (PCP) in an effort to commit suicide. Evidence showed that mother had also used cocaine three times during her pregnancy. Mother had a history of neglecting her first child, who was born deaf and later diagnosed as bipolar. Mother demonstrated a history of inadequate parenting ability. Mother's parental rights were terminated under (D) ground and best interest. The Dallas Court of Appeals affirmed.

***In re J.K.H.*. No. 02-07-165-CV, 2007 Tex. App. LEXIS 9747 (Tex. App.–Fort Worth December 13, 2007, no pet.)(mem. op.)**

TEX FAM. CODE § 161.001(1)(D)
TEX FAM. CODE § 161.001(1)(Q)
TEX FAM. CODE § 263.405(d) – Frivolous Finding
Best Interest

Mother had an extensive history of methamphetamine abuse. Although she stopped use during pregnancy, she began using bi-monthly when the child was seven months old. Mother and husband were arrested for possession of over 400 grams of methamphetamine. Mother pled guilty to child endangerment and was sentenced to two years in TDCJ on the endangerment charge and ten years on the possession charge. Upon release from prison, and while on parole, she relapsed and failed to report. No services were offered due to incarceration. At trial in January of 2006, mother's parole officer testified that she would likely be released in 2009. Mother was not able to care for child and could not offer any viable placement options. The trial court terminated her parental rights under ground (D) and best interest and found her appeal to be frivolous. The Fort Worth Court of Appeals affirmed upon review of the record.

***In re J.L.W.M.*, No. 07-07-0043-CV, 2007 Tex. App. LEXIS 8130 (Tex. App.–Amarillo October 11, 2007, no pet.)(mem. op.)**

TEX FAM. CODE § 263.405

Father filed statement of points two days late arguing that the mail box rule applied. However, father mailed his statement of points to the wrong clerk. The Amarillo Court, while acknowledging that 263.405 can have harsh consequences, held that it is obligated to follow 263.405 and affirmed the trial court's order.

***In re J.M, J.J., J.J. ANF J.J.*, No. 12-07-00371-CV, 2008 Tex. App. LEXIS 4871 (Tex. App.–Tyler, June 30, 2008, no pet.) (mem. op.)**

TEX FAM. CODE § 263.405

Appellant failed to file statement of points. The Tyler Court could not consider the issues raised on appeal and affirmed the trial court's order.

***In re J.M.L.M. AND K.M.*, No. 10-08-00108-CV, 2008 Tex. App. LEXIS 4237 (Tex. App.–Waco June 11, 2008, no pet.) (mem. op.)**

TEX FAM. CODE § 263.405(g)
TEX FAM. CODE § 161.001(1)(D)
TEX FAM. CODE § 161.001(1)(E)
Best Interest

Trial court terminated under 161.001(1) (D), (E), and best interest. At the § 263.405(d) hearing, the trial court found the appeal to be frivolous. The Waco Court, employing an abuse of discretion standard, affirmed. *See Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex. 2002); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex 1985), *cert. denied*, 476 U.S. 1159.

_In re J.O._, No. 04-07-00752-CV, 2008 Tex. App. LEXIS 3465
(Tex. App.–San Antonio, May 14, 2008, no pet.) (mem. op.)

TEX FAM. CODE § 153.373
TEX FAM. CODE § 153.423

Mother's aunt and uncle filed a SAPCR case seeking appointment as J.O.'s managing conservator. Although aunt and uncle prevailed at the temporary orders hearing, at final trial, mother was appointed sole managing conservator and father possessory conservator. The trial court found that the parental presumption had not been rebutted. The trial court further declined appointment of aunt and uncle as possessory conservators. The San Antonio Court of Appeals affirmed, finding that the trial court did not abuse its discretion.

In re J.O.A., T.J.A.M., T.J.M. AND C.T.M., No. 07-07-0042-CV, 2008 Tex. App. LEXIS 1357
(Tex. App.–Amarillo February 25, 2008, pet. filed) (mem. op.)

TEX FAM. CODE § 263.405(b)
TEX FAM. CODE § 263.405(i)
TEX FAM. CODE § 161.001(1)(D)
TEX FAM. CODE § 161.001(1)(E)
Best Interest

The trial court signed its termination order on February 16, 2007. On February 21, 2007, mother's counsel filed her notice of appeal and motion to withdraw. On February 22, 2007, father's counsel filed his notice of appeal and motion to withdraw. The trial court never ruled on either motion. On March 5, 2007, seventeen days after the date the final order was signed, appellate counsel was appointed for mother. On March 15, 2007, twenty seven days after the date the final order was signed, appellate counsel was appointed for father. Mother had a history of marijuana, cocaine and barbiturate abuse. Father used marijuana with mother. At the time of the birth of the twins, she admitted to marijuana use and tested positive for cocaine and barbiturates. At trial, mother admitted to going on a five-hour cocaine binge just prior to the birth of the twins. Subsequent to removal, mother was incarcerated for four months for cocaine possession and eleven days for criminal trespass. At trial, father admitted to using marijuana on June 28, 2006, and was delinquent in child support. At trial, father presented evidence of steady employment as he had been working at Wal-Mart for about three weeks. He had a car and housing, had attended parenting class, had attended regular visitation with the children, and had three negative drug tests. The Amarillo Court first found that both mother and father's counsel were ineffective in failing to file a statement of points. The court next conducted a *Matthews v. Eldridge* analysis to determine whether the failure to file a statement of points in this case rose to the level of a due process violation. The court, while acknowledging that not every failure to

preserve error by failure to timely file a statement of points rises to a due process violation, concluded that this case warranted a legal and factual sufficiency review to determine whether the parents had meritorious defenses. In the case of mother, the court found that the risk of erroneous deprivation was slight from a sufficiency of evidence prospective and concluded that her claim of ineffective assistance of counsel did not raise a due process claim. However, in the father's case, the court found the opposite, concluding that the evidence supporting termination of his parental rights was both legally and factually insufficient. In conducting its analysis of father's legal and factual insufficiency claims, the Amarillo Court concluded that, "where the Department seeks termination of both parents' rights to multiple children based upon primarily upon acts of parent directed towards less than the whole number of children, we cannot be swept away with emotional determination of the best interest of the children at the expense of factually sufficient grounds of termination as to each parent, as to each child. In other words, although contextually connected, the grounds for termination must independently exist as to each parent, as to each child."

_In re J.P._, No. 2-07-026-CV, 2008 Tex. App. LEXIS 773 (Tex. App.–Fort Worth February 4, 2008, no pet.)(mem. op.)

TEX FAM. CODE § 161.001(1)(D)
TEX FAM. CODE § 161.001(1)(E)

Mother had a history of mental illness. After the birth of her son, she displayed bizarre behavior and reported a history of schizoaffective, bipolar, and obsessive compulsive disorder. The Department caseworker visited her home and discovered that house was not a suitable environment for a child due to the overwhelming odor of cat urine, cat feces smeared on the floor, clutter, no baby bed, and no car seat or playpen. Mother agreed to a safety plan that provided that she was to stay with her mother and cooperate with the Department. Thereafter, the caseworker was notified that mother was at a community treatment center for a checkup when she started acting bizarre. Mother was then accompanied by a caseworker to an emergency care center where she was checked in. Due to the fact that the mother could not take the child to the care center with her, the Department took custody of the child. After the child's removal, the status order indicated that mother "demonstrated adequate and appropriate compliance with the service plan". Mother was hospitalized for twenty-nine days in a state hospital after making the following remark at her psychological evaluation: "What do I have to do to get some help around here, slit my wrists." Mother also had three brief relationships with men she had met on the Internet who had mental problems. Although mother had improved the condition of her home, the caseworker testified that it was too soon to determine if she could maintain a clean environment. At trial, mother testified that her remark about slitting her wrists was "flippant." The caseworker indicated mother had fairly regularly visited her child, but the caseworker was concerned that mother still lacked appropriate parenting skills. The Fort Worth Court considered mother's mental health and living conditions in the context of endangerment under (D) and (E) grounds. Although the appeals court found the evidence legally sufficient, it concluded that the evidence was factually **insufficient** to support termination under the endangerment grounds. The court, therefore, did not address best interest. *It is interesting to note that although the Department did not attempt to terminate mother's parental rights under TEX FAM. CODE § 161.001(3)(a)(2), (4), the appeals court discussed that the Department did not meet the more*

stringent standards that required it to prove that the mother's mental illness will render her unable to provide for the child's needs until the child is eighteen years old and the Department made reasonable efforts to return the child to the parent.

***In re J.S., M.N.S.C., and T.S.*, No. 2-07-279-CV, 2008 Tex. App. LEXIS 4149 (Tex. App.–Fort Worth June 5, 2008, no pet. h.) (mem. op.)**

Best Interest

The court of appeals found the evidence legally and factually sufficient to support the trial court's finding that termination of mother's parental rights was in the children's best interest when one of the children was seriously injured. The court reached this conclusion, despite the fact that mother: 1) completed all of her services; 2) maintained steady housing and employment; 3) had made significant progress according to her therapist; and 4) stated that she did not know who harmed her child and offered multiple explanations for the severe injuries. The court held: "In sum, the record demonstrates that although appellant diligently completed her services, the severity of [the child's] injury, TDFPS's uncertainty as to the identity of the person or persons who inflicted the injuries, her denial of the intent and nature of the injuries, her failure to inform TDFPS of her new boyfriend, and the intentional neglect of the children, all demonstrate that it was in [the children's] best interest that appellant's parental rights be terminated."

***In re K.C. and W.C.*, No. 2-06-367-CV, 2007 Tex. App. LEXIS 5729 (Tex. App.–Fort Worth July 19, 2007, no pet.) (mem. op.)**

Constitutionality of TEX. FAM. CODE § 263.405(g)
Frivolous Finding

A jury terminated father's parental rights to the children. On appeal, father challenged the trial court's finding that his appeal was frivolous, arguing that section 263.405(g) and its abuse of discretion review was an unconstitutional burden shifting. He argued that there could be "no appeal" without a record. Constitutional challenges to a statute can be waived. In the absence of such a complaint in the trial court, we cannot consider it. Even though not raised before the trial court, the court considered father's issue because he attacked the standard of review. Thus, the court construed his issue liberally, assuming that his brief was the earliest time he could raise it. The court had recently held that 263.405(g) allows it to request a full record if necessary. As father failed to file a motion for new trial, he waived any factual sufficiency challenges. The court reviewed the record to determine whether it would request a full record to review the frivolousness determination. The court reviewed the eight volumes of exhibits, and found the evidence sufficient to support the frivolous finding. The record showed that K.C. was terribly burned at father's residence, suffering serious and near-death injuries. There was no batteries in the smoke alarm and a charred space heater was found in the child's bedroom. The child was hospitalized for some time. Father did not visit the child regularly and did not learn how to care for the child's burns. Regarding W.C., father was jailed briefly. When released, father did not pick up the child. Father missed approximately half of his visits with W.C. When he did visit W.C., he would sometimes fall asleep or talk on his cell phone. Both children were delayed and

father did not pay child support as ordered. The trial court did not abuse its discretion in finding father's appeal frivolous.

***Kerst v. Tex. Dep't of Family and Protective Servs.*,**
237 S.W.3d 441 (Tex. App.–Texarkana 2007, no pet.)

TEX. FAM. CODE § 155.201
Transfer of Venue

After termination of parental rights, the Department placed three children with foster parents. After a disagreement, the children were removed from them. The foster parents, who had lived with the children in Bowie County for over six months, filed a motion to modify and a motion to transfer venue in the Hopkins County court of continuing exclusive jurisdiction. At the hearing, it was undisputed that the children had lived with the foster parents in Bowie County for seventeen months. However, the Hopkins County court refused to transfer the case. The court of appeals granted the foster parents' mandamus. Transfer of a SAPCR to a county where the child has resided for more than six months is a ministerial duty under Family Code section 155.201(b). The court declined to follow the Department's argument that *forum non conveniens* prevented the transfer. The Department argued that legislative intent never intended for foster parents to be able to transfer venue of cases. The court disagreed, stating that the statute is "straightforward and clear" – transfer is mandatory if the child has resided in the county for six months or longer. It is immaterial that the foster parents could not file an original SAPCR in Bowie Court. The statute has been amended and no longer requires that. Finally, the Department argued that the children did not "reside" with the foster parents, but were merely placed there by the Department. The court did not follow the argument, stating that the children's biological parents' parental rights had been terminated and the children had nowhere more permanent to go. The court noted in a footnote that neither party argued that Family Code section 153.371(10) allows the authorized agency with conservatorship to "designate the primary residence of the child." Here, the Department designated the children's residence by placing them in the foster parents' home.

***In re L.K.M.*, No. 2-06-228-CV, 2008 Tex. App. LEXIS 204 (Tex. App.–Fort Worth 2008, no pet.) (mem. op.)**

Appointment of Counsel
Lack of a Reporter's Record
Involuntary Signing of Relinquishment

Private termination case. Father sought sole managing conservatorship of the child. After her initial counterpetition, mother responded with an amended counterpetition alleging that father had a history of committing family violence and requested sole managing conservatorship. Mother also alleged various other tortious claims and requested a court order. At trial, both parties appeared and were represented by attorneys. The trial court entered an order finding that the parties had voluntarily entered into an *Agreed Order of Termination*. It terminated father's parental rights to the child. The order was signed by mother and her attorney but not father or his attorney. Father complained on appeal that the trial court erred in not appointing him pro

bono counsel after he became indigent. The trial court conducted a hearing as ordered by the court of appeals. It determined that father had failed to give mother timely notice of the filing of his affidavit of indigence and that the court clerk had failed to give timely notice to the court reporter. After a second hearing, the trial court found father not indigent and denied his request for court-appointed counsel. The test for indigence is whether a preponderance of the evidence shows that the party would be unable to pay costs "if he really wanted to and made a good-faith effort to do so." If a contest is filed, the party filing the affidavit must prove the affidavit's allegations. The trial court's indigence determination is reviewed for an abuse of discretion. Despite being instructed to do so by the trial court, father failed to bring documents establishing his income. The trial court did not abuse its discretion, because father failed to meet his burden of proving indigence. The court advised father that if he did not pay for the record it would consider only his issues that did not require a record. Father's attachment of the record as an appendix to his brief cannot be considered as part of the record. As father failed to produce a proper record, the court did not consider his issues requiring the record, including father's claims that: 1) he signed the agreed termination under duress due to mother's threats of tort actions; 2) the trial court relied on unsubstantiated hearsay; 3) the legal and factual sufficiency of the evidence; 4) mother's counsel engaged in unethical conduct; 5) his claim that the trial judge should have disqualified himself; and 6) the trial court violated his due process by not granting him a new trial.

***Lopez v. Kushner,* No. 03-06-00779-CV, 2008 Tex. App. LEXIS 1136 (Tex. App.–Austin Feb. 13, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 155.001 - Jurisdiction
TEX. FAM. CODE § 153.009 - Interviewing the Child
TEX. FAM. CODE § 107.021 - Appointment of an Attorney *ad Litem*
Appointment of Psychologist
Recusal of Judge
Request for Jury Trial
Right of Inmate to Participate in Hearing
Telephonic Appearance

Private termination case. The trial court terminated father's parental rights and granted adoption to a stepparent. After father's and mother's divorce, mother was named sole managing conservator of the child. Shortly after the divorce, father was convicted of two counts of aggravated sexual assault of a child and sentenced to thirty-one years confinement. The trial court terminated father's parental rights under 161.001(1)(Q). Father participated in the trial by telephone. Father first argued that the trial court did not have jurisdiction because mother and step-father lived in Hawaii. However, mother's petition stated that at the time of filing, the child lived in Tom Green County. Father's issue was without merit. Next, father argued that the trial court was statutorily required to interview the child. The statute states that the trial court "shall" interview of a child twelve years of age or older, and "may" interview a child younger than twelve. The trial court declined father's request to interview the child as the child was under twelve years of age. Father does not show in what respect the trial court abused its discretion. Father contended that he moved to recuse the judge, but the judge would not recuse himself or obtain a ruling from another judge. Father's objection was to the sitting judge, Judge

Woodward. Judge Gossett denied the recusal motion because he, not Judge Woodward, heard the case. Father did not renew his objection to Judge Gossett, and the record does not show any reason for recusal. Father claimed that the trial court abused its discretion by denying his request for a jury trial. Father had thirty days notice of trial. He then asked for, and received, a continuance for another sixty days. Despite the continuances, father did not file a jury request until two days before trial. The trial did not abuse its discretion in denying it. Father argued that he was not allowed to fully participate in the hearing and was excluded from it after he testified. A prisoner in Texas has a constitutional right to access to the courts, but only a qualified right to appear personally in a civil proceeding. If an inmate is allowed to proceed, particularly if the merits can be determined without his presence, a trial court should afford the inmate the opportunity to proceed by affidavit, deposition, telephone, or other effective means. The right of an inmate to appear is not so much the right to personally appear as the opportunity to present evidence and participate in the proceedings. After finding that father failed to justify a personal appearance, the trial court permitted him to appear by telephone. Father was given a chance after the hearing to add additional evidence on the record which he did not do. Father failed to make any request to be present for trial. He further failed to preserve the issue for review, because he did not complain to the trial court of the existence of any excluded evidence. He did not contend his affidavit and testimony were insufficient to put his evidence before the court. Finally, father complains that he and the child were not each appointed counsel and that a psychologist was not appointed to examine the child. In anything other than a suit brought by a governmental entity, the Family Code allows for the discretionary appointment of an *ad litem* for the child. Father did not object to the lack of an *ad litem* for the child and does not show an adverse interest between the mother and child. There is no support for Father's argument that the Family Code requires the appointment of a psychologist to assess any harm to the child caused by the termination. Regarding appointment of an attorney for father, the trial court entered an order requiring father to file an affidavit containing information to justify the appointment of an attorney. Father failed to do so. A parent is not entitled to an attorney in every termination proceeding, only those brought by a governmental entity. Father fails to show how the trial court abused its discretion. He further fails to show how the denial resulted in an improper judgment. Finally, father argues that the trial court erred in not granting his motion for continuance. Father only asked for one continuance. He received it. Again, father failed to show what he would have produced if given a continuance and did not show that the denial resulted in an improper judgment.

***In re M.D.*, No. 07-07-0126-CV, 2008 Tex. App. LEXIS 2252 (Tex. App.–Amarillo Mar. 28, 2008, no pet.). (mem. op.)**

Constitutionality of TEX. FAM. CODE § 263.405

The trial court terminated mother's and father's parental rights. Mother challenged the legal and factual sufficiency of the evidence supporting the statutory termination grounds and best interest determination. She also argued that termination is improper when a parent contacts the Department for help. Father argued that Family Code subsections 263.405(b) and (i) violated his federal and due process rights by requiring a statement of points within fifteen days of the date the trial court signs its final order. He also challenged the sufficiency of the evidence supporting the statutory termination grounds found by the trial court. The filing of a statement of points is a procedural prerequisite to the appellate court's authority to

consider any issue presented. Neither parent filed a motion for new trial. Mother filed her statement of points well outside the fifteen-day period. Father did not file a statement of points. The court considered mother's and father's due process complaints, because their issues were precluded from review. If possible, a court must interpret a statute in a way that renders it constitutional. The court disagreed with the due process complaints, writing: "[Mother's] appointed counsel points out that he filed a statement of points within fifteen days after receiving the reporter's record, which was necessary to develop a statement of points. He argues that the fifteen day period in which to file the statement of points from the date the trial court's order was signed violated [mother's] due process rights by 'barring her from access to the court system.' Counsel ignores the fact that he was appointed twenty-seven days prior to the statement of points being due, as well as the fact that he also served as appointed trial counsel. Regardless of when he received the reporter's record he should have been able to fully develop a timely statement of points." The court continued: "[Father's] appointed counsel maintains that the arbitrary designation of a date certain to file specific issues for appeal is unnecessary when the Legislature has granted the right to appeal. He argues that the statute promotes a system of unreasonably restricting an indigent parent's right to appeal a termination order thereby violating a parent's due process rights. Section 263.405 operates equally to indigent as well as non-indigent parents. Therefore, it does not, in and of itself, operate to restrict an indigent parent's right to appeal a termination order." Section 263.405 does not provide that a notice of appeal expressing dissatisfaction with the trial court's order is sufficient to satisfy the requirement for a timely filed statement of points. Under these facts, a procedural requirement, *i.e*. the fifteen-day deadline, does not, in and of itself, violate mother's or father's due process rights."

***Mikowski v. Tex. Dep't of Family and Protective Servs.*, No. 01-07-00011-CV, Tex. 2007 App. LEXIS 8309 (Tex. App.–Houston [1st Dist.] Oct. 18, 200, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(O
TEX. FAM. CODE § 263.405
Best Interest

The jury terminated mother's and father's parental rights. On appeal, mother and father challenged the sufficiency of the evidence supporting the termination findings. Father filed his statement of points on appeal seventeen days – two days late – after the trial court signed its order of termination. The court held: "Though [father's] statement was filed only two days after the fifteen-day deadline, the plain language of Family Code section 263.405(i) precludes this Court from considering [father's] appellate issues, as draconian as this may seem." Mother filed a timely statement of points, but failed to include one issue in her statement of points. The court did not consider the issue as it was precluded from doing so pursuant to 263.405(i), even though mother brought the issue in an untimely amended statement of points. One of the termination grounds found by the jury was 161.001(1)(O). At trial, mother admitted that she did not complete counseling, parenting classes, submit to random drug tests, or maintain suitable housing and employment. She argued, however, that she had substantially complied with her court-ordered services. Evidence of substantial compliance will not defeat a section 161.001(1)(O) ground finding. The court stated: "In support of [her] assertion, [mother] does not cite, and we cannot find, any legal authority holding that a parent's substantial compliance with

court-ordered services will preclude a section 161.001(1)(O) finding." Aside from the foregoing, the court disagreed "in any event" that mother had substantially complied with her service plan. Thus, the evidence was legally and factually sufficient to support (O) ground. Regarding best interest, the Department presented evidence that mother had engaged in criminal conduct following the child's birth. Mother admitted to smoking marijuana while pregnant with the child. She engaged in domestic violence in front of the child. In addition, the child was bonded with his foster family and was doing well there. While some evidence showed that mother expressed a desire to be a good parent, "evidence cannot be read in isolation; it must be read in the context of the entire record." The evidence was sufficient to support the best interest finding.

In re M.R. AND W.M., No. 2-07-163-CV, 2007 Tex. App. LEXIS 9750 (Tex. App.–Fort Worth December 13, 2007, no pet.) (mem. op.)

TEX. FAM. CODE § 104.006
TEX. FAM. CODE § 161.001(D)
TEX. FAM. CODE § 161.001(E)
Best Interest

Mother's and father's rights were terminated under 161.001(1)(D), (E) and best interest. Mother had a history of domestic violence that occurred in the presence of the children, marijuana and methamphetamine abuse, she failed to show up for drug tests during the case, and refused to participate in her service plan. M.R. made an outcry while in foster care about mother's drug use. The child made specific reference to mother's using drugs, smoking a pipe, and leaving M.R. in charge of the other children. Father of W.M. had been incarcerated for twenty-six months of W.M.'s thirty-six month life. Father was aware that mother sporadically lived with her parents who used illegal drugs. Mother complained about the admission of the child's hearsay outcry statements (claiming that they were unreliable) and the sufficiency of evidence. Father complained about the sufficiency of evidence relative to him. The Fort Worth Court of Appeals affirmed the trial court's termination of both parents. The appeals court concluded that the child's outcry statements were admissible under TEX. FAM. CODE § 104.006, because both mother and foster mother stated that M.R. is adamant about telling the truth. Mother admitted that the child witnessed other people doing drugs at maternal grandparent's house. Mother invoked her Fifth Amendment privilege when asked about her use of drugs. Based upon the history of both parents indicated above, the appeals court found the evidence to be factually sufficient to support termination of both parent's rights.

_In re N.L.G._, 238 S.W.3d 828 (Tex. App.–Fort Worth 2007, no pet.)

TEX. FAM. CODE § 102.004 – Foster Parent Intervention and Substantial Past Contact

Mother complained that the trial court erred in allowing the foster parents to intervene. Foster parents, as intervenors, have two avenues to the court house. First, they can bring an original suit affecting parent child relationship if the child has lived in their home "for at least [twelve] months ending not more than [ninety] days preceding the date of the filing of the petition." The second avenue, which applies to the case at bar, allows foster parents to intervene in a suit

affecting the parent-child relationship brought by someone with standing if they can demonstrate that they have had substantial past contact with the child. Since *Mendez*, the Legislature has passed 102.004, which creates the requirement for substantial past contact. Even though the substantial past contact standard may be more relaxed than the "justiciable interest" standard, there still must be substantial past contact in order for a party to properly intervene. The court held: "On appeal, [appellant] relies heavily on the *Mendez* case for its precedential value. As demonstrated, however, such reliance is misplaced because the Texas Legislature has repealed and replaced the statute relied on in *Mendez* with a statute specifically addressing the standing requirements for intervenors in a suit affecting the parent-child relationship." The evidence was sufficient to show substantial past contact between the foster parents and the child as the child had been placed with them for seventeen months. The trial court did not abuse its discretion in allowing the intervention.

***In re R.M., W.L., AND C.L.*, No.04-07-00048-CV, 2007 Tex. App. LEXIS 7984 (Tex. App.–San Antonio July 11, 2007, pet. denied) (mem. op.)**

TEX FAM. CODE § 263.405(i)

Father failed to file a motion for new trial or statement of appellate points. The single issue on appeal was whether counsel was ineffective for failure to do so. The San Antonio Court held that although the application of 263.405(i) to claims of ineffective assistance of counsel for failure to file statement of points is harsh, it concluded that it was precluded from considering the issue on appeal.

***In re S.K.A., M.A., AND S.A.*,**
236 S.W.3d 875 (Tex. App.–Texarkana 2007, pet. filed)

TEX FAM. CODE § 263.405(i)
TEX FAM. CODE § 263.307(b)(12) – statutory provision for best interest
TEX FAM. CODE § 161.001(1)(D), (E), (N)
TEX FAM. CODE § 109.002
TEX FAM. CODE § 107.013(a)(1)
TEX R. CIV. P. 239
TEX R. CIV. P. 93
TEX. CONST. Art. II, § 1
Best Interest

A default judgment was entered against father who was incarcerated in Mississippi. Father had requested the appointment of appellate counsel, but was not appointed counsel until after the deadline for filing his statement of points had passed.

- February 15, 2006 – Father is served with citation.
- February 17, 2006 – Father is not at adversary hearing but judge noted that he called court coordinator.
- July 11, 2006 – Court orders termination trial set for December 11, 2006.

- September 5, 2006. Department attorney (A.D.A.) sent notice of trial setting to father in Mississippi prison. Letter was returned due to father being held at other unit;
- October 8, 2006. Second notice sent to father in prison. Father responded by sending letter to A.D.A., not District Clerk, seeking postponement. (This letter was not brought to the court's attention until the default hearing of December 11, 2006);
- October 13, 2006 – A.D.A. responds to father's letter indicating that he would not agree to postponement and intended to request termination;
- November 16, 2008 – A.D.A. send notice to father of November 28th pretrial hearing and December 11th trial setting;
- December 1, 2006 – Father's sworn and notarized letter dated November 21, 2006, requesting court appointed counsel, seeking postponement, noting his incarceration, and rebutting allegations in the Department's petition, is postmarked December 1, 2006. Letter is addressed to "court clerk" but addressed to the A.D.A's suite number;
- December 11, 2006 – Default judgment entered against father on grounds (D), (E), (N) and best interest. (9:40 – 10:45 a.m.);
- December 11, 2006 – Judge receives father's letter at 1:30 p.m. Judge treats as request for continuance and for appointment of appellate counsel;
- January 2 or 3 , 2007 – Judge signs order appointing counsel. Counsel not notified until the afternoon of January 3, 2007;
- January 3, 2007 – Father's counsel files "points for appeal," motion for new trial, and motion to set aside default judgment; and
- January 4, 2007 – Judge found father indigent, denied motion for new trial, and found appeal "nonfrivolous."

On appeal, father asserts that TEX FAM. CODE § 263.405(d) is unconstitutional facially and as applied. The facial attack was based upon his complaint that the statute reserves the frivolous finding to the trial court instead of the appeals court. In light of the fact that the trial court ruled that father's appeal **was not** frivolous, the appeals court considered it to be a request for an advisory opinion and did not address it. The appeals court then turned to the "as applied" analysis, finding that it had been preserved for appellate review, because it was raised at the trial level on the motion for new trial. The appeals court found that the "express purpose" of the statute was to eliminate frivolous appeals in termination cases, reduce associated costs, and dispose of appeals "with the least possible delay." The appeals court further found that the statute was not to bar appeals that raise meritorious complaint or to prevent appellate courts from considering meaningful appeals. Viewing the fundamental liberty interest implicated in parental-rights termination cases, and the fundamental right to counsel, the Texarkana Court embarked upon a *Matthews v. Eldridge* analysis of father's constitutional claim. The court reasoned that the State's interest in judicial economy by allowing trial courts to correct errors, pales in comparison to the private interest at stake in erroneously depriving a parent of his or her parental rights and the child's right to parental companionship. Regarding father, the appeals court viewed the State's interest in maintaining procedural integrity as less compelling than the delay in appointing father counsel during a critical period. The risk of an erroneous decision in a case where an indigent father, who timely and properly requested appointment of counsel but was not appointed counsel until after the deadline for filing a statement of points, was too high. The court concluded that appointment of counsel after the critical deadline had passed was a "meaningless ritual' and held that the statue was unconstitutional as applied to father.

The Texarkana Court then proceeded to review the substantive appeal. Father argues that his October 8, 2006 letter was a pre-default answer. The court rejected that claim, indicating that it had never been filed with the court. Father then asserts that his December 1, 2006, letter was a pre-default answer relying on the mail box rule. The court also rejected that claim, finding that the mail box rule only applies to filings with a specific deadline. Although an original answer has a deadline (TEX. R. CIV. P. 93) a pre-default answer can be filed anytime before the hearing. Therefore, the mail box rule dos not apply. Having filed no answer in the case, the court did not address the issue of continuance. Father next complains that the trial court committed reversible error by failing to appoint him counsel pre-default. The court disagreed, explaining that father failed to show harm other than the constitutional claim that was already addressed. Father contended that he was denied access to the courts. Texarkana rejected that argument on the basis that father never requested a bench warrant, and the trial court has no duty, s*ua sponte*, to bench warrant an incarcerated person to court. The incarcerated person bears the burden to establish his right to relief. Finally, the appeals court applied an analysis of his motion for new trial under *Craddock.* First, father urges that his failure to appear was not intentional or the result of conscious indifference, but was due to accident or mistake. Second, father had a meritorious defense. Third, the motion will not cause delay. The court observed that father's letters to the district attorney started after the goal changed from reunification to termination. The court viewed that as the reason for his not having filed an answer in the case, not a mistake. Further, the court found that father offered no evidence or affidavit at the hearing on motion for new trial that his failure to file an answer was due to mistake and not conscious indifference. The appeals court soundly rejected that claim. Next, the court reviewed the sufficiency of evidence supporting termination grounds (D), (E), (N), and best interest. The evidence showed that father, after having notice of the termination proceedings, and in violation of the terms of his pre-release for possession of precursors with intent to manufacture methamphetamine, did a line of white powder while in prison. Father had a history of domestic violence – battering the mother in child's presence, a history of drug use, and a violent outburst when he made his one attempt to visit the children during the pendency of the CPS case. Father had an extensive criminal history aside from the methamphetamine case, including a burglary conviction and revocation in Gregg County, and another burglary conviction in Rusk County. Father never demonstrated outside of his periods of incarceration that he had the parenting skills necessary to meet the minimum needs of his children. The trial court's judgment was affirmed.

_In re S.L.M._, No. 04-07-00566-CV, 2008 Tex. App. LEXIS 4488 (Tex. App.–San Antonio June 18, 2008, no pet.) (mem. op.)

TEX FAM. CODE § 102.004(b)
TEX FAM. CODE § 102.0045
TEX FAM. CODE § 153.551
TEX FAM. CODE § 153.552

Mother's parental rights were terminated. S.L.M.'s foster parents, who had possession of the child since the date of removal, petitioned for adoption. On the same day as the adoption petition was filed, the foster parents of S.L.M.'s half-sibling filed a petition in intervention seeking appointment as S.L.M.'s sole managing conservator. The trial court struck the

intervention on the basis of the intervenors lack of standing. TEX FAM. CODE § 102.004(b) allows other persons to intervene in a SAPCR where parental rights have been terminated if they had past substantial contact with the child. In this case, intervenors did not meet the standing requirements of TEX FAM. CODE § 102.004(b). The appeals court could not conclude that the intervenors had past substantial contact with the child. The intevenors next argued that they have an equitable right of intervention. This argument was rejected. The court cannot confer jurisdiction where none exists. The trial court did not abuse its discretion in not granting sibling access. The evidence showed that the parties were antagonistic and visits between the children were less than ideal.