Termination Case Law Update

"Facts and Evidence Are Essential Things"

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I. ALTERNATIVES TO REMOVAL

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 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. The Supreme Court denied the Department's request for mandamus relief. After reviewing both 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 TFC 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 several provisions of the TFC 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. TFC 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. TFC 105.001(a)(4);
- The court may enter an order removing an alleged perpetrator from the child's home. TFC 262.1015; and
- Other provisions of the TFC 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. TFC 161.303(a)-(c), 261.3032.

While denying mandamus relief, the Supreme Court held that the court of appeals' decision did 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 Tex. Dep't of Family and Protective Servs.*, 255 S.W.3d 613 (Tex. 2008).

II. STANDING

A. Standing Is a Threshold Issue

Standing is a threshold issue in a custody proceeding. Legal standing, which is a question of law, is reviewed under a *de novo* standard. Standing is determined at the time a suit is filed in the trial court. A person who has standing to file an original conservatorship suit under TFC chapter 102 may also file a suit for modification under TFC 156.002(b) in a court with continuing, exclusive jurisdiction. Martha, as a grandparent, had standing to file an original suit for managing conservatorship of the child if she provided satisfactory proof to the trial court that her appointment "is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development" under TFC 102.004(a)(1). The Court declined to impose the additional requirement requested by the parent that Martha must demonstrate an imminent or immediate substantial impairment concerning the welfare of the child. Moreover, the Court found that the plain language of the statute does not require a grandparent to overcome the parental presumption under 153.131(a) merely to have

standing to bring suit. *In re Vogel*, 261 S.W.3d 917 (Tex. App.–Houston [14th Dist.] 2009, orig. proceeding).

B. Quasi-Estoppel Doesn't Confer Standing

The parental rights of the biological parents of the children were terminated. The maternal grandparents were named managing conservators of the children. After the termination, the children were adopted by the Gibbenses with the grandparents' consent based on the Gibbenses' promise that the grandparents could continue visitation with the children after the adoption. Two years after the final adoption, Lori Gibbens filed for divorce. Eight months after the final divorce decree was entered, and after the promised visitations were discontinued, the grandparents filed an "Intervenor's [sic] Petition for Modification of Parent-Child Relationship to Provide Grandparent Access" requesting an order permitting them possession of or access to the children. The grandparents argued under a quasi-estoppel theory that the trial court had the equitable authority to estop the Gibbenses from asserting an absence of standing. This was because the Gibbenses made misrepresentations to the grandparents to secure their consent to the adoption, and without the grandparents' consent, the adoption might not have occurred. Lori Gibbens filed a motion to strike the intervention, contending the grandparents lacked standing and there was no basis in law for their argument regarding quasi-estoppel.

The Court stated: [W]hile equity may estop a party from relying on a mere statutory bar to recovery, it cannot confer jurisdiction where none exists. … If the Texas Legislature has not conferred subject matter jurisdiction on a trial court, the courts cannot mindlessly produce that result based on equity." The Court held "[b]ecause they [grandparents] do not have standing and because estoppel cannot be used to confer jurisdiction, the trial court did not err in dismissing the [grandparents'] petition in intervention." *In re H.G., K.G., J.G., and T.G.*, 267 S.W.3d 120 (Tex. App.–San Antonio 2008, pet. denied).

C. Terminated Parent Lacks Standing

Department sought to terminate parental rights of mother and father on all five children. Department later nonsuited the termination proceedings as to the three boys, seeking only PMC. Foster parents intervened in termination suit for conservatorship of the two girls. Mother signed an affidavit of relinquishment as to the two girls so they could be adopted by the foster parents. Both parents were terminated as to the two girls. Father complained on appeal that foster parents' petition in intervention did not allege any facts to support standing and the foster parents lacked standing as to oldest child as she was only in their care for thirty-nine days.

Because father failed to challenge court's termination findings on appeal, he is bound by them. "The consequence of not challenging the termination of his parental rights is that [father] became a former parent with no legal rights" as to the two girls. He therefore lacks standing to challenge foster parents' petition in intervention. *In re R.A., Jr., M.A., R.A., III, A.A., and M.A.*, No. 07-08-0084-CV (Tex. App.–Amarillo Jan. 13, 2009, no pet.) (mem. op.).

D. Determining Principal Residence

The Connors' petition alleged, and the trial court found, standing under TFC 102.003(a)(9). To show standing under TFC 102.003(a)(9), the Connors had to prove they had actual care, control, and possession of the child for at least six months, ending not more than ninety days before February 29, 2008, the date they filed their suit. In computing the time under subsection (9), the trial court "may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit". TFC 102.003(b). Courts should determine a child's principal residence by looking at the following factors: 1) whether the child has a fixed place of abode

within the possession of the party; 2) occupied or intended to be occupied consistently over a substantial period of time; and 3) which is permanent rather than temporary.

The Court found the evidence did not show mother voluntarily relinquished permanent care, control, and possession of the child to the Connors for six months preceding their filing of the suit. Ms. Connors' own testimony shows that mother controlled where the child would stay and for how long, and that the Connors did not have such control. Nor is there any evidence that mother intended the child to stay with the Connors for any extended periods of time. In other words, there is no evidence that the child's abode in Hood County was fixed or permanent; rather, the evidence is that it was temporary, sometimes up to several months at a time, but always depending on mother's consent. *In re Kelso*, 266 S.W.3d 586 (Tex. App.–Fort Worth 2008, orig. proceeding).

E. Relative Caregivers

The child's maternal aunt and uncle were named the child's managing conservators after a Department initiated suit; mother and father were named possessory conservators. Subsequently, mother executed a voluntary affidavit of relinquishment, whereas father filed a motion to modify the order naming the aunt and uncle as managing conservators. After father's motion was dismissed, father appealed, claiming *inter alia* that the aunt and uncle lacked standing to possess the child. Father argued first that the aunt and uncle lacked standing under TFC 102.004 because they were not related to the child within the third degree of consanguinity. TFC 102.004 only addresses a grandparent or other relative who files an **original suit** affecting the parent-child relationship. Here, that did not occur. The Department instituted the suit. The child was placed with the aunt and uncle because they were identified as relative caregivers under TFC 262.114. Under TFC 262.114, a relative is not limited to the third degree of consanguinity, but rather is defined by the Government Code as: "Two individuals are related to each other by consanguinity if: (1) one is a descendant of the other; or (2) they share a common ancestor." Because aunt and uncle did not file an original suit, and were identified as relative caregivers and appointed as managing conservators, the standing provision of TFC 102.004 did not apply. Father also argued that aunt and uncle lacked standing under TFC 102.006. That section states that a relative of a parent whose rights have been terminated may not file an original suit for custody of the child if there is a living parent of the child whose rights have not been terminated. The statute provides an exception for a person who "has a continuing right to possession of or access to the child under an existing court order." This argument was without merit. First, aunt and uncle had not filed an original suit as required under 102.006, and second, even if they had filed an original suit, they had access to the child under an existing court order. *In re C.S.*, 264 S.W.3d 864 (Tex. App.–Waco 2008, no pet.).

F. Standing *via* Consent to File Petition

Darlene, child's paternal aunt, and her husband, Larry, filed a petition seeking to be appointed joint managing conservators of the child. In open court and on the record, mother, father, Darlene, and Larry agreed to appoint Darlene and Larry as joint managing conservators. The trial court entered a final order in accordance with the agreement. Mother and father filed a motion for new trial alleging Darlene and Larry lacked standing to file the petition. The trial court denied the motion. Mother and father appealed, challenging the constitutionality of the trial court's interpretation that TFC 102.004 allows for consent to standing after a petition is filed. The Court determined that mother's and father's constitutional challenge failed because "the consent permitted by [TFC] 102.004 merely waives the statutory limitations [to standing], not the constitutional limitations." The Court continued: "At the hearing on the agreed order, both [mother and father] expressly represented

that they agreed to the order. Consent to entering the order necessarily included consent to filing of the suit." Darlene was appointed sole managing conservator as Larry lacked standing under 102.004 because he was not related to the child within three degrees of consanguinity. *In re A.M.S.*, 277 S.W.3d 92 (Tex. App.–Texarkana 2009, no pet.).

III. TRANSFER OF VENUE

A. Mandamus Available

The transfer of a suit affecting the parent-child relationship to a county where the child has resided for more than six months is a mandatory ministerial duty. Therefore, a writ of mandamus is available to compel the mandatory transfer of a suit affecting the parent-child relationship. *In re Nabors*, 276 S.W.3d 190 (Tex. App.–Houston [14th Dist.] 2009, orig. proceeding).

B. TFC Venue Procedures Exclusive

Transfer of venue procedures under the TFC are the ***exclusive*** mechanism for transferring suits affecting the parent-child relationship and were designed to supplant the regular venue rules. *In re Nabors*, No. 276 S.W.3d 190 (Tex. App.–Houston [14th Dist.] 2009, orig. proceeding).

C. Principal Residence

The Fourteenth Court of Appeals followed the reasoning of *In re Kerst*, 237 S.W.3d 441 (Tex. App.–Texarkana 2007, orig. proceeding) and *In re Gore*, No. 07-07-0290-CV (Tex. App.–Amarillo Aug. 23, 2007, orig. proceeding) (mem. op.), rejecting the Department's argument that the children had merely been "placed" in Fort Bend County with the foster parents for seventeen months and that the "principal residence" of the children was always Harris County. The Department clearly designated that the children would live at the Nabors' home, where they remained more than six months. The children were placed in Harris County approximately two weeks before the Nabors filed their motion to transfer venue. Fort Bend County was the children's principal residence for the six-month period preceding the commencement of the suit to modify under TFC section 155.201(b). *In re Nabors*, No. 276 S.W.3d 190 (Tex. App.–Houston [14th Dist.] 2009, orig. proceeding).

IV. ANSWER

Pro Se Email to Court Clerk Sufficient

Father was served on December 6, 2007. Among the papers served on father was a notice of a January 3, 2008 hearing. Father did not file a formal answer or appear at the January 3, 2008 hearing, but he did email the court clerk. The trial court found that the email was sufficient to be an answer. *In re E.J.C. and R.A.C.*, No. 2-08-295-CV (Tex. App.–Fort Worth Apr. 2, 2009, no pet.) (mem. op.).

V. INTERVENTION

A. No Equitable Right to Intervention

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 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. TFC 102.004(b) allows other persons to intervene in a SAPCR where parental rights have been terminated if they have past substantial contact with the child. In this case, intervenors did not meet the standing requirements of TFC 102.004(b). The appellate court could not conclude that the intervenors had past substantial contact with the child. The intevenors next argued that they had an equitable right of intervention, because of a "justiciable interest". 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 TFC only permits a sibling eighteen years of age or older to seek sibling access. A suit for access cannot be

brought by a conservator on the child's behalf. Further, the evidence showed that the parties were antagonistic and visits between the children were less than ideal. *In re S.L.M.*, No. 04-07-00566-CV (Tex. App.–San Antonio June 18, 2008, pet. denied) (mem. op.).

B. Multiplication of Issues and Timeliness

Termination hearing was set for March 17, 2008. On February 11, 2008, E.A.O.'s foster parents filed a petition in intervention, seeking to terminate mother's parental rights to E.A.O. Two days later, E.A.O's attorney *ad litem* filed a petition to terminate mother's parental rights to E.A.O. on the same grounds presented by the foster parents. Mother filed a motion to strike the foster parents' petition, complaining 1) their petition was not timely filed; 2) she lacked sufficient time to propound discovery; and 3) the intervention would complicate the case by an excessive multiplication of issues. The trial court denied the motion to strike on March 5, 2008, and ordered an expedited discovery schedule to be concluded by March 14, 2008. On March 12th, the Department dropped termination from its petition. Mother's rights were terminated and in one issue she appealed the trial court's failure to strike the foster parents' intervention.

Multiplication of Issues: Mother argued that since the Department had effectively abandoned termination, the foster parents' intervention multiplied and confused the issues by adding the termination issue, the issue of the appointment of the foster parents as conservators, and the implied issue of adoption. The Court rejected mother's argument, noting that E.A.O.'s attorney *ad litem* had filed a petition seeking termination and requesting that the foster parents be named conservators. Thus, these issues would have been addressed regardless of the intervention. In addition, the Court agreed with the foster parents' argument that their proposed adoption of E.A.O. did not confuse the issues, but in fact, "if anything, it provided clarification and answered the unspoken question the jurors surely had: What will happen to this child in the long run if we choose this placement?" The Court concluded there was no excessive multiplication of issues.

Timeliness: Mother argued that the foster parents had legal standing in October 2007. They waited an additional four months to file their petition, and the trial court gave the parties only six days to propound discovery and an additional three days to respond. The foster parents responded that they took action and filed their intervention as soon as they realized the Department intended to remove E.A.O. and place her with R.L.A. in a questionable relative placement. They argued that the trial court had the discretion to order an expedited discovery period as a less restrictive alternative to striking their intervention, and that mother was not harmed because discovery was propounded by mother and answered in full prior to the trial date. The Court held that even though the foster parents could have intervened earlier than they did, the trial court had the discretion to determine whether to allow them to intervene and whether to impose an expedited discovery period. *In re R.L.A. and E.A.O.*, No. 2-08-153-CV (Tex. App.–Fort Worth Apr. 2, 2009, no pet.) (mem. op.).

VI. PRE-TRIAL MOTIONS

A. Notice of Hearing

1. Shortening of Notice

Maternal aunt and uncle, managing conservators of the child, moved to dismiss father's motion to modify for failure to comply with the affidavit requirement of TFC 156.102. The motion to dismiss was granted. Father complained that he did not receive adequate notice of the hearing because: 1) aunt's and uncle's motion was like a summary-judgment motion, thus he was entitled to 21 days notice under TRCP 166(c); or 2) he was at least entitled to six days notice under TRCP 21 and 21a. Following precedent of the Texas Supreme Court in *Tex. Dep't of Parks and Wildlife v. Miranda*, the Court determined father

was not entitled to 21 days notice to respond to a dismissal motion under TFC 156.102(c). Ordinarily, a party is entitled to six days notice of a hearing when served with a notice of hearing by mail or facsimile. However, TRCP 21 permits a trial court to shorten that notice. A trial court's decision to shorten notice is reviewed for an abuse of discretion. Here, aunt and uncle filed their dismissal motion and accompanying notice of hearing on August 6. Father was served that day. The hearing was conducted on August 8, over father's objection. First, although father had only two days notice from the filing, he had been previously informed by the aunt and uncle in a facsimile on July 30 that they planned on filing the motion to dismiss. Second, the trial court's decision was based solely on the facts in the supporting affidavits. Father failed to identify any additional facts which would change the outcome. Accordingly, the trial court did not abuse its discretion. *In re C.S.*, 264 S.W.3d 864 (Tex. App.–Waco 2008, no pet.).

2. Reasonable Notice under TRCP 245

The forty-five day notice provision in TRCP 245 is mandatory. But it applies only to the first setting of the trial. The trial court may reset a trial to a later date on any reasonable notice to the parties. The trial court signed a permanency hearing order on June 22, 2007, that set October 5, 2007 as the final trial date. The order indicates that mother "appeared in person and announced ready". On October 5, 2007, the trial court signed a permanency hearing order resetting the final trial date for January 14, 2008. The order does not indicate that mother was present. On October 24, 2007, the trial court signed an order appointing Jeff Eaves to represent mother. Mother alleged in her brief that her attorney did not receive notice of the termination "until some time in December after December 11, 2007." The Court held that mother received notice of the first trial setting as required by TRCP 245 on June 22, 2007. Mother's counsel receiving notice in December of the January 14, 2008 resetting final hearing is reasonable notice as required by TRCP 245. *In re J.R.S., J.L.S., and B.L.N.S.*, No. 2-08-034-CV (Tex. App.–Fort Worth Feb. 5, 2009, pet. denied) (mem. op.).

B. Request for Court-Appointed Expert

An indigent parent has no *per se* right to appointment of an expert. *Crowden v. Dep't of Family and Protective Servs.*, No. 01-07-00025-CV (Tex. App.–Houston [1st Dist.] Jan. 29, 2009, no pet.) (mem. op.). *See also In re J.T.G.*, 121 S.W.3d 117, 130 (Tex. App.–Fort Worth 2003, no pet.) (declining to hold that due process requires the appointment of expert assistance in parental termination cases).

C. Incarcerated Parent

1. Bench Warrant

Failure to Bench Warrant Not an Abuse of Discretion: In a private termination case, mother sought termination of father's parental rights alleging (L) and (Q) grounds. Father filed *pro se* answer requesting appointment of counsel, admitting that he had pled guilty to causing a person's death, but denying that the person was a child, and alleging that he had not abandoned his children. Father did not deny that he knowingly engaged in criminal conduct that resulted in at least a two year term of future imprisonment. He also filed a *petition for writ of habeas corpus ad testificandum* (bench warrant). Father filed an amended answer admitting that he was incarcerated for the rape of a child, but asserting that it was only a second degree felony. Mother testified at trial: 1) respondent was the presumed father; 2) he was serving time in Missouri for sexually assaulting a child; 3) he had been convicted of causing the death of another child while driving intoxicated; 4) he had a drug problem; 5) he was violent towards her and her children; and 6) he never supported his children. Father appealed complaining that his due process rights were violated by the trial court's failure to appoint counsel for him and its failure to bench warrant him for trial. In rejecting father's

claims, the Court held that there is no right to court-appointed counsel in private termination cases (citing *In re J.C.*, 250 S.W.3d 486, 489 (Tex, App.–Fort Worth 2008, pet. denied), and that father failed to meet his burden in showing that his appearance in court was necessary to preserve his constitutional right (citing *In re Z.L.T.*, 124 S.W.3d 163, 164 (Tex. 2003). When a trial court denies a request for bench warrant and does not allow an inmate to appear in person, it should afford the inmate the opportunity to proceed by affidavit, deposition, telephone, or other means. In this case, father was allowed to appear by affidavit in which he contested mother's allegations. The Court found that the trial court did not abuse its discretion by denying father's request for a bench warrant and appointment of counsel. *In re C.M.R., D.C.R., A.N.R., and D.R.R., II.*, No. 02-07-394-CV (Tex. App.–Fort Worth Nov. 20, 2008, no pet.) (mem. op.).

2. Denial of Bench Warrant Improper

Father, who was incarcerated for causing the death of one of his children, appealed the mother's termination of his parental rights. In an earlier appeal, the Court reversed his termination, finding that he had been denied notice of the hearing and an opportunity to be heard. Prior to the retrial, father acknowledged notice of the hearing date and expressed his desire to appear at the trial. After hearing evidence from only mother at the retrial, the trial court entered a judgment of termination, reciting that father "made a general appearance and was duly notified of trial but failed to appear and defaulted". Construing two of father's issues liberally, the Court interpreted his complaint to be that the trial court denied him due process of law and due course of law under the United States and Texas Constitutions respectively when it denied him participation in the trial. After analyzing the due process claim under *Mathews v. Eldridge*, the Court found that the trial court erred by not affording father the opportunity to participate in the hearing in some manner, whether by telephone, affidavit, deposition, etc. Further, the error was harmful because he was unable to cross-examine witnesses and produce evidence. The Court could not determine what evidence father would have offered at trial. Thus, the denial of meaningful participation at trial probably prevented father from properly presenting his case on appeal. *In re T.L.B.*, No. 07-07-0349-CV (Tex. App.–Amarillo Dec. 17, 2008, no pet.) (mem. op.).

D. Motion for Continuance

Mother received her service plan in June 2007; the trial court ordered her to comply with the service plan later the same month. Mother acknowledged she understood the service plan. As of April 2008, mother had not completed any of the service plan's requirements. Instead, mother chose to spend much of the time between June 2007 and April 2008 on a temporary visit to Georgia to "get away from trouble" and give her "peace of mind". Mother filed a motion for continuance, requesting more time to complete her service plan. The Court held that when a parent, through her own choices, fails to comply with a service plan, and then at the time of the termination trial requests a continuance in order to complete the plan, the trial court does not abuse its discretion by denying the continuance. *In re S.W. and S.W.*, No. 2-08-164-CV (Tex. App.–Fort Worth Oct. 9, 2008, no pet.) (mem. op.).

VII. TRIAL ISSUES

A. ICWA: Proper Notice Required

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C 1901, applies to **all** state custody proceedings involving an Indian child when the court knows, or has reason to know, that an Indian child is involved. ICWA provides that no termination of parental rights may be ordered in such proceeding in absence of a determination, supported by evidence **beyond a reasonable doubt,** including testimony of a qualified witness, that the continued custody of the child

by the Indian custodian is likely to result in serious emotional or physical danger to the child. Further, the tribe is entitled to notice of a custody proceeding and has the right to intervene at any time. Tribal membership can be established by tribal enrollment or using criteria established in the Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). When a state court has reason to believe that a child involved in a child custody proceeding is an Indian, the court shall seek verification from either the Bureau of Indian Affairs or the child's tribe. 25 C.F.R. 23.11 (2008). The determination that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or the biological parent is or is not a member of that tribe, **is conclusive.**

In this case, the assistant district attorney who prosecuted a termination case sent out four notices under ICWA which were defective. Although a returned enrollment form indicated that the mother's mother was one-half Kiowa, the court did not apply ICWA at trial. The mother filed a motion for new trial. At the hearing on mother's motion, the court heard mother's testimony that she is a member of the Kiowa tribe. The court denied mother's motion for new trial but found that her appeal was not frivolous. The question as to whether a court applied ICWA correctly is a question of law reviewed *de novo.* On appeal, the Department argued that the court had no reason to believe that the children were Indian children. The Court rejected that argument because it found that the Department had information that the children were members of the Kiowa tribe. Further, the Court found that the notices were defective in three respects: 1) they were sent to the Secretary of the Department of the Interior instead of the area director; 2) they did not contain the appropriate information; and 3) they were not sent by certified mail, return receipt requested. The Court held that substantial compliance with these provisions will not suffice. The Court warned that a violation of an ICWA notice provision may cause the invalidation of the termination at "some later, distant point in time." A violation of ICWA notice provisions does not warrant automatic reversal. An appeals court may remand the case so that proper notice may be provided. The Court remanded the case for further proceedings to comply with ICWA notice provisions. The Court instructed the trial court that if the children are not determined to be Indian children, then the judgment is affirmed. However, if the trial court determines that the children are Indian children, then the termination judgment is reversed, and the court shall conduct a trial applying ICWA. *In re R.R., Jr. and V.R.*, No. 2-08-061-CV (Tex. App.–Fort Worth, March 19, 2009, no pet.) (mem. op.).

B. Jury Denial

Mother filed a jury demand request which was untimely under TRCP and the specific pre-trial order in the case. The Pre-Trial Scheduling Order, signed February 16, 2007, provided in bold, italicized, and underlined language: "All jury demands are to be filed on or before the date of the Initial Permanency Hearing." The initial permanency hearing was set for June 8, 2007. Mother filed her jury demand on October 9, 2007. Mother argues the jury demand was necessitated by the Department's change in requested relief from reunification to termination. The scheduling order did not have alternate timetables depending on the course of the proceeding. Mother failed to file a new jury demand before the *de novo* hearing, and she did she object to the absence of a jury at that hearing. The Court held that neither the associate judge nor the district judge abused their discretion by denying the jury demand. *Gammill v. Tex. Dep't of Family and Protective Servs.*, No. 03-08-00140-CV (Tex. App.–Austin May 22, 2009, no pet. h.) (mem. op.).

C. Jury Trial

The Department filed suit to terminate mother's and father's parental rights to two children. Mother filed for divorce and also pleaded that

father's parental rights be terminated. Father was appointed an attorney, who perfected a jury request on February 16, 2007. In June 2007, the Department dismissed its termination suit. Citing the dismissal of the termination suit, the trial court ordered father's court-appointed attorney to withdraw from the case and denied father's request for continuing court-appointed counsel. On February 6, 2008, without objecting that the case was being tried before the bench, both mother and father testified at the divorce/termination final hearing. The trial court granted the divorce and terminated father's parental rights. The Court noted that the right to a jury trial in a civil case "is not self-executing". Even when a party has perfected the right to a jury trial under TRCP 216, a litigant waives that right if the litigant participates in a bench trial without objection. Because father did not object to the trial court proceeding with the bench trial or otherwise take any affirmative action to indicate that he intended to stand on his perfected right to a jury, he waived his right to a jury trial. The Court also rejected father's assertion that the trial court erred by denying him his "mandatory" right to an appointed attorney *ad litem* under TFC 107.013(a)(1). No statutory right exists to appointed counsel in a private termination suit. *Brothers v. West*, No. 2-08-202-CV (Tex. App.–Fort Worth May 7, 2009, no pet. h.) (mem. op.).

D. Death Penalty Sanctions Improper

A home study was requested on paternal grandmother but was never conducted by the Department. The trial court sanctioned the Department for failing to conduct a home study as required by TFC 262.114 by denying the Department's request for termination. The Department appealed. The Court held that the statute [TFC 262.114] was silent on sanctions. A death penalty sanction was disproportionate and did not consider that the safety of the children was paramount. The Court reversed the trial court's order and remanded for further proceedings on termination. *In re J.F., J.J., and J.J.*, No. 02-07-007-CV (Tex. App.–Fort Worth Oct. 11, 2007, pet. denied) (mem. op.). *Note*: The re-trial resulted in termination of mother's parental rights, which judgment was affirmed in the second appeal. *In re J.F., J.J., and J.J.*, No. 02-08-183-CV (Tex. App.–Fort Worth, Mar. 26, 2009, pet. denied) (mem. op.).

E. Mandatory Dismissal

1. TFC 263.401(d)

The Department filed suit to terminate Walker's parental rights to two children. On July 18, 2006, the trial court entered an order appointing the Department temporary managing conservator of the children; the order set a dismissal date of July 23, 2007. A bench trial took place on June 28, 2007 and July 10, 2007. On July 10, 2007, the judge orally ordered Walker's parental rights terminated. In August 2007, Walker filed a motion for new trial. On August 21, 2007, the trial court entered a written order of termination, but on August 28, 2007, the trial court granted Walker's motion for new trial. The trial court never entered an order extending the time for which the case was to be retained on its docket under TFC 263.401(b).

The Supreme Court found that at the time Walker moved for dismissal of the suit in March 2008, both the one-year dismissal date and the 180-day period for the trial court to retain the suit on its docket had passed. The trial court could have retained the suit if Walker waived her right to dismissal under TFC 263.402(b) by failing to make 1) a timely motion to dismiss; or 2) a motion requesting the court to render a final order before the deadline for dismissal. The Supreme Court found that Walker did not waive her right to dismissal by failing to request that the trial court render a final order before the one-year dismissal date of July 23, 2007 because the trial court ***did*** render such an order on July 10, 2007.

The Supreme Court reasoned that it would make no sense to hold that Walker waived her right to dismissal when the trial court did exactly what

she would have been required to request that the trial court do to avoid waiver. Moreover, when the trial court granted a new trial, the one-year dismissal date had passed and another dismissal date had not been set. At that point, Walker did not have an opportunity to request that the trial court enter a final order before a dismissal date. The Supreme Court concluded that because there was no final order in place as of the time Walker filed her March 2008 motion to dismiss, her motion was timely when it was filed before the Department had introduced all its evidence, other than rebuttal evidence, at the pending trial on the merits. Thus, under TFC 263.402(b), the trial court had no discretion to deny Walker's motion to dismiss the Department's suit and abused its discretion in doing so. *In re Dep't of Family and Protective Servs.*, 273 S.W.3d 637 (Tex. 2009).

2. Extraordinary Circumstances

Department sought to terminate parental rights of mother. Less than a month before the dismissal date, the Department moved for an extension of the original dismissal date. Mother objected and a hearing was held. Trial court stated: "there only needed to be a finding that it's in the best interest" for the court to grant an extension and "I'm going to have to do a little bit of research on what's fair." No evidence was offered to establish extraordinary circumstances. Trial court wrote on the docket sheet "grant 3 mos. extension in best int. of child due to several findings in record of extraord. circs but also limiting to 3 mo. in fairness to parent." Mother filed a motion to dismiss the case based on the trial court's failure to enter an order extending the dismissal date which complied with TFC 263.401. The Court held: "neither a determination of what's fair nor the child's best interest satisfies the statute's requirement of finding of extraordinary circumstances." Without a finding of extraordinary circumstances, the trial court abused its discretion when it failed to dismiss the suit on the dismissal date. *In re J.H.G.*, No. 05-08-00875-CV (Tex. App.–Dallas May 14, 2009, no pet. h.) (mem. op.).

VIII. EVIDENTIARY ISSUES

A. Rebutting Parental Presumption

Non-parents may be appointed as joint managing conservators of a child under TFC 153.372. It is presumed under TFC 153.131(a) that the best interest of the child is served by appointing the parent as a sole managing conservator or both parents as joint managing conservators. However, the parental presumption for both sole and joint managing conservatorship is rebutted by a finding of family violence. TFC 153.004(b); 153.131(b). When evidence rebutting the presumption is offered, the presumption disappears and is not weighed or treated as evidence. All that must be shown by a preponderance of evidence is that the appointment of the non-parents as joint managing conservators would be in the best interest of the child. TFC 105.005; 153.002. The Court rejected mother's argument that a conviction is required before a finding of domestic violence can occur. The Court considered that both parents had been arrested on two occasions for domestic violence, even though in one instance they refused to file charges against each other. *In the Matter of the Marriage of Preston*, No. 10-08-00066-CV (Tex. App.–Waco Nov. 19, 2008, no pet.) (mem. op.).

B. Invoking Fifth Amendment Privilege

Factfinder in termination of parental rights case is entitled to draw a negative inference from appellant's assertion of her Fifth Amendment privilege when she refuses to testify in response to probative evidence offered against her. *Carpenter v. Tex. Dep't of Family and Protective Servs.*, No. 03-06-00239-CV (Tex. App.–Austin Dec. 31, 2008, no pet.) (mem. op.).

C. Admission of Photographs

In a termination suit involving the death of a child, autopsy photos were introduced into evidence. Appellant argued that photos were irrelevant because: 1) they did not establish that

he, as opposed to mother, inflicted the injuries; and 2) they were cumulative of the medical examiner's testimony of injuries. The Court held that the photos were relevant to show an ongoing pattern of maltreatment, including severe physical abuse and malnutrition, and the medical examiner's testimony of injuries did not reduce irrelevance of photos. *In re K.Y. and K.Y.*, No. 14-07-00866-CV (Tex. App.–Houston [14th Dist.] November 6, 2008, no pet.) (mem. op.).

IX. TERMINATION GROUNDS UNDER 161.001

A. Provisions Apply to Alleged Father

Except for the standards of termination specifically listed in section 161.002(b), the provisions of section 161.001 also apply to an alleged father. *In re D.M.F.*, No. 2-08-212-CV (Tex. App.–Fort Worth Apr. 16, 2009, no pet.) (mem. op.).

B. TFC 161.001(1)(C)

Mother and father had A.T.C. while they were dating. They never married nor lived together, and their relationship ended six months after A.T.C. was born. Father's parentage was adjudicated and the parents were named joint managing conservators. Mother married, had another child, and A.T.C. told stepfather that he had concerns about being the only one in the family with a different last name. Mother wrote to father in jail asking him to relinquish his parental rights so stepfather could adopt A.T.C. Father refused despite his lack of involvement in A.T.C.'s life. Mother filed a petition to terminate father's parental rights as he had not had any contact with A.T.C. for several years, nor had he provided financial or other support in years. Mother filed for termination under (C), (F), and (Q). At the final hearing, mother's undisputed testimony was: 1) father was not interested in a relationship with A.T.C. if he could not have one with her also; 2) A.T.C. was eight years old at the time of trial and father had not seen the child since the child was one; 3) father called about three times since A.T.C. was one; 4) mother saw father at a funeral when A.T.C. was four and although father inquired as to A.T.C., he did not ask to see him; 5) father called mother when A.T.C. was six but did not ask about A.T.C.; 6) at a chance encounter at the airport, father asked about A.T.C. and when mother pointed to where A.T.C. was, father did not get out of the car to see A.T.C. After mother filed her petition, father attempted to correspond with A.T.C., however, mother refused the correspondence so as not to confuse A.T.C. because "[A.T.C.] doesn't know who [father] is." Mother also testified that father, nor his family, ever provided any financial or other support for A.T.C. over the years. This evidence was legally and factually sufficient to support termination of father's parental rights under (C). *In re A.T.C.*, No. 07-08-0258-CV (Tex. App.–Amarillo Dec. 12, 2008, no pet.) (mem. op.).

C. Endangering Surroundings under (D)

1. Actual Endangerment Required

Father was aware that mother was drinking alcohol heavily, smoking marijuana, and involved with drug users and prostitutes at the time she had custody of the child. Although father acknowledged mother had previously abused alcohol and narcotics, there is no evidence in the record that father knowingly allowed the child to remain in conditions or surroundings that "actually endangered" the child. Trial court did not err in granting Silva a directed verdict under (D). *Tex. Dep't of Family and Protective Servs. v. Silva*, No. 01-08-00195-CV (Tex. App.–Houston [1st Dist.] Feb. 5, 2009, no pet.) (mem. op.).

2. Aware of Potential for Danger

At the time the Department removed the children, father was incarcerated and serving an eight-year sentence for evading arrest. Father had not seen V.S.R.K. since she was ten months old, a period of more than nine years. The Court noted that although the parent need not have certain knowledge that an actual injury is occurring, there must be evidence that the parent was at least aware of the potential for danger to

the child and disregarded that risk. The Court found there was evidence that mother's home was a dangerous environment, but the record is devoid of evidence tending to show that father knew anything about the home or its condition. There is simply no evidence that father "*knowingly* placed or *knowingly* allowed V.S.R.K. to remain in conditions or surroundings that endangered her physical or emotional well-being. There is no evidence that father was aware of a potential for danger to V.S.R.K. and disregarded that risk." The Court reversed and rendered judgment that the Department take nothing on its claim seeking to terminate father's alleged parental rights. *In re V.S.R.K.*, No. 2-08-047-CV (Tex. App.–Fort Worth, Mar. 19, 2009, no pet.) (mem. op.) (emphasis in original). *Compare In re D.B.*, No. 2-07-428-CV (Tex. App.–Fort Worth June 26, 2008, no pet.) (mem. op.) (Father's leaving child with his diabetic mother despite her poor health and inability to adequately care for herself contributed to the sufficiency of evidence for termination under (D) and (E).).

D. Endangering Conduct under (E)

1. Evidence of Injury

Evidence of "Actual Injury" Not Required: A parent's failure to remain drug free while under the Department's supervision supports a finding of endangering conduct under (E) even if there is no direct evidence the parent's drug use "actually injured" the child. *In re J.A.W., J.A.W., J.E.W., and J.A.W.*, No. 2-08-215-CV (Tex. App.–Fort Worth Mar. 5, 2009, no pet.) (mem. op.).

Direct Result of Conduct Required: Appellant had two prior convictions for evading arrest, one for which he was incarcerated at the time of the termination trial. Appellant had not seen V.S.R.K. since she was ten months old, a period of more than nine years. The Court, however, reversed the trial court's termination of appellant's rights, concluding that the Department failed to show how V.S.R.K. was endangered as the "direct result" of appellant's conduct or that appellant knew that the person with whom he left V.S.R.K. engaged in endangering conduct. The Court reversed and rendered judgment that the Department take nothing on its claim seeking to terminate appellant's alleged parental rights. *In re V.S.R.K.*, No. 2-08-047-CV (Tex. App.–Fort Worth, Mar. 19, 2009, no pet.) (mem. op.).

2. Physical Abuse

Injuries over Time Sufficient: The factfinder was allowed to consider prior skull fracture, humerus fracture, various red marks, scrapes, and bruises noted by child's day care in the weeks before child's most recent skull fractures, and emotional endangerment to establish a "course of conduct". *Carpenter v. Tex. Dep't of Family and Protective Servs.*, No. 03-06-00239-CV (Tex. App.–Austin Dec. 31, 2008, no pet.) (mem. op.).

Injuries over Time Not Sufficient: The Court reversed the termination of father's parental rights in *Lopez*, finding the evidence legally insufficient to support termination. There, the record reflected that father took the child to the emergency room with a strangulation injury, petechial hemorrhaging under his eye, and bleeding in his ear canal. Father told the Department he was present when the injury occurred. He stated that the injury occurred when mother's hair became wrapped around the child's neck while the two were sleeping on a sofa. Father told the Department "accidents happen." Criminal charges against father were dismissed. The child also had a previous chemical burn on his leg for which medical records could not be located. The Court rejected the Department's argument that father was present during the injury and later lied about it being an accident. "Although a single act or omission may support a subsection (D) finding, no evidence was presented of [father's] actions, or failure to act, at the time of, or before, the injury occurred." "No evidence revealed any of the circumstances surrounding the injury, and the undisputed evidence showed that criminal

charges against [father] relating to the injury were dismissed." The Court found that the Department presented no evidence that father was aware that mother posed a risk to the child, and that father's false post-injury statement, standing alone, did not establish that he allowed the child to remain in a dangerous environment. Further, no evidence was presented regarding the circumstances surrounding the chemical burn, or that it arose from abuse or neglect. Finally, the Department's evidence that it could not find medical records did not establish a claim of failure to provide medical care. This did not prove that father did not seek treatment for the child's chemical burn. *Lopez v. Dep't of Family and Protective Servs.*, No. 01-08-00111-CV (Tex. App.–Houston [1st Dist.] Sep. 25, 2008, pet. denied) (mem. op.); *Compare In re J.P.B.* 180 S.W.3d 570, 574 (Tex. 2005) (termination of father's parental rights under (D) upheld where evidence established multiple injuries to the child over time, indicating ongoing mistreatment).

Inadequate Evidence of Injuries over Time: Although the Court ultimately upheld mother's termination under (E) based on mother's refusal to submit to drug tests and criminal conduct, the Court nevertheless offered a discussion detailing why certain evidence offered by the Department was inadequate. The evidence reflected that mother force fed the child ice chips at the hospital after birth and attempted to pry the child's eyes open to see the color of the child's eyes. The Court found that there was no evidence to establish: 1) how mother's mental health issues might affect her parenting; 2) the size of the ice chips; 3) whether the child could have choked on the ice chips; 4) whether mother used force to see the child's eyes; and 5) whether mother intended to harm the child. Further, the record contained no evidence that mother used drugs during pregnancy and a positive drug test two weeks after the child was placed in the Department's care was insufficient to support an inference of endangerment. The Court stated: "Termination of parental rights is serious business. Because the law demands clear and convincing evidence of facts supporting termination, we cannot terminate a parent's rights based on strong rhetoric alone. Facts and evidence are essential things." *In re C.A.B.*, No. 14-08-00360-CV (Tex. App.–Houston [14th Dist.] Apr. 2, 2009, no pet.) (mem. op.).

3. Emotional Abuse

Solely Emotional Endangerment: Courts are not limited to consideration of a child's physical injuries when determining whether a parent engaged in an endangering course of conduct. Termination of parental rights may be based solely on emotional endangerment. *Carpenter v. Tex. Dep't of Family and Protective Servs.*, No. 03-06-00239-CV (Tex. App.–Austin Dec. 31, 2008, no pet.) (mem. op.).

Emotional and Physical Abuse: At the bench trial, the Department presented evidence of the physical and emotional abuse present in mother's and father's home. Both parents had been violent towards each other when the children were present. The Department presented evidence of the "negative influence of the abusive home on the children". J.J.S. was diagnosed with adjustment disorder, which affects his ability to function at school and his mood. D.D.S. was also diagnosed with adjustment disorder, but with a depressed mood, and she exhibited behaviors such as being overwhelmed, spontaneous crying, getting upset, irritability, and altered eating habits. She was also diagnosed with anxiety disorder attributable to the domestic violence she had been exposed to. L.S. was diagnosed with adjustment disorder but with mixed emotions and conduct and oppositional defiant disorder by history causing her to have "significant" behavioral problems.

The trial court entered findings of fact that found mother's testimony demonstrated that she conducted herself in a manner, namely her abusive relationships, which exposed her children to a home where physical violence was present. The Court found the evidence legally

and factually sufficient to support termination of mother's parental rights under (E). *In re J.J.S., D.D.S., and L.S.*, 272 S.W.3d 74 (Tex. App.–Waco 2008) (pet. filed).

4. Violating Safety Plan

The evidence at trial reflected that mother was aware a safety plan had been initiated for the protection of the child after the mother and child were released from the hospital. There was significant testimony that mother violated the safety plan on almost a daily basis. The factfinder could view mother's actions in violating the safety plan as conduct that endangered the child. *In re K.C.B.*, 280 S.W.3d 888 (Tex. App.–Amarillo 2009, pet. denied).

5. Drug Use

Drug Use and Causal Connection Required: Mother was drinking alcohol heavily, smoking marijuana, and involved with drug users and prostitutes at the time she had custody of the child. Drug use, "in some circumstances, may give rise to termination under section (E)." However, the evidence must show that the narcotics use somehow endangers the child. Mother did not use drugs while pregnant with or caring for the child. There is no evidence mother ever used drugs in the presence of father or the child. In sum, there is no evidence that mother's use of drugs or alcohol jeopardized the physical or emotional well-being of the child. Trial court did not err in granting Silva a directed verdict under section (E). *Tex. Dep't of Family and Protective Servs. v. Silva*, No. 01-08-00195-CV (Tex. App.–Houston [1st Dist.] Feb. 5, 2009, no pet.) (mem. op.).

Failure to Remain Drug Free: A parent's failure to remain drug free while under the Department's supervision will support a finding of endangering conduct under (E) even if there is no direct evidence that the parent's drug use actually injured the child. *In re J.A.W., J.A.W., J.E.W., and J.A.W.*, No. 2-08-215-CV (Tex. App.–Fort Worth Mar. 5, 2009, no pet.) (mem. op.).

Refusal to Submit to Drug Screen: During the time period mother was trying to reunify with the child, she refused to submit for drug screening on more than one occasion. The factfinder may infer from a refusal to take a drug test that mother was using drugs. *In re K.C.B.*, 280 S.W.3d 888 (Tex. App.–Amarillo 2009, pet. denied).

6. Recent Improvement Immaterial

In *J.O.A.*, the Texas Supreme Court modified (effectively reversing) the court of appeals' reversal of father's termination. The court of appeals found the termination grounds supporting father's termination, (D) and (E), legally insufficient. The court of appeals ignored father's substantial history of drug use and endangering conduct toward one of the children, focusing instead on his recent improvements in parenting, life choices, and living situation. The Supreme Court disagreed with the court of appeals' analysis of the evidence. The Court stated: "endangering conduct may include the parent's actions before the child's birth, while the parent had custody of older children, including evidence of drug use." "We accordingly agree that a parent's use of narcotics and its effects on his or her ability to parent may qualify as an endangering course of conduct." In remanding the case for a new trial, the Court found the evidence legally sufficient, holding: "While the recent improvements made by [father] are significant, evidence of improved conduct, especially of short-duration, does not conclusively negate the probative value of a long history of drug use and irresponsible choices." "The court of appeals' analysis here instead suggests a comparison of [father's] conduct over time, attributing greater weight to his recent improvements and less to his past challenges. While we do not question the court's logic, we do reject its use here as part of the legal sufficiency review." *In re J.O.A., T.J.A.M., T.J.M., and C.T.M.*, ___ S.W.3d ___, No. 08-0379 (Tex. May 1, 2009).

E. TFC 161.001(1)(F)

Mother filed a petition to terminate father's parental rights to N.A.F. under (F). At the bench trial, father did not attend because he was incarcerated. Mother testified she sought child support in 2003 through the Attorney General, had not received a full child-support payment in almost two years, and had last received some payment in July of 2007. Mother did not testify about father's ability to pay or his employment history, nor did she testify when father's incarceration began. The Court held: "While it is true that a child-support order contains an implied finding that the obligor was able to pay the ordered support, 'that support order only contains an implied finding as of the time the order is entered; it cannot predict the future.' Thus, a child-support order is no evidence of [a parent's] ability to pay support for the twelve consecutive months required by [F]." *In re N.A.F.*, 282 S.W.3d 113 (Tex. App.–Waco 2009, no pet.).

F. TFC 161.001(1)(H)

Because the provisions of TFC 161.001 also apply to an alleged father, the trial court did not err in applying (H) to Jerry, who was an alleged parent during part of the times required by the statute. It is improper to look to or consider the conduct of an alleged father before paternity has been established or acknowledged by the father. (H) requires scienter or knowledge of the pregnancy ***before birth.*** The abandonment of the mother, with knowledge of the pregnancy, must begin before birth and continue after the birth. The failure to support must occur during the period of abandonment. Sara was the one who left the state where she and Jerry were residing; the last pregnancy tests she took while with Jerry were negative; she did not tell Jerry she was pregnant until two weeks before the baby was born; Sara was living with a new boyfriend when she called Jerry and told him she was pregnant. The child was born on January 10, 2007. Jerry's DNA test was done on December 5, 2007. The Court reasoned that since there was no clear and convincing proof Jerry had knowledge Sara was carrying his child until December 2007, ***after*** the child was born, the evidence could not show that he abandoned her ***during*** her pregnancy. *In re D.M.F.*, No. 2-08-212-CV (Tex. App.–Fort Worth Apr. 16, 2009, no pet.) (mem. op.).

G. TFC 161.001(1)(K)

Father executed a voluntary relinquishment of parental rights. The trial court terminated his parental rights under not only (K), but (D) and (E) also. On appeal, father argued that his voluntary relinquishment rendered the involuntary termination aspects moot and left the trial court without jurisdiction to determine whether any grounds for involuntary termination existed. Father sought only to overturn the (D) and (E) findings. The Court disagreed with father's contention. First, the statute does not provide that an affidavit of voluntary relinquishment ends the trial court's inquiry as to other bases for termination. Second, an affidavit of relinquishment neither automatically concludes a termination proceeding nor terminates parental rights. Third, the trial court is still required to make a determination whether termination is in the child's best interest, whether termination is sought under involuntary or voluntary grounds. *Vallejo v. Tex. Dep't of Family and Protective Servs.*, 280 S.W.3d 917 (Tex. App.–Austin 2009, no pet.).

H. TFC 161.001(1)(M)

Where a prior decree of termination as to another child is properly admitted into evidence, the Department need not establish the underlying basis for termination as to the prior decree of termination to satisfy the requirements for termination under (M). *Espinosa v. Tex. Dep't of Family and Protective Servs.*, No. 01-08-00309-CV (Tex. App.–Houston [1st Dist.] Oct. 30, 2008, no pet.) (mem. op.).

I. TFC 161.001(1)(N)

The Department's preparation and administration of a service plan for the parent constitutes

evidence that the Department made reasonable efforts to return the child to the parent. *In re J.R.S., J.L.S., and B.L.N.S.*, No. 2-08-034-CV (Tex. App.–Fort Worth Feb. 5, 2009, pet. denied) (mem. op.).

J. TFC 161.001(1)(O)

1. Court Order Required

Father's parental rights were terminated solely under TFC 161.001(1)(O) and best interest. The record established that father signed the Department's service plan on January 5, 2007. The record did not, however, contain a written order requiring father to comply with the service plan. The Court concluded that because there were no court orders specifically establishing the actions necessary for father to obtain the return of the child, **written or otherwise,** the Department failed to establish by clear and convincing evidence any grounds enumerated under TFC 161.001(1) to support termination. This case was reversed and remanded. *In re B.L.R.P.*, 269 S.W.3d 707 (Tex. App.–Amarillo 2008, no pet.).

(O) requires the existence of a valid, predicate court order that a parent has failed to comply with to obtain the return of the child. No specific order was submitted into evidence or identified as being an order with which Jerry had not complied. While there was testimony about Jerry's compliance with a service plan, it was unclear whether this was an order directed to Jerry. The Court concluded there was legally insufficient evidence of an order directed to Jerry that he violated as required by (O). *In re D.M.F.*, No. 2-08-212-CV (Tex. App.–Fort Worth Apr. 16, 2009, no pet.) (mem. op.).

2. Abuse or Neglect Required

Court upheld directed verdict for father where Department presented no evidence that the child was removed from him due to abuse or neglect. The trial court specifically found that mother had caused a "danger to the physical health or safety of the child" at removal and it was this danger to the child that allowed the Department to remove the child from the mother. *Tex. Dep't of Family and Protective Servs. v. Silva*, No. 01-08-00195-CV (Tex. App.–Houston [1st Dist.] Feb. 5, 2009, no pet.) (mem. op.).

The Department removed the child directly from mother at the hospital the day after he was born. The child's removal had nothing to do with claims of abuse or neglect by Jerry. (O) requires that the removal be from someone with possession of the child. Moreover, (O) applies only to a child who has been removed ***from the parent*** and placed with the Department due to the abuse or neglect of the child. The Court held the evidence legally insufficient to support the trial court's finding that Jerry's parental rights should be terminated under (O). *In re D.M.F.*, No. 2-08-212-CV (Tex. App.–Fort Worth Apr. 16, 2009, no pet.) (mem. op.).

Termination under (O) was upheld; however, the Court found that mother's leaving child in a shelter while she went to commit a crime was not sufficient to establish neglect under (O) because "DFPS provided no evidence that [mother] knew or reasonably should have known that her child would not be taken care of when she left [the child] at the shelter." However, the Court found the evidence 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. *In re A.A.A.*, 265 S.W.3d 507 (Tex. App–Houston [1st Dist.] June 26, 2008, pet. denied) (mem. op.).

3. Abuse or Neglect Specific to Child

Child died from medical neglect while in the custody of mother. Two other children in mother's home were removed. Mother's parental rights were terminated as to the other two children under (O). The Court held that (O) requires that the evidence establish that the children were removed as a result of abuse or neglect "specific to them" by the parent being terminated under (O). *In re J.S.G. and J.A.G.*, No. 14-08-00754-CV (Tex. App.–Houston [14th

Dist.] May 7, 2009, no pet. h.) (mem. op.).

4. Excuses Regarding Compliance

Mother's defense against termination under (O) was based on an excuse of her failure to comply. The evidence established that mother failed to comply with her court services. The Court rejected the argument, stating: "[O], however, does not make a provision for excuses." *In re C.M.C., C.E.C., and G.L.C.*, 273 S.W.3d 862 (Tex. App.–Houston [14th Dist.] 2008, no pet.).

5. Substantial Compliance Rejected

Mother's argument that termination under (O) was insupportable because she substantially complied with services was rejected. She argued that the evidence showed she was receiving psychiatric treatment, had been compliant with her medication, and had not used drugs or engaged in criminal activity. "However, [mother] has not cited any cases, nor are we aware of any, holding that substantial compliance is sufficient to avoid a termination finding under [O]." "To the contrary, Texas courts have held that substantial compliance is not enough to avoid a termination finding under [O]." *In re C.M.C., C.E.C., and G.L.C.*, 273 S.W.3d 862 (Tex. App.–Houston [14th Dist.] 2008, no pet.).

K. TFC 161.001(1)(Q)

1. "Knowing" Requirement

Smith did not find out he was the father of the children until the trial to the bench on January 9, 2007. After his motion for new trial was granted, and after the second trial to the bench, Smith's parental rights were terminated under (E) and (Q) and best interest. On appeal, Smith argued (Q) requires a showing that he knew that he was the children's father before he committed the criminal conduct that resulted in his inability to care for his children. The Court held: "the knowing requirement in subsection Q pertains to a showing that the parent knowingly engaged in the underlying criminal conduct that resulted in his conviction, imprisonment, and inability to care for his child. (Q) cannot be reasonably read to require a showing that the parent knew he was the child's parent at the time he engaged in the criminal conduct." *Smith v. Dep't of Family and Protective Servs.*, No. 01-07-00648-CV (Tex. App.–Houston [1st Dist.] June 19, 2008, no pet.) (mem. op.).

2. Evidence of Parole

Father's parental rights were terminated under (Q). At trial, father testified that he was unaware that he had fathered the child until advised by the Department. Although father was serving a six-year sentence for aggravated robbery with a deadly weapon, not only was he eligible for parole, he had actually had a hearing and was awaiting a decision on whether he would be paroled. He had not had any disciplinary problems while incarcerated and taught an anger management class. On appeal, father argued that the evidence was insufficient to support termination under (Q). Father relied on his testimony of good behavior and a recent probation hearing and claimed that "to the extent possible, due to his incarceration, [he] demonstrated the ability to care for [the child]." The court rejected father's argument regarding evidence of parole, following *In re H.R.M.*, 209 S.W.3d 105, 109 (Tex. 2006), finding that father's testimony regarding his parole and good behavior was not so significant that the jury could not have formed a firm belief or conviction that father would remain incarcerated for two years from the date of the filing of the petition. *Lewis v. Tex. Dep't of Family and Protective Servs.*, No. 03-07-00510-CV (Tex. App.–Austin Aug. 20, 2008, no pet.) (mem. op.).

3. Inability to Care

Father argued that the Department had failed to show that he was unable to care for the child for not less than two years from the filing of the petition, the second prong of (Q). In determining this factor, the court may consider the availability of financial and emotional support from the incarcerated parent. Because the

incarcerated parent cannot directly care for the child, the "care" contemplated by subsection (Q) encompasses arranging care for the child by another. Father testified that he had eight children by six different women. He had no trade or technical skills and had not provided support for any of his children while incarcerated. Father arranged for the child to be care for by the mother who was unemployed, had little money, and had a daughter with a learning disability and a granddaughter with health issues who lived with her. The Court rejected father's argument, finding the above evidence sufficient to satisfy the second prong of (Q). *Lewis v. Tex. Dep't of Family and Protective Servs.*, No. 03-07-00510-CV (Tex. App.–Austin Aug. 20, 2008, no pet.) (mem. op.).

4. Calculation of Two-Year Period

Father's paternity was confirmed approximately a month before trial. Shortly thereafter, the Department filed a fourth amended petition seeking termination of his parental rights under (Q). Father asserted that due process required that the calculation of his two-year period of confinement under (Q) should begin on the date his paternity was confirmed, not the date the Department filed its original petition some seventeen months earlier. In a footnote, the Court stated it did not reach the due process argument because the Department conceded, and it agreed, that the two-year period of father's confinement should be calculated from the date the Department filed its fourth amended petition. *Lewis v. Tex. Dep't of Family and Protective Servs.*, No. 03-07-00510-CV (Tex. App.–Austin Aug. 20, 2008, no pet.) (mem. op).

L. TFC 161.001(1)(R)

The trial court found that mother was the cause of the child being born addicted to alcohol or a controlled substance under (R). The TFC defines "born addicted to alcohol or a controlled substance" as referring to a child "born to a mother who used during the pregnancy a controlled substance [as defined by applicable law]" and who, after birth, as a result of the mother's use of a controlled substance, exhibits withdrawal symptoms, health effects, or the demonstrable presence of a controlled substance in the child's bodily fluids. Mother admitted that she had an extensive history of using drugs, including cocaine, during the first three months of her pregnancy with the child. Also, knowing that it was dangerous to the child for her to use drugs during the pregnancy, mother admitted to drinking three beers and smoking marijuana the day before she gave birth to the child. Medical records reflected that the child tested positive for marijuana, cocaine, and hydrocodone. Mother admitted to hospital staff that she went to a party and smoked a "joint" laced with cocaine. Evidence supporting the child's extensive medical needs included: 1) the child suffered from failure to thrive and required a feeding pump; 2) the child needed a home health nurse; 3) doctors recommended that the child not be removed from foster care; 4) the child had a heart murmur; and 5) the child's foster mother was concerned that the child was a "medically-fragile baby" because she was on a strict feeding routine. The Court found the evidence sufficient to support the trial court's finding of conduct in violation of (R). *In re P.K.C. A/K/A P.K.G.C.*, No. 2-08-060-CV (Tex. App.–Fort Worth Feb. 5, 2009, no pet.) (mem. op.).

X. ALTERNATE TERMINATION GROUNDS

A. TFC 161.002

At the time the Department removed the children, appellant was incarcerated and serving an eight-year sentence for evading arrest. The Department alleged in its original petition that appellant was V.S.R.K.'s biological father. Appellant filed a general denial and a request for appointment of counsel in which he stated, "I am the parent of the child named above [V.S.R.K.]." Appellant requested DNA testing to determine whether he was V.S.R.K.'s father, but the test results were not available at the time of trial. The Court held there are no formalities that must be observed for an admission of paternity to be

effective under TFC 161.002. The Court concluded that Appellant admitted paternity of V.S.R.K. for purposes of section 161.002(b)(1). *In re V.S.R.K.*, No. 2-08-047-CV (Tex. App.–Fort Worth, Mar. 19, 2009, no pet.) (mem. op.).

B. TFC 161.003

Mother does not contest that she is mentally ill or that the Department had been the temporary managing conservator of R.L. for the six months preceding the filing of the petition. She challenges the sufficiency of the evidence showing: 1) her mental illness renders her unable to provide for R.L.'s physical, emotional, and mental needs; 2) her mental illness would continue to render her unable to provide for R.L.'s needs until his eighteenth birthday; and 3) DFPS failed to make reasonable efforts to return R.L to her. The Court stated the Department need only prove that the mental illness **in all probability** will continue to render mother unable to provide for the child's needs until the child's eighteenth birthday. The Court stated there was evidence that mother could not care for R.L. if she did not take medication, that she displayed inappropriate and dangerous behavior as a result of her mental illness, that she had a long history of hospitalization for mental illness, and that she repeatedly refused to take her medication. The Court stated that TFC 161.003 requires the Department to make reasonable efforts to return the child to mother (not to other family members). The creation of the service plan requiring mother to follow the recommendations of her mental health provider; mother's failure to complete the service plan; and evidence that mother was a danger to R.L. because of her behavior when she did not medicate demonstrate the Department's efforts to return R.L. to mother. The evidence supporting termination under TFC 161.003 was legally and factually sufficient. *Liu v. Dep't of Family and Protective Servs.*, 273 S.W.3d 785 (Tex. App.–Houston [1st Dist.] 2008, no pet.).

XI. BEST INTEREST

A. Medical Neglect

The child, S.M., suffered from numerous health conditions, including: respiratory disease, chronic lungs disease, cerebral palsy, muscle spasticity, vocal chord paralysis, convulsions, seizures, gastro-electro-reflux disease, speech disorders, and mixed incontinence. The Department became involved when the child was admitted to the hospital because mother could not afford to have electricity turned on to power S.M.'s feeding tube and oxygen pump. Family based safety services were initiated. Three months later the Department received another referral. The child had been admitted to the hospital with a one hundred and six degree fever. The child was dehydrated and lacking in oxygen because mother had delayed in getting prompt medical attention. The child was hospitalized for approximately the next eight months. Mother's parental rights were terminated under (N) and (O) grounds and best interest. Mother challenged the underlying termination grounds and best interest on appeal. In analyzing best interest, the Court found the evidence of the mother's medical neglect of the child, as well as evidence concerning the child's living arrangements with the current foster caregiver, supported the finding that termination of her parental rights was in the child's best interest. *Quiroz v. Dep't of Family and Protective Servs.*, No. 01-08-00548-CV (Tex. App.–Houston [1st Dist.] April 9, 2009, no. pet) (mem. op.). (*See also In re S.H.A.*, 728 S.W.2d 73, 87 (Tex. App.–Dallas 1987, writ ref'd n.r.e.) (holding medical neglect alone sufficient to support termination).

B. Use of Endangering Conduct

On appeal, mother asserted that the best interest finding must have a firm basis in facts separate and apart from the evidence supporting the statutory termination grounds. She contended that the best interest finding should be reversed if the evidence shows that the abusive or neglectful parent has changed in a material way. The Court

disagreed. The Supreme Court has held that although evidence supporting acts under 161.001(1) do not relieve the petitioner from having to prove best interest, the same evidence may be probative of both. "We hold that, particularly when the evidence shows that the parental relationship endangered the child's physical or emotional well-being, evidence of the parental misconduct leading to the removal and subsequent termination should be considered when reviewing the best interest of the child." *In re C.C., D.W., Jr., and A.W.*, No. 13-07-00541-CV (Tex. App.–Corpus Christi Apr. 2, 2009, pet. filed) (mem. op.).

C. Recent Turnaround

Mother argued that the evidence showed that she was "complying with the Department's service plan and had demonstrated a clear departure from her past failures." She asserted that the court should give deference to her evidence of a recent turnaround given the public policy favoring reunification of families. The Court rejected this argument, noting: "while we agree that a presumption exists that reunification is in the child's best interest, we disagree that evidence of a recent turnaround will *always* offset other evidence favoring termination." *In re C.C., D.W., Jr., and A.W.*, No. 13-07-00541-CV (Tex. App.–Corpus Christi Apr. 2, 2009, pet. filed) (mem. op.) (emphasis in original).

D. Failure to Foster Relationship

The evidence established that father had engaged in substantial criminal conduct and had been incarcerated during the entire time the children were in foster care. The children, who were behind in school due to an unstable lifestyle, were in a stable placement with a relative who was considering adoption. The Court found the evidence and "the lack of a challenge to the statutory grounds justifying termination" sufficient to support the best interest finding. Although the children expressed a desire for father's parental rights not to be terminated and father wrote the children regularly and completed some parenting classes in prison, the Court noted that "[father] had the opportunity to foster his parental relationship with his children but opted instead to engage in criminal conduct detrimental to that relationship." *In re R.L.M., B.M.M., C.M., J.N.M., J.A., T.T., and J.J.R.*, No. 07-07-0489-CV (Tex. App.–Amarillo Oct. 17, 2008, no pet.) (mem. op.).

E. TFC 263.307 Factors

Mother objected to evidence of abusive or assaultive conduct toward another child not the subject of the suit, claiming it was inadmissible under TRE 404(b), which prohibits the admission of evidence of other crimes, wrongs, or acts used "to prove the character of a person in order to show action in conformity therewith." The Court noted the Texas Supreme Court has stated the factors listed in TFC 263.307, including a "history of abusive or assaultive conduct by the child's family", should be taken into account when determining if termination of parental rights is in the best interest of the children. The Court noted that evidence of other wrongs or acts is admissible for determining what is in the child's best interest. The Court concluded that the trial court did not abuse its discretion in admitting the evidence for the purpose of determining whether termination is in the children's best interest. *In re J.A.P., A.K.A.C., D.J.P., and C.C.P.*, No. 06-08-00092-CV (Tex. App.–Texarkana Apr. 1, 2009, no pet.) (mem. op.).

XII. CUSTODY AND GRANDPARENT ACCESS

A. Custody

The TFC requires appointment of managing conservators under TFC 161.207 when parental rights are terminated. The foster parents' attempted to amend their pleadings to be named managing conservators under TFC 153.371 during the termination and adoption hearing. This attempt was struck. Their original petition seeking termination had not requested custody. Therefore, their appointment as managing conservators was not independent of father's

termination. Because termination was reversed, the Court concluded the trial court erred in naming the foster parents managing conservators. *In re D.M.F.*, No. 2-08-212-CV (Tex. App.–Fort Worth Apr. 16, 2009, no pet.) (mem. op.).

B. Grandparent Access

Appellant paternal grandparents filed a petition against the biological parents, seeking to be named as the joint managing conservators of the child. Appellee maternal grandparents filed suit seeking possession and access to the child. Appellants subsequently filed an amended petition seeking termination of the parents' rights; the parents executed affidavits of relinquishment and appellants sought to adopt the child. The trial court granted the appellants' unopposed termination and adoption, but granted the appellees' opposed request for possession and access. The Court reversed the trial court's award of possession and access. Pursuant to *Troxel*, "so long as a parent adequately cares for his children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family." TFC 153.433(2) requires that a grandparent seeking access must overcome the presumption that a parent acts in his or her child's best interest by establishing that "denial... of access to the child would significantly impair the child's physical or emotional well-being." The applicable presumption of parental fitness applied to the case because appellants were the new adoptive parents of the child. The uncontested evidence at the hearing established that appellants had acted as the child's parents, were appropriate, and there was a good relationship between appellants and appellees. An express element of obtaining grandparent access under the statute is the "denial of access or possession to the child." There was no evidence that appellants intended to deny appellees access to the child; rather, the evidence showed that appellants intended to provide access to appellees but did not want to be subject to a rigorous schedule. Further, the only evidence of impairment to the child was a conclusory response by appellee maternal grandmother. Thus, there was no evidence to support a claim of impairment. *In re J.M.T.*, 280 S.W.3d 490 (Tex. App.–Eastland 2009, no pet.).

XIII. POST-TRIAL PRACTICE

A. Notice of Appeal

An appeal from an order terminating parental rights is an accelerated appeal and is perfected by filing a notice of appeal in compliance with TRAP 25.1 within the time allowed by TRAP 26.1(b), or as extended by TRAP 26.3. *See* TFC 109.002(a); 263.405(a). The notice of appeal must be filed within 20 days after the judgment or order is signed. In the case at issue, the notice of appeal was filed more than two months late. Father conceded the notice of appeal was untimely filed, but argued that retained appellate counsel failed to file the notice of appeal through no fault of father's. The Court noted it is to construe the TRAP rules reasonably and liberally so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule. However, the Court is prohibited from enlarging the scope of its jurisdiction by enlarging the time for perfecting an appeal in a civil case in a manner not provided by rule. *See* TRAP 2. Jurisdiction of the Court is invoked by the timely filing of a notice of appeal. In the absence of such, the Court has no jurisdiction to hear the appeal and has no choice but to dismiss the appeal for lack of subject matter jurisdiction. *In re B.H.G.*, No. 01-07-01001-CV (Tex. App.–Houston [1st Dist.] Nov. 6, 2008, no pet.) (mem. op.).

B. Implied Findings

The trial court terminated mother's parental rights finding termination was in the child's best interest and mother had engaged in conduct under (E). The Department sought termination under (E), (N), and (O). On appeal, the Department argued that a finding of conduct under (O) should be supplied because such a finding should be deemed under TRCP 279. The

Department argued that under *J.F.C.*, a finding under (O) should be deemed because evidence supported the finding. In *J.F.*C., because there was a jury finding on the ground but not best interest, and the evidence supported best interest, the court deemed the best interest finding. However, in the instant case, the trial court made express findings as to both the grounds and best interest; therefore, there was no need to supply a missing element. "In sum, an express finding of one or more of the items listed in [TFC 161.001(1)] precludes a finding on appeal regarding the items in [161.001(1)] as to which the court made no express finding." *In re C.A.B.*, No. 14-08-00360-CV (Tex. App.–Houston [14th Dist.] Apr. 2, 2009, no pet.) (mem. op.).

C. *Anders* Procedure

The Dallas Court of Appeals joined its sister courts in holding that *Anders* procedures apply in termination of parental rights cases. *In re D.D., Et. Al.*, 279 S.W.3d 849 (Tex. App.–Dallas Feb. 2009, no pet.).

D. Ineffective Assistance of Counsel

Mother complained on appeal that her counsel was ineffective for: 1) failing to objet to a defective affidavit; 2) failing to object to a custodial caregiver remaining in the courtroom during the trial; 3) failing to adequately impeach custodial caregiver after "his damaging testimony;" and 4) failing to object to hearsay evidence regarding a hair follicle test, complaining that her trial counsel "had a deficient understanding of the rules of evidence." In applying the *Strickland* standard, the Court found that the record was silent as to all issues of which mother complained, and that without explanation as to why trial counsel acted as he did, the Court must presume that trial counsel acted out of sound trial strategy. Mother, failing to show how her trial counsel's performance was deficient, cannot show that such deficient performance resulted in prejudice to her. The judgment was affirmed. *In re Z.D.*, No. 02-07-386-CV (Tex. App.–Fort Worth Sept. 25, 2008, no pet.) (mem. op.).

After mother's motion for new trial was denied, the court of appeals abated the appeal so that mother could develop a record regarding her alleged ineffective assistance of trial counsel. After the hearing, the trial court found that mother's trial counsel was not ineffective. On appeal, mother argued that her counsel was ineffective for: 1) failing to include a claim of ineffective assistance of counsel in her statement of points on appeal; 2) failing to seek a court-appointed expert; 3) failing to properly investigate or prepare for the case, including failing to interview or call witnesses; 4) failing to ask for a continuance; 5) failing to impeach a critical witness; and 6) improperly presenting mother's motion for new trial by failing to have mother present. The Court rejected mother's ineffective claim. Mother's trial counsel did include a claim of possible ineffective assistance of counsel in her statement of points on appeal. There is no *per se* right to appointed counsel, and evidence from the abatement hearing established that trial counsel's decision not to seek an expert was based on trial strategy. Regarding calling witnesses, the abatement record reflected that counsel: 1) did interview a certain witness which mother complained she did not, and counsel chose not to call the witness because he could potentially harm mother's case; 2) there was disputed evidence which the factfinder weighed whether mother advised counsel of another witness; and 3) there was disputed evidence between the testimony of a discussion between mother's aunt and counsel; the trial court could believe counsel. Trial counsel established that she had considered a motion for continuance, had approached the opposing parties regarding a continuance, and did not request a continuance because she did not think she had grounds for one based on mother's incarceration alone. Mother argued that counsel should have impeached mother's fifteen-year old daughter with a prior inconsistent statement regarding a CPS investigation in Oklahoma. The decision on

what to ask during cross-exam-ination falls within the parameters of trial strategy. Counsel testified at the abatement hearing that she did not impeach the child with the statement because it would highlight less favorable evidence from the Oklahoma CPS records. Finally, counsel stated that she had attempted to locate mother for the motion for new trial hearing but was unable to. Mother's ineffective assistance claim was overruled. *Crowden v. Dep't of Family and Protective Servs.*, No. 01-07-00025-CV (Tex. App.–Houston [1st Dist.] Jan. 29, 2009, no pet.) (mem. op.).

E. TFC 263.405

1. Definition of Final Order

On September 24, 2007, the trial court entered an "Interlocutory Order of Termination" following a jury trial terminating father's rights to D.J.R. On November 14, 2007, the trial court entered an "Order of Termination" addressing additional parties and children involved in the case and another father. On November 27, 2007, D.R.'s appointed counsel filed a "Statement of Points to be Presented on Appeal, with Objection, Motion for Extension of Time, and Memorandum of Law" pursuant to TFC 263.405(b). Citing TFC 263.401(d) and *In re T.L.S.*, 143 S.W.3d 284 (Tex. App.–Waco 2004, no pet.), the Department argued that the "Interlocutory Order of Termination", entered September 24, 2007, was a final order with respect to father and, therefore, his statement of points were due no later than October 9, 2007. The Department argued that since his statement of points was filed too late, the Court could not address any of father's issues. The Court rejected the Waco Court's interpretation of TFC 263.401, holding that the plain meaning of the phrase "For purposes of this section …" in TFC 263.401(d) limits the application of the definition of "final order" to TFC 263.401. Thus, the TFC 263.401(d) definition of "final order" does not apply to TFC 263.405 and father's statement of points was timely. *D.R. v. Tex. Dep't of Family and Protective Servs.*, No. 08-07-00355-CV (Tex. App.–El Paso Dec. 18, 2008, no pet.) (mem. op.).

2. Motion for New Trial Insufficient

Mother and father filed only a motion for new trial. A motion for new trial that does not specifically include a statement of points is not sufficient to allow a review of the termination. Because the parents' motion for new trial "made no effort to include a statement of points on appeal", the Court concluded it was without "jurisdiction" to consider the issues on appeal. The Court noted that even if it could consider the parents' motion for new trial, it could still not address the parents' issue on appeal. The only issue raised in the parents' motion for new trial, even if considered sufficient under a lenient standard, stated that the evidence was insufficient to show that the parents were "responsible for any of the events that allegedly put the child in danger." Conversely, in their brief, the parents only argued that the trial court erred in allowing the foster mother to testify that the children had contracted sexually transmitted diseases. Because the Court could not "stretch the issue raised in the motion for new trial sufficiently to cover the contention currently raised on appeal", even if it could consider an issue solely from a motion for new trial, it still could not address the issue raised on appeal. *In re B.L.T.*, No. 06-08-00058-CV (Tex. App.–Texarkana Nov. 26, 2008, no pet.) (mem. op.).

3. Appointment of New Counsel

TFC 263.405 is not unconstitutional when applied to a parent represented by new counsel for the appeal. Appellate counsel, who was appointed the day after the judgment was signed, acknowledged that trial counsel assisted her in the preparation of the parents' statement of points. On appeal, the parents argued that a reporter's record should be supplied to appellate counsel for the preparation of the statement of points when appellate counsel did not represent the parent at trial. At the motion for new trial hearing, the trial court rejected appellate

counsel's statements that she was required to prepare the statement of points "blindly". The parents were uncooperative at trial, the trial court immediately appointed appellate counsel with assurances that trial counsel would be available for consultation, and appellate counsel received trial counsel's notes. No evidence in the record established that circumstances beyond the parents' control prevented them from communicating with appellate counsel. Further, the Department did not move to strike anything from the parents' statement of points, and on appeal, the parents abandoned their challenges to the termination findings. Finally, as to their claim of ineffective assistance of counsel, a record to support same should have been made at the motion for new trial; the fact that trial counsel did not appear at the motion for new trial "is some indication that there was no record of ineffectiveness to develop." Points are required for appeal, but counsel is not required to develop a full brief on the merits for the hearing. "Thus, to obtain a record for the appeal, the appellant must meet a relatively low hurdle of identifying the points for the appeal; if the Department establishes during the hearing that the appellants have not identified a substantial issue for review, the trial court may determine that an appeal would be frivolous and deny a request for a record." Although appellate counsel's job would have been easier with a record, under the circumstances of the case, the lack of a record did not preclude the parents from participating in the motion for new trial hearing, preparing a record to support their ineffective assistance of counsel claim, or arguing that their points were not frivolous. *In re A.F.*, 259 S.W.3d 303 (Tex. App.–Beaumont 2008, no pet.).

4. Extension of Time for SOP

The trial court terminated mother's parental rights and appointed the Department as the child's managing conservator. Mother filed a late statement of points, but requested an extension of time from the trial court which was granted. The court of appeals affirmed the trial court's termination of mother's parental rights, finding that TFC 263.405(b) did not permit an extension of time for filing a statement of points.

On appeal to the Texas Supreme Court, mother argued that she should be permitted an extension of time for filing a statement of points. Although the intended effect of TFC 263.405 was to expedite the final disposition of termination cases, it does not address whether an extension of time for filing the statement of points is permitted. The Court is obligated to promulgate rules of practice and procedure in civil cases. These rules are intended to promote fair, just, and equitable resolution of cases. TFC 263.405 does not indicate legislative intent to unfairly or unreasonably preclude parents from appealing final orders. The Legislature adopted TFC 263.405 in light of the rules of civil and appellate procedure providing for extensions of deadlines under certain circumstances. In fact, TFC 263.405(h) provides that an appellate court may not extend certain deadlines except for good cause. Considering the foregoing, and there being no language in the statute specifically preventing an extension, the Court held: "the provisions of Texas Rule of Civil Procedure 5 apply to the question of whether the trial court may extend the time for filing a statement of points for appeal under section 263.405. Accordingly, the trial court could grant [mother's] motion to enlarge the time for filing her statement of points if [mother] showed good cause for her failure to timely file it."

Good cause under TRCP 5 is established when the party failing to timely file shows: 1) the failure was not intentional or the result of conscious indifference; and 2) allowing a late filing will not occasion undue delay or otherwise injure the other party. The grant or denial of an extension is reviewed for an abuse of discretion. Here, mother's motion for extension stated that her counsel mis-calendared the time for filing post-trial documents. At the motion to extend, mother's counsel advised the court, without objection, that she mistakenly used the date of

receipt of the judgment for the filing date calculation rather than the date the judgment was signed. Mother desired to appeal the judgment at all times and the Department did not contest the allegations in mother's motion or her counsel's explanation. The appellate court did not consider whether mother showed good cause for her late filing. On these facts, the Supreme Court reversed the court of appeals' opinion, finding that mother established good cause for her late filing. The matter was reversed and remanded for consideration of the merits. *In re M.N.*, 262 S.W.3d 799 (Tex. 2008).

5. Effect of Frivolous Finding

An appellate court's affirmance of a frivolous finding contemporaneously affirms the underlying decree. The Legislature established an intricate appeal process in TFC 263.405. If a trial court's finding of frivolousness is upheld, an appellant may not circumvent the procedures for appellate review established in TFC 263.405, even if he does so at his own expense. *In re S.T.*, 263 S.W.3d 394 (Tex. App.–Waco 2008, pet. denied). *But see Vallejo v. Tex. Dep't of Family and Protective Servs.*, No. 03-07-00003-CV (Tex. App.–Austin Apr. 18, 2008, order) (not designated for publication) (affirming the trial court's frivolous finding but leaving open the possibility for the appellant to proceed on the merits at his own cost).

6. Failure to File SOP

One of the issues addressed by the Texas Supreme Court in *J.O.A.* was whether a claim of ineffective assistance of counsel regarding failing to file a statement of points on appeal could be brought in contravention of the statute. In that case, both father's and mother's appointed attorneys continued to represent them during the fifteen-day period of 263.405(b). Neither mother's nor father's attorney filed a statement of points. On appeal before the Supreme Court, father argued that his attorney had been ineffective for failing to file a statement of points on appeal, thus violating his right to due process. The Court agreed. After engaging in a *Mathews v. Eldridge* due process analysis, the Court determined that father had been denied effective representation, and thus due process, stating: "Trial counsel's failure to follow through with his representation until relieved of that duty was tantamount to abandoning his client at a critical stage of the proceeding." "We accordingly agree with the court of appeals that [father] was entitled to effective assistance of counsel through the deadline date for filing a statement of points and that trial counsel's performance during this period was seriously deficient." *In re J.O.A., T.J.A.M., T.J.M., and C.T.M.*, ___ S.W.3d ___, No. 08-0379 (Tex. May 1, 2009).