Termination Case Law Update

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I. PRE-TRIAL ISSUES

A. Standing

1. Foster Parents' Standing to Intervene Governed by TFC 102.004(b)

In 2010, the Department filed suit for the protection of two children. The Department was appointed temporary managing conservator of the children. In February 2012, the foster parents filed a petition in intervention requesting managing conservatorship. The intervenors alleged standing under TFC 102.004(b), which provides, in part: "the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development." The intervenors asserted that that they had past substantial contact with the children and that their intervention is necessary to protect their interest and would not complicate the issues in the case. The respondent parents filed a motion to strike the foster parents' petition in intervention. At the hearing on the motion to strike, the court heard testimony that the intervenors were the foster-to-adopt "parents" of the children, and the children had been living in their home since October 14, 2011. After the hearing, the trial court granted the parents' motion to strike determining that the foster parents lacked standing under TFC 102.003(12), ("a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition").

The intervenors sought mandamus relief, contending that they had no adequate remedy at law because the trial court abused its discretion by striking their petition in intervention under TFC 102.003(12) when they had standing to intervene under TFC 102.004(b). The Houston First Court agreed and granted conditional mandamus relief, holding that the trial court did not consider the foster parents' petition to intervene under the proper statute. The trial court based its ruling on TFC 102.003(12), which addresses foster parents' standing to file an original SAPCR petition. Instead, the trial court should have considered their motion to intervene under TFC 102.004(b), which governs standing to intervene in existing proceedings. TFC 102.004 provides an avenue for foster parents and other persons to participate in a SAPCR apart from filing an original petition when they are deemed by the court to have had past substantial contact with the child if there is satisfactory proof that the appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. The appeals court cited *In re A.M.*, 60 S.W.3d 166, 169 (Tex. App.—Houston [1st Dist.] 2001, no pet.), which recognized that intervening in an existing suit and filing an original suit are distinct legal actions and applying subsection 102.004(b) to foster parents' motion to intervene in suit originally filed by the Department, and that the Legislature created this distinction because it "decided the overriding concern for the best interest of the child when a termination suit is already pending is greater than the concern for the privacy of the parties." The *A.M.* court concluded that, in so doing, the Legislature recognized a "relaxed standing rule for intervention." The Houston First Court held that the trial court abused its discretion when it did not consider the intervenors' petition under the proper statute—TFC 102.004(b). *In re Tina and Greg Salverson*, No. 01-12-00343-CV (Tex. App.—Houston [1st Dist.] Apr. 23, 2012, orig. proceeding) (mem. op.).

2. Lack of Standing to File an Original Petition Under TFC 102.004

N.L.D.'s great-aunt and great-uncle, Jimmy and Angela Black, and Geraldine Black, the child's paternal great-grandMother (collectively referred to as "Blacks"), filed a petition requesting their appointment as the child's managing conservator, alleging that the Mother had neglected and physically abused the child. The Blacks alleged they have standing pursuant to TFC 102.004(a), which provides, in relevant part: "(a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that: (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit." The trial court appointed the Blacks as N.L.D.'s joint managing conservators and Mother as possessory conservator.

Mother appealed, complaining, in part, that the great-aunt and great-uncle lacked standing. The Texarkana Court reversed and remanded the case, in part, because it held that the maternal great-aunt and great-uncle did not have standing under TFC 102.004(a) because they are not related to the child within the third degree of consanguinity. *In re N.L.D.*, 344 S.W.3d 33 (Tex. App.—Texarkana 2011, no pet.).

NOTE: The court of appeals found that Geraldine Black, the child's paternal great-grandMother, is related to the child within the third degree of consanguinity, and although the trial court made no specific finding under TFC 102.004(a)(1) that child's present circumstances would significantly impair the child's physical health or emotional development of the child, it can be inferred from the judgment that all of the necessary findings exist to support such a finding if it is raised by the pleadings, supported by the evidence, and the trial court's theory is consistent with evidence and applicable law. *In re N.L.D.*, 344 S.W.3d 33 (Tex. App.—Texarkana 2011, no pet.).

3. Intervention After Final Order -- No Standing Under 102.004(b)

The trial court terminated parents' rights to the children on January 10, 2008, and appointed the Department the children's permanent managing conservator. Appellants, Husband and Wife, were a fictive kin placement for the children from April 2007 until October 2009. The Department removed the children in October 2009 because Husband tested positive for marijuana. On December 17, 2009, appellants filed a "Petition for Intervention in Suit Affecting Parent-Child Relationship" asserting standing under TFC 102.004(b), 102.003(a)(9), and 102.005. TFC 102.004(b) says that the court may grant a person with substantial past contact leave to intervene in a pending suit. The trial court struck the petition in intervention under 102.004(b) because it concluded that they "lacked standing under section 102.004(b) because their petition was not filed during a pending suit."

On appeal, appellants argue they had standing to intervene "in the termination case under family code section 102.004(b)" because "in a proceeding . . . where parental rights have been terminated and DFPS was named managing conservator, the case remains 'pending' until the subject children have been adopted or become adults." Appellants relied on TFC 263.501(b) to support their argument reasoning "that family code section 263.501(b) requires courts in such cases to conduct periodic placement-review hearings after the entry of the final order of termination." The court explained: "We disagree that the existence of this statutory duty means that the SAPCR remains 'pending' in the sense that term is used in family code section 102.004(b). Section 263.501(b)'s reference to 'a final order' indicates that the court has already decided the termination suit. The proceeding, therefore, is not 'pending' by any ordinary definition of that term. This conclusion is further confirmed by the characterization of the subsequent activities as 'review hearings,' denoting supervision with regard to the results of a proceeding that has already been concluded by the 'final order.'" Citing precedent from the Texas Supreme Court, the court stated that a "termination proceeding, in which a final and appealable order has issued, is no longer 'pending.'" Thus, the court held: "section 102.004(b) was not available to the [appellants] here because there was no 'pending suit' in which to intervene." *Jasek v. Tex. Dep't of Family and Protective Servs.*, 348 S.W.3d 523 (Tex. App.—Austin 2011, no pet.); *see also In re K.A.P.*, No. 14-11-00536-CV (Tex. App.—Houston [14th Dist.] Sept. 20, 2011, no pet.) (mem. op.) ("Where final judgment has been rendered, a plea in intervention comes too late and may not be considered unless and until the trial court first sets aside its final judgment." "Therefore, appellant's remedy lies in either intervening after the judgment is set aside, or in filing an original suit.").

4. "Actual Control" -- 102.003(a)(9)

TFC 102.003(a)(9) "confers standing to bring an original SAPCR to 'person[s], other than a foster parent, who [have] had actual care, control, and possession of the child[ren] for at least six months ending not more than 90 days preceding the date of the filing of the petition.'" After the Department was appointed the children's PMC, it placed the children with appellants, Husband and Wife, fictive kin. Two years after placement, the Department removed the children due to Husband testing positive for marijuana. Appellants' pleading was styled a "Petition in Intervention" but claimed standing to file an original suit under 102.003(a)(9). The Department argued that the appellants failed "to establish standing under section 102.003(a)(9) because they … could not establish that they had 'actual control' over the children because, at all relevant times, DFPS had sole legal control over the children." The trial court found the appellants lacked standing and granted the Department's motion to dismiss.

On appeal, the Department reasoned that the appellants "could not have had 'actual control' during [the two years the children were placed with them] because that requires having the 'authority to make legal decisions, decisions of legal significance and including the responsibilities of a legal parent.'" The Department claimed "that only DFPS had 'actual control' over the children because, as the district court found, DFPS was vested with the ultimate legal authority to make decisions for the children, including the discretion to remove them from the [appellants'] home at any time." The court disagreed with the Department stating that "actual control" does not "hinge[ ] on whether a care giver possesses this sort of legal authority."

The court reasoned: "'actual . . . control of the child,' as used in section 102.003(a)(9), means the actual power or authority to guide or manage or the actual directing or restricting of the child, as opposed to legal or constructive power or authority to guide or manage the child. In sum, these words reflect the Legislature's intent to create standing for those who have, over time, developed and maintained a relationship with a child entailing the actual exercise of guidance, governance and direction similar to that typically exercised by parents with their children."

The court held that in order for appellants to establish standing under 102.003(a)(9), the appellants "had to show that they had actual control of [the children]—meaning the actual power or authority to guide or manage [the children] without regard to whether they had the legal or constructive power or authority to guide or manage [the children]—for at least six months ending not more than 90 days preceding the date of the filing of their petition." Because the evidence established, *inter alia*: (1) the children lived with the appellants continuously for more than two years; (2) appellants filed their petition two months after the Department removed the children; (3) appellants' obligations to care for the children enumerated in the "Placement Authorization" required them to "provide for [the children's] 'daily care, protection, control, and reasonable discipline,' and to enroll them in school"; and (4) appellants provided for the children's "basic needs for food, shelter, medical care, and therapeutic needs" and "structure, nurturing and therapeutic interventions," the court held as a matter of law that the appellants had standing under TFC 102.003(a)(9). *Jasek v. Tex. Dep't of Family and Protective Servs.*, 348 S.W.3d 523 (Tex. App.—Austin 2011, no pet.); *see also In re A.C.F.H. and D.A.B.H.*, ___ S.W.3d ___, No. 04-11-00322-CV (Tex. App.—San Antonio 2012, no pet.).

B. Venue

In November 2007, an order was entered establishing parent-child relationship in Montgomery County in which Mother was appointed managing conservator and Father possessory conservator. In October 2008, Father filed a motion for enforcement of possession and petition to modify the parent-child relationship. After a hearing, Father was granted supervised visitation, but the motion remained pending. On August 11, 2010, Mother filed by facsimile a divorce petition in Harris County and a motion to transfer the SAPCR suit from Montgomery to Harris County, "asserting that the trial court had a duty to transfer the suit to Harris County because a suit for dissolution of the marriage was pending in Harris County", citing TFC 6.407 (which provides that if a SAPCR is pending when suit for dissolution of marriage is filed, SAPCR shall be transferred to court in which dissolution of suit is file). TFC 155.201(a) provides:

> On the filing of a motion showing that a suit for dissolution of the marriage of the child's parents has been filed in another court and requesting a transfer to that court, the court having continuing, exclusive jurisdiction of a suit affecting the parent-child relationship shall, within the time required by Section 155.204, transfer the proceedings to the court in which the dissolution of the marriage is pending.

On August 13, 2010, the trial court held a hearing on Mother's motion to transfer. At the hearing, the trial court noted that it had "not seen evidence of the filing of" a suit for dissolution in Harris County. The trial court said: "Okay. I am going to allow you to prove to the Court that there has been a filing of this divorce action, that it has been filed, and it is on file…. I am not going to rely on just mere representation that there has been a petition filed at this hour…." Mother's counsel presented testimony that his paralegal had faxed the divorce petition for filing but had not yet received a return fax showing that the petition had been file-stamped and assigned a cause number. The court denied Mother's motion to transfer and set the hearing on Father's motion to modify for August 16th. On August 16, 2010, trial counsel presented the trial court with a fax confirmation showing that Mother's petition for divorce had been sent by fax to Harris County together with an unfiled copy of the petition. On that date, the trial

court heard evidence on Father's motion to modify and ordered that he have standard, unsupervised possession of the child.

Mother appealed the denial of her motion to transfer. The Corpus Christi Court of Appeals reiterated that "[t]he duty to transfer the SAPCR is considered a mandatory, ministerial act upon a 'showing that a suit for dissolution of the marriage of the child's parents has been filed in another court.'" The court of appeals stated: "The trial court's comments suggest that it denied [Mother's] motion to transfer because no proof was offered that a petition for divorce had actually been filed in Harris County." It continued: "We recognize that '[b]y its very terms, [TFC 155.201(a)] requires a certain factual showing before the mandatory duty to transfer is triggered.'" The court found that "the trial court gave [Mother] an opportunity to 'prove to [the court] that there has been a filing of this divorce action.' No evidence that the divorce petition had been filed in Harris County was offered. Based on the evidence presented, we conclude [Mother's] motion to transfer failed to make a showing that a suit for dissolution of the marriage of the child's parents has been filed in another court." Accordingly, the Corpus Christi Court affirmed the trial court's denial of the motion to transfer. *In re R.E.A.*, No. 13-10-00557-CV (Tex. App.—Corpus Christi Aug. 11, 2011, no pet.) (mem. op.).

C. Competency to Stand Trial and Due Process

On appeal, Father argued: (1) the trial court erred in denying his motion for continuance; (2) the trial court erred in proceeding to trial when he was incompetent because to do so violated his procedural due process rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution; and (3) the trial court erred when it permitted him to testify over counsel's TRE 601 objection that he was not competent to testify. The court construed Father's first two arguments to "allege [he] was deprived of his procedural due process rights under the United States and Texas Constitutions" "due to his alleged incompetence at the time of trial."

In accordance with well-established precedents, the court found that Father's "rights to retain custody of [the child] is a constitutionally protected liberty interest and must be afforded procedural due process." Prior to conducting its due process analysis, the court acknowledged "that there is no Texas authority which would permit a trial court to halt termination proceedings due to the incompetency of the parent." Father argued "that because a parental rights termination proceeding is a quasi-criminal proceeding, procedural due process requires (as in criminal cases), that he not be subjected to trial until such time as he is competent to do so." Although "various courts have recognized termination proceedings to be quasi-criminal in nature," the court responded: "We do not believe [ ] that classification of a termination proceeding as quasi-criminal can (or should) be a sole factor which is outcome determinative in resolving the question of whether [Father's] termination of parental rights proceeding should have been continued until such time as he regained competency. Rather, we look to and weigh the *Eldridge* factors to determine if the termination proceeding in this case afforded [Father] the measure of procedural due process to which he was entitled—that is, whether he received a fair hearing."

The court conducted a *Mathews v. Eldridge* analysis to decide "what process is 'due' before the attempted deprivation of parental rights." In its analysis of the first *Eldridge* factor—the private interests affected by the termination proceeding—the court wrote: "[Father's] liberty interest in the parent-child relationship is of fundamental significance . . . and weighs heavily in favor of strong procedural protections." The court also acknowledged "that while the constitutional underpinnings of the parent-child relationship are of fundamental significance, they are not absolute." It continued: "It is also essential that the child's emotional and physical interests not be sacrificed in order to preserve the parent-child relationship." Children, like their parents, "have an interest in an accurate resolution and just decision in termination cases." "[C]hildren also have a strong interest in a final decision on termination so that adoption to a stable home or return to the parents is not unduly prolonged."

In applying its private-interest analysis to the facts of the case, the court considered that the trial court was presented with a situation whereby it "could not accommodate [the child's] interest in achieving permanency without proceeding to trial while [Father] was incompetent." The dismissal date in the case was April 30, 2011, and the trial was held February 28, 2011.

On appeal, Father argued "that the trial court should, at the least, have postponed the trial until April 30, 2011, the absolute deadline for the case to be tried or dismissed, in order to afford him additional time to regain competency." The court explained: "Despite [Father's] request for a continuance in which he argued there was time to regain

competency prior to the 'drop dead date' of April 30, 2011, there is no evidence to indicate any likelihood or probability that [Father] would regain competence by this time, if ever." The court noted that: (1) Father was found incompetent to stand trial in a criminal case on March 4, 2010; (2) on September 29, 2010, a licensed psychologist reported that "[Father] remained incompetent to stand trial" and "[r]estoration of [Father's] trial competency is very unlikely in the near future"; and (3) Father's "records from North Texas State Hospital indicate that he 'has been unable to achieve competency to stand trial during this hospitalization' and that incompetency was expected to continue for more than ninety days." The court continued: "Under this scenario, the trial court could not protect the child's interest in achieving permanency in a timely fashion and accommodate [Father's] request that the case not proceed to trial while incompetent." It reasoned: "the interests of the child appeared to be in direct conflict with the interests of the parent. In such a head-to-head conflict, one person's interest must trump the other; here, the interest of the child is the trump card."

In its analysis of the second *Eldridge* factor—the government's interest in proceeding—the court defined the state's interest to include "protecting the best interest of the child, an interest which is 'served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home,'" citing *In re M.S., E.S., D.S., S.S., and N.S.*, 115 S.W.3d 534, 547 (Tex. 2003). It continued: "The State also has an interest in an accelerated timetable and a final decision that is not 'unduly prolonged' with negative psychological effects on the children left in limbo." The court explained: "the State's interest in economy and efficiency were urgent. The State had a strong interest in conducting the termination proceeding in a timely fashion, in light of the fact that the deadline to try or dismiss the case was looming on the horizon like a harbinger of doom." "The stark reality of the situation left the State with a Hobson's choice—to either dismiss the case, which would result in [the child] living in limbo (as her Father was hospitalized for mental problems) or proceed to trial while [Father] remained incompetent." The court decided: "Here, the State's interest in economy, efficiency, and finality were strong. In light of the fact that the Texas Family Code does not allow for extensions beyond what was already given, this factor weighs in favor of conducting the termination proceeding forthwith."

The court's analysis of the final *Eldridge* factor—risk of erroneous deprivation—reiterated that "the Texas Family Code does not provide for a parental competency hearing in any type of case." The court explained the procedural safeguards provided to parents who suffer from a mental or emotional illness or from a mental deficiency as contained in TFC 161.003. A trial court is required to appoint an attorney ad litem for a parent subject to a suit for termination under TFC 161.003. The court identified "[o]ther procedures designed to reduce the risk of an erroneous deprivation" to include: (1) the clear and convincing burden of proof of the predicate grounds and best interest; and (2) the strict scrutiny review by appellate courts of decisions to terminate parental rights. The court explained: "[Father] was represented in the termination proceeding by his attorney ad litem, who did all that one might anticipate could be done to guard against a trammeling of his rights and concerns." Father was also represented by a guardian ad litem.

Father argued that the procedural safeguards were inadequate to prevent the risk of erroneous deprivation of his parental rights, and suggested that the court "adopt the additional procedural safeguard utilized in criminal cases—to prevent the government from subjecting him to trial at a time when he lacked 'the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.'" Father alleged that because he had already been determined to be mentally incompetent "there remained the risk of erroneous deprivation of his rights." The court reasoned: "Given that [Father] was provided with the full panoply of constitutional safeguards provided by the Texas Family Code, we cannot conclude the risk of erroneous deprivation in this case was significant." Relying on the presumption that the procedural rules of TFC 263.401 comport with constitutional due process requirements and noting that 263.401 "does not provide for an extension of the deadline for resolution of termination cases beyond what was given in this case," the court held that "[a] calibration of the *Eldridge* factors in this case reveals that [Father] was accorded all process due him in the parental rights termination hearing."

The court explained: "the imposition of a requirement that [Father's] termination trial be delayed indefinitely until a return of competence would contravene the State's and the child's interest in a final decision so that the child's adoption or placement in a stable home or return to the parent is not unduly prolonged. The trial court was given no indica-

tion of when [Father] might regain competency, if ever." *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.).

D. Fair Notice Standard for Pleading

Appellants' 2009 pleading was styled as a "Petition in Intervention" to a SAPCR suit that was concluded in 2008 by a final order. The court stated that "this inaccurate nomenclature is not singularly fatal" because "Texas follows a 'fair notice' standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." The appellants' petition asked the court to appoint them managing conservators of the children, and "in addition to seeking to 'intervene', asserted that [they] had 'general standing under section 102.003(a)(9) to file an original SAPCR.'"

The court reasoned: "by requesting appointment as the children's managing conservators, referencing an original SAPCR—as opposed to an intervention in a pending matter—and invoking a provision governing standing to bring an original SAPCR (and section 102.003(a)(9) specifically), the [appellants] provided DFPS and the district court adequate and fair notice of their intent to bring an original SAPCR under section 102.003(a)(9) to modify [the children's] conservatorship." The court continued: "because the district court had acquired continuing exclusive jurisdiction over [the children] as a result of the final order of termination, it would have been proper for the [appellants'] to file an original proceeding there." *Jasek v. Tex. Dep't of Family and Protective Servs*, 348 S.W.3d 523 (Tex. App.—Austin 2011, no pet.).

II. TRIAL PRACTICE

A. Denial of Continuance to Conduct Discovery

In April 2005, Husband and Wife separated and Husband moved from Texas to California. On May 17, 2006, Wife filed a petition for divorce. Husband was represented by counsel for one year and had one continuance granted during that time period. Seven days before trial, the trial court granted Husband's counsel's motion to withdraw and gave notice in open court that trial was set for August 30, 2007. Husband, who was not present, elected to represent himself after counsel's motion to withdraw was granted. On August 30, 2007, prior to the final hearing, Husband filed an emergency motion to reset the trial setting, arguing that he received insufficient notice of the hearing by opposing counsel through written correspondence on August 27, 2007. Again, Husband failed to appear so the trial court denied his motion and proceeded to hear evidence at the final hearing. On September 4, 2007, the trial court signed the final divorce decree.

Husband argued on appeal that the trial court's setting of the final trial was "premature" because he was not allowed to conduct discovery on the cross-petition he filed on August 20, 2007. The Corpus Christ Court of Appeals construed Husband's motion as a motion for continuance. The court stated that in order to determine if a court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery it must consider: (1) the length of time the case has been on file; (2) the materiality and purpose of the discovery sought; and (3) whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. In rejecting Husband's argument, the court relied on the fact that Husband was served with the divorce petition on May 30, 2006, Wife propounded discovery to Husband from May 2006 to August 2007, and "At no time during that period did [Husband] conduct his own discovery, as he was permitted to do as a party to the pending litigation." Because "all permissible forms of discovery were available and went unused by [Husband]," the court held that Husband's argument is without merit.

Husband also argued that three days' notice of the hearing was insufficient for him to travel from California to Texas "and amounted to a hasty setting." The court rejected this argument citing TRCP 245, which provides that a case previously set for trial may be reset upon reasonable notice to the parties. The court acknowledged that there is a lack of due process when a party is not given "the required reasonable notice." However, in this case, the court reasoned that three days' notice was reasonable and that a review of the record "shows that the final hearing in this cause has been set and reset multiple times over the course of approximately one year." The court reasoned that Husband was given a reasonable three-days' notice and was required to make every effort to be in attendance and stated that Husband's "failure to appear on August 30, 2007 was not enough good cause to support a continuance or postponement of his case set for final disposition." The Court held that the trial court did not abuse its discretion in denying Husband's motion for continuance. *Hontanosas*

v. Hontanosas, No. 13-08-00309-CV (Tex. App.—Corpus Christi Feb. 9, 2012, no pet.) (mem. op.).

B. Parties

Prior to the final hearing, Mother executed an affidavit of voluntary relinquishment of her parental rights. The trial court took no action regarding Mother's parental rights prior to the final hearing, during which the court considered both parents' rights related to the child. At a pretrial hearing, Father objected to Mother testifying at the final trial arguing that because she executed the affidavit of relinquishment, she was no longer a party and was not listed as a non-party witness in discovery. The trial court overruled Father's objection. Mother testified at trial.

On appeal, Father argued the trial court erred by allowing Mother to testify as a party during the final hearing. Father's complaint is that after Mother executed the affidavit, she was no longer a party to the case and should not have been permitted to testify because she was not included on the Department's witness list. The court stated: "In essence, [Father] argues that [Mother] was a 'surprise witness,'" and therefore he "concludes that by permitting her to testify, the trial court violated his right to due process under the state and federal constitutions." The court explained that "[Father's] constitutional arguments are predicated entirely on his summary conclusion that [Mother] was not a party to the case when the final hearing took place. He fails to cite to any legal authority holding that execution of a voluntary relinquishment affidavit, without further action by the trial court, had any effect on [Mother's] status as a party to the case." The court held the trial court did not abuse its discretion in allowing Mother to testify because Father's "argument is contrary to Texas law":

> When a parent executes an affidavit voluntarily relinquishing their parental rights, the affidavit merely provides a basis for the trial court to enter a judgment of termination, it has no immediate effect on the parent-child relationship. Only the court having considered the grounds for termination and the best interests of the child, has the authority to terminate parental rights by entry of a final judgment. Despite the affidavit, there was no final judgment terminating [Mother's] rights prior to the final hearing. [Internal citations omitted].

In re J.L.J., 352 S.W.3d 536 (Tex. App.—El Paso 2011, no pet.).

C. No Notice of Hearing

N.L.D.'s great-aunt and great-uncle, Jimmy and Angela Black, and Geraldine Black, the child's paternal great-grandMother (collectively referred to as the "Blacks"), filed a petition requesting their appointment as the child's managing conservator, alleging that Mother had neglected and physically abused the child. Mother was served but did not file an answer. Mother appeared at the temporary orders hearing and requested a continuance, which was granted with an order that Mother submit to a drug test. Mother neither submitted to a drug test nor appeared at the rescheduled temporary orders hearing. The Blacks were appointed temporary managing conservators of the child. After Mother's time for filing an answer had expired, a final hearing was set without notice to Mother. The court appointed Jimmy and Angela Black, and Geraldine Black as N.L.D.'s joint managing conservators and appointed the Mother as possessory conservator.

Mother appealed, complaining, in part, that she had not received notice of the final hearing. The Texarkana Court of Appeals reversed and remanded the case, in part, because it held, that Mother's announcement at the first hearing entitled her to notice of the final trial. The court reasoned that Mother's "appearance" at the initial temporary order hearing entitled her to notice of the final hearing. Whether a party "appeared" at a hearing depends on the nature and quality of the party's activities in the case. "A party who is 'a silent figurehead in the courtroom, observing the proceedings without participating,' has not" made an appearance. The Texarkana Court found in this case that Mother conferred with Black's counsel who advised the court that Mother did not wish to relinquish custody or grant full access to the Blacks. Mother told the court that she had been approved for free legal assistance and had scheduled an appointment to meet with her attorney the following day, and she requested a two-day continuance. The appeals court concluded that although Mother neither announced ready nor examined a witness, the above facts constituted an appearance that entitled her to notice of the final hearing in accordance with her due-process rights. The Texarkana Court reversed the final order, set aside the default, and remanded the case for a new trial. *In re N.L.D.*, 344 S.W.3d 33 (Tex. App.—Texarkana 2011, no pet.).

D. Appointment of Counsel for Parents

1. Timing of Appointment of Counsel

The Department filed an "Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship" on December 10, 2009. The adversary hearing was held on January 21, 2010. The temporary orders from that hearing indicating that Mother appeared at the hearing and announced ready and that the trial court was "deferring its finding regarding an attorney ad litem for [Mother] because she 'has not appeared in opposition to this suit or has not established indigency.'" The service plan dated February 16, 2010, indicated that the permanency goal for all of the children was "family reunification." The Department's permanency progress report filed September 23, 2010, changed the permanency goal to "termination of parental rights." The next permanency hearing was held October 8, 2010, and the court's docket sheet entry "reflects that the court noted that the Department's goal was 'now termination,' and that both parents were advised of their right to an attorney; the court appointed an attorney to represent [Mother]." A new trial date was set for December 16, 2010, but Mother's counsel requested a continuance, which was granted to February 3, 2011. After the bench trial, the court terminated Mother's parental rights.

On appeal, Mother argued that "the trial court should have appointed counsel to represent her soon after the Department filed its petition because it was obvious she was indigent and opposed the termination of her parental rights." She "contend[ed] the trial court had notice of her indigency as early as December 16, 2009 by virtue of the caseworker's affidavit attached to the Department's original petition, which stated she was currently receiving food stamps." She "also argue[d] her appearances at all of the hearings showed she was 'opposed to' any termination of her parental rights from the beginning of the proceedings; therefore, the trial court erred in not appointing her an attorney ad litem right away."

Although the appellate record did not include an affidavit of indigence filed by Mother as required by TFC 107.103(d), the October 8th order appointing trial counsel for Mother indicated that Mother had filed an affidavit of indigency. However, the record did not contain any instance in which Mother "ever made an earlier request for appointment of an attorney, either orally or in writing, or filed an answer or testified in opposition to removal of the children prior to October 8, 2010."

The San Antonio Court of Appeals reiterated that "the complete failure to appoint counsel for an indigent parent is reversible error, but that the trial court has discretion in the timing of appointment of counsel based on the open-ended language of section 107.013 and the omission of any set time-frame in the statute for appointment of counsel." The court then reasoned: "[Mother] neither appeared in opposition to removal of her children nor filed an affidavit of indigence as required by section 107.013 at any time prior to the appointment of counsel on October 8, 2010. Moreover, the Department's stated permanency goal for the children was family reunification until the September 23, 2010 progress report, when it was changed to parental termination; [Mother] was appointed counsel at the next hearing held two weeks later. [Mother's] appointed counsel had four months to prepare for trial and [Mother] does not assert that her counsel was unprepared or otherwise rendered ineffective assistance due to the timing of the appointment." The court held "that the trial court did not abuse its discretion under TFC 107.013(a) by appointing an attorney ad litem for [Mother] on October 8, 2010, ten months after the Department's petition was filed." *In re C.Y.S., et al*., No. 04-11-00308-CV (Tex. App.—San Antonio Nov. 30, 2011, no pet.) (mem. op.); *see also In re A.M. and J.E.M.*, No. 13-11-00304-CV (Tex. App.—Corpus Christi Nov. 22, 2011, no pet.) (mem. op.)

2. Formal Request for Counsel Not Required

On January 11, 2010, while Mother was in jail, the Department filed a petition seeking the termination of Mother's parental rights to daughter and son. Mother was still in jail at the time of the adversary hearing on January 25th, when she agreed to an order appointing the Department temporary managing conservator of son. Because Mother had agreed to the temporary order, the trial court deferred a finding regarding the appointment of counsel. Mother was later released from jail and participated in review conferences from March 1, 2010 through October 4, 2010. After that, she stopped attending conferences or hearings. Through most of case prior to the final hearing, the Department's stated goal was reunification. Mother was arrested again on March 9, 2011, released on May 2, 2011, and re-confined on May 25, 2011, after being adjudicated guilty and sentenced to serve six years in TDCJ.

At the time of the June 14, 2011 final hearing, Mother was in jail, waiting to be transferred to prison. The only issue considered at the final hearing was Mother's parental rights to son, because Mother had earlier agreed that the Department should be named permanent managing conservator of daughter. Mother replied "yes" when asked if she was ready for trial. She confirmed that she agreed that the Department be permanent managing conservator of the daughter and that she understood that the trial would only concern son. The court made no further inquiries of Mother. Mother participated in the trial, trying to object to some exhibits and conducting cross-examination. One exhibit introduced by the Department was a "Judgment Adjudicating Guilt" against Mother. Attached to the judgment, was a "Bill of Costs" from the district clerk, listing court-appointed attorney's fees of $1600.00. The court terminated Mother's parental rights to son and appointed an attorney ad litem to represent Mother on appeal.

On appeal, Mother complained that the trial court erred in terminating her parental rights without appointing trial counsel under TFC 107.013(a)(1) (providing for the appointment of counsel to "an indigent parent . . . who responds in opposition to the termination"). The Amarillo Court of Appeals noted that the evidence at trial of the $1600 in attorney's fees in the criminal case led to a logical deduction that Mother was found indigent for the purposes of the criminal case shortly before the final termination trial. It then framed the issue before it as: "[D]oes a trial court err in failing to appoint an attorney ad litem to represent a parent when the parent at issue has made no formal request?"

The Department argued on appeal that absent a formal request for counsel, the trial court had no duty to appoint counsel. It also argued that Mother's failure to present an affidavit of indigency supported the trial court's actions. Mother argued that the trial court's failure to inquire whether she desired counsel was an error of constitutional magnitude.

The Amarillo Court of Appeals reasoned that requiring a formal request for counsel would mean that the trial court would not have a duty to inquire about Mother's indigency status even if she had filed a written answer to the suit. It distinguished the cases relied upon by the Department, and queried, "What is the duty of the trial court when the parent appears in person to contest the termination but does not affirmatively request appointment of counsel? Does the failure to file a written answer mean that the parent is not responding in opposition to the termination?"

The court of appeals rejected the Department's argument that Mother "did not appear in opposition," noting that her responses on the day of trial—concurring that she had reached an agreement regarding daughter and that the issue remaining to be tried involved her son—made it "apparent" that she was responding in opposition to the termination. It held that no "magic words" were required to be "in opposition" to a request for termination, and it noted that the trial court was aware of the appointment of counsel issue, as evidenced by the trial court's order deferring a finding regarding the appointment of counsel. The court of appeals commented that Mother's position at trial had changed since the time of the adversary hearing, stating: "We see her position in opposition from both the lack of a voluntary relinquishment and [Mother's] efforts on the day of the hearing."

The appellate court also rejected the Department's argument that Mother's announcement of ready for trial, without making a request for counsel, meant there was no error in not appointing counsel. The appellate court held that such a contention placed an additional requirement on a parent that does not exist in TFC 107.013(a)—to both appear in opposition *and* to request an attorney.

The court of appeals noted that the record affirmatively undermined the Department's position because: (1) Mother was brought to the courthouse from the jail for the hearing; (2) she had been adjudicated guilty and sentenced to six years in prison; (3) an exhibit introduced by the Department contained a bill of costs in the criminal case indicating that Mother had an appointed attorney; and (4) when the children were removed, Mother was receiving state benefits in the form of a Lone Star Card. The court of appeals specifically referenced the Department's petition, noting that it contained a request that the trial court inquire about the indigency of any parent who appeared in opposition to the termination without an attorney—which the appellate court remarked was "the exact scenario we find in this record."

The court of appeals finally rejected the Department's contention that Mother's failure to request the appointment of counsel at or before the final hearing meant that she had voluntarily waived her right to appointed counsel. It noted that the record was devoid of any indication that Mother knew of her right to claim indigency and request counsel.

It also observed that in criminal cases, by analogy, a waiver of the right to counsel must be made voluntarily and intelligently and with knowledge of the dangers and disadvantages of proceeding to trial without counsel.

The court of appeals concluded: "In consideration of the recognized constitutional dimensions of the parent-child relationship, we see no reason why the trial court should not make an inquiry into whether [Mother] desired to proceed without benefit of counsel." The appellate court sustained Mother's issue and reversed and remanded the case for a new trial. *In re J.M.*, 361 S.W.3d 734 (Tex. App.—Amarillo 2012, no pet.); *but see In re A.M. and J.E.M.*, No. 13-11-00304-CV (Tex. App.—Corpus Christi Nov. 22, 2011, no pet.) (mem. op.) ("In a termination proceeding, a trial court has discretion not to appoint counsel until after a parent has requested appointment.").

3. No Right to Appointed Counsel of Choice

Immediately before trial began, court-appointed counsel for Father and Mother informed the court that his clients wished for him to be discharged from representing them and desired that a specifically-named attorney be appointed in his place. The trial court noted that it did not have a motion to substitute before it and that the specifically-named attorney was not present in court. The trial court also commented on the fact that the mandatory dismissal date was in a few days. The trial court denied the request, the case proceeded to trial, and Father's and Mother's parental rights were terminated.

On appeal, Father and Mother complained that they were forced to go to trial "without counsel of their own choosing." The Austin Court of Appeals wrote that there were no cases dealing with this issue in the parental-rights context, but noted that the Texas Supreme Court has looked to well-established criminal jurisprudence as a guide when deciding questions that arise frequently in the criminal context but only recently became part of parental-rights jurisprudence. The court of appeals stated that it is well-established that an indigent criminal defendant does not have a right to court-appointed counsel of his or her own choosing. The appellate court then rejected Father and Mother's complaint, holding that "the conclusion that an indigent criminal defendant has no right to appointed counsel of his or her choosing applies equally in the parental-rights context." *Elder v. Tex. Dep't of Family and Protective Servs.*, No. 03-10-00876-CV (Tex. App.—Austin Sept. 20, 2011, no pet.) (mem. op.).

E. Monitored Return

The Department brought a petition seeking termination of Mother's parental rights. Shortly before the original statutory dismissal date in the case, the associate judge ordered a monitored return of the child to Mother and set a new dismissal date of February 12, 2011, as required by TFC 263.403(b)(2). About two and a half months later, the associate judge issued a monitored return disruption order, removed the child, and set a new dismissal date of May 15, 2011, per the requirements of TFC 263.403(c). The final bench trial commenced on May 9, 2011, and all parties rested and made closing arguments on May 11, 2011. The associate judge reserved ruling for a later date. On May 20, 2011, five days after the expiration of the dismissal date set pursuant to TFC 263.403(c), the associate judge announced that the court was ordering a second monitored return to Mother and would give the parties an opportunity to reopen the evidence in the termination trial at the conclusion of the monitored return. On June 10, 2011, the associate judge signed an order granting the monitored return and setting a new dismissal date of November 15, 2011. The Department appealed the case to the referring court, which adopted the associate judge's ruling, but granted an emergency stay. The Department then filed a petition for writ of mandamus against the referring court.

The Fort Worth Court of Appeals conditionally granted the Department's petition for writ of mandamus, holding that the language of TFC 263.403 denied the trial court the authority to order a monitored return after the new date for which the case was set for dismissal pursuant to TFC 253.403(b)(2) or (c). The Court of Appeals explained that although TFC 263.403 allows a trial court to retain jurisdiction and enter an order for the monitored return of a child beyond the provisions of TFC 263.401, the monitored return provisions of TFC 263.403 contain their own dismissal date requirements that the trial court "shall" abide by. "Simply put, no part of the plain and unambiguous terms of section 263.403 permits a trial court to order a monitored return after the dismissal date established by subsection (c) of section 263.403 has passed."

In this case, "[w]hen the associate judge announced that she was ordering a monitored return, she stated she was doing so 'in the middle [of] this final hearing,' and she also said, 'I think I can do this in the middle of this.'" The court stated: "The associate judge thus appeared to rely on

section 263.403(c)'s 'unless the court has commenced' language as authority for ordering the post-dismissal date monitored return because [the child's] termination trial had commenced before the [ ] dismissal date." The court explained: "We cannot agree that the legislature intended that section 263.403(c) be used to permit a trial court to bypass the dismissal date and order a monitored return so long as the final trial on the merits has commenced before the dismissal date." *In re Tex. Dep't of Family and Protective Servs.*, 348 S.W.3d 492 (Tex. App.—Fort Worth 2011, orig. proceeding).

III. EVIDENTIARY ISSUES

A. Public Records Exception

The Texarkana Court of Appeals held that a "Contact Log Narrative", which contained observations and notes made by a Department special investigator during an investigation, was admissible as a public record and report under TRE 803(8). The court of appeals noted that under TRE 803(8), "records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth: . . . (B) matters observed pursuant to a duty imposed by law . . . or (C) in civil cases as to any party . . ., factual findings resulting from an investigation made pursuant to authority granted by law" do not constitute hearsay unless they indicate a lack of trustworthiness. The appellate court held that because the contact log narrative tracked the special investigator's observations made during his investigation, the trial court did not abuse its discretion in admitting the contact log narrative over a hearsay objection. *In re B.G.M.*, No. 06-10-00022-CV (Tex. App.—Texarkana Aug. 4, 2011, pet. denied) (mem. op.).

B. Department's Service Plan Admissible –TRE 803(8)

TFC 263.101 requires the Department to file a family service plan in the trial court within forty-five days after conservatorship is granted. TRE 803(8) allows a trial court to admit a document over hearsay objections if it is a "[r]ecord[ ], report[ ], statement[ ], or data compilation[ ], in any form, of [a] public office[ ] or agenc[y] setting forth … the activities of the office or agency [or] … matters observed pursuant to duty imposed by law as to which matters there was a duty to report". Because the Department complied with TFC 263.101 and "a statement and compilation of data required to be filed with the court" "qualifies as a public record", it "was within the trial court's discretion to determine that the copies of the plans were admissible." *In re R.R.*, No. 01-10-01069-CV (Tex. App.—Houston [1st Dist.] Oct. 20, 2011, pet. filed) (mem. op.). [**NOTE:** The issues before the Texas Supreme Court do not pertain to the trial court's admission of the Department's service plan.]

IV. CHILD CUSTODY

A. General Denial Sufficient to Contest Change in Conservatorship

T.R.B. is the adoptive Mother of Y.B., K.B., and T.B. and their only legal parent. T.R.B. was married to and later separated from D.S. D.S. filed a suit affecting the parent-child relationship seeking conservatorship of the girls. T.R.B. filed a general denial. The Department later sought to terminate T.R.B.'s parental rights to the children and the suits were consolidated. After the Department had rested and before T.R.B. had presented her case, the Department and D.S. announced that they had reached an agreement. Under that agreement, the Department and D.S. would be joint managing conservators of the girls and T.R.B. would be their possessory conservator with no right of possession. T.R.B., who was not party to the agreement, objected to the agreement and complained that she was being denied her right to a jury trial. The trial court entered a directed verdict in favor of the Department and D.S. with the terms of T.R.B.'s possession, if any, to be determined at a later date. The trial court entered the directed verdict based on a perceived pleading error that T.R.B. had not requested a claim for affirmative relief with respect to conservatorship. T.R.B. filed a petition for writ of mandamus.

The San Antonio Court held that T.R.B.'s general denial was sufficient to contest any change in conservatorship and that she clearly asserted her rights as the sole parent in this case. The Department and D.S. had the burden to rebut the presumption that a parent shall be appointed sole managing conservator unless the appointment of the parent as sole managing conservator would significantly impair the child, either physically or emotionally. TFC 153.131; 263.404(a). The Court held that the Department and D.S. were required to carry their burden when seeking to reduce or eliminate T.R.B's conservatorship status. The trial court's belief that the general denial was insufficient to raise a fact issue on T.R.B.'s conservatorship and its directed verdict neglected the burden of proof in this case and was an abuse of discretion. Writ conditionally grant-

ed. *In re T.R.B.*, 350 S.W. 3d 227 (Tex. App.—San Antonio 2011, orig. proceeding).

B. No Parental Presumption in Suit to Modify Conservatorship

Parents were divorced in 2006 and parents were named as joint managing conservators of the children with Mother having the exclusive right to establish the residency of the children. After the divorce, the children resided with Mother, a maternal aunt, and an adult sister. In 2008, Mother passed away and maternal aunt and the children's adult sister filed an original suit affecting parent-child relationship requesting to be appointed joint managing conservators of the children. Both the aunt and adult sister swore out an affidavit averring that eight days after Mother's death, Father had forcibly entered their house and removed the children. They also feared for the children's well-being because of the Father's history of domestic violence. Father filed a motion to dismiss alleging that aunt and sister did not rebut the parental presumption under TFC 151.131 by showing that awarding custody to Father would result in physical or emotional harm to the children. The trial court granted Father's motion with respect to conservatorship, signed a temporary order allowing the aunt and adult sister to have supervised visitation, and appointed an attorney *ad litem* for the children. The attorney *ad litem* filed a cross-petition for modification requesting that the sister be appointed sole managing conservator and Father possessory conservator of the children. At trial, the court appointed the adult sister and Father as joint managing conservators with the sister having the exclusive right to establish the residency of the children.

On appeal, Father argued that the trial court abused its discretion by appointing the sister as joint managing conservator of the children because there was no evidence that appointing the Father as a sole managing conservator would significantly impair the children's physical health or emotional development. The attorney *ad litem* filed a brief contending that because the suit was a modification, the parental presumption did not apply. The San Antonio Court of Appeals agreed, holding that modification suits are brought under Chapter 156 of the Family Code, and the chapter does not require the rebuttal of the parental presumption, only that the petitioner demonstrate a material and substantial change since the entry of the last order and that the modification would be in the children's best interest. The San Antonio Court affirmed the conservatorship. *In re N.L.V., D.N.V., and G.R.V.*, No. 04-09-00640-CV (Tex. App.—San Antonio May 4, 2011, no pet.) (mem. op.).

V. General Challenges to Termination

A. Conviction Not Required for Termination

In 2008, two months after being born, one of the two twins died. Medical experts said the child, D.G., died from dehydration and starvation. Mother had five surviving children. The Department sought conservatorship of the children, and another child born about a year later. At the time of trial, Mother "was under indictment for the murder of D.G." After Mother's appellate counsel filed an *Anders* brief, pro se Mother filed a brief complaining "that she had not been convicted of murder at the time of the termination trial." The court explained: "the family code allows a parent's rights to be terminated if the parent places a child in jeopardy, regardless of whether criminal charges support the termination proceeding." It continued: "Although it is a ground for termination if a parent is convicted of certain crimes against a child . . ., there is no requirement that she be convicted of, or even criminally charged with, misconduct that can give rise to a termination proceeding. Thus, the fact that at the time of trial [Mother] had not been convicted of a crime in connection with D.G.'s death is of no import." *Rodriguez v. Tex. Dep't of Family and Protective Servs.*, No. 03-10-00361-CV (Tex. App.—Austin Aug. 4, 2011, pet. denied) (mem. op.).

B. Home Study Not Required for Termination

The failure to conduct or obtain a home study on possible relative placements pursuant to TFC 262.114, is "not a bar to termination." The Waco Court of Appeals rejected Mother's complaint that such a failure was reversible error, and it noted that numerous courts of appeals have also rejected this type of complaint. The court of appeals further stated that trial court does not abuse its discretion in determining that it would be against a child's best interest to delay a suit in order to evaluate a relative, risking dismissal of the case. The appellate court also noted that there is no statutory or common-law authority imposed on the Department to place a child with a relative before a party's parental rights may be terminated. *In re G.B. II*, 357 S.W.3d 382 (Tex. App.—Waco 2011, no pet.) (mem. op.).

VI. TERMINATION GROUNDS

A. 161.001(1)(B)

The Department responded to a referral alleging that the children were in danger due to neglectful supervision. The allegations were that Mother would leave the children with family members for up to a month without returning for them. The Department removed the children from Mother in December 2009, and placed them in foster care with the Browns. "Father was aware of CPS's involvement and signed a release allowing the children to be placed with the Browns." The case was then assigned to at Department conservatorship who could not locate Father. Mother told caseworker that Father was living "in Kansas City somewhere."

It was not until August 2011 that Father "finally contacted" the caseworker. Father said he did not contact the caseworker "because he did not have stable housing or employment." Father initially requested a visit with the children, but then cancelled due to a family wedding that would "'interfere' with his plans to visit the children." Father did not visit the children, never sent presents, and did not write or call them. Mr. Brown testified at trial and "said that Father has made no attempt to visit the girls while they were in the Browns' care and that he did not provide any financial support or supplies to help care for the children." Father's rights were terminated pursuant to findings under (B), (N), and best interest.

TFC 161.001(1)(B) allows for the involuntary termination of a parent's rights if the court finds that the parent has "voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months." On appeal, Father only challenged the sufficiency of the evidence supporting the finding under (B) that he left the children in the possession of the Browns without expressing an intent to return.

The evidence showed that Father: (1) knew the Department placed the children with the Browns and he wanted the children to live with them; (2) knew the Department tried to find him for months, but decided not to contact the Department; (3) never visited the children, never sent them any presents, and never wrote or called them; (4) did not show any interest in seeing the children; (5) never expressed an intent to return for the children to Mr. Brown; and (6) never provided any financial support to the Browns for the children. In holding that the evidence was legally and factually sufficient to support the trial court's finding under (B), the court reasoned: "There was no evidence that Father was interested in gaining custody of the children, moving to Texas to be with the children, or bringing the girls to Missouri. The evidence supports the trial court's inherent finding that Father has no plans for a permanent reunification with his children." *In re G.A.H. and K.D.B.*, No. 02-11-00015-CV (Tex. App.—Fort Worth Oct. 6, 2011, no pet.) (mem. op.)

B. TFC 161.001(1)(D)

1. Conditions and Surroundings

Mother argued that the evidence was legally and factually insufficient to support a finding under TFC 161.001(1)(D) because evidence at trial established that the children were clean, well-dressed, and happy in her care, and there was no evidence about the conditions or surrounding of any of their homes prior to removal. In rejecting Mother's arguments, the Houston First Court of Appeals reiterated that "evidence of the environment in which children live can encompass more than the physical characteristics of a home," and it cited to evidence of "a history of CPS involvement with the family, that prior to the Department taking custody of the children, [Mother] had been unable to provide stable living conditions," as well as evidence of the children's repeated exposure to domestic violence and illegal drug use. *In re M.T.W., A.N.W., and S.M.W.*, No. 01-11-00162-CV (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, no pet.) (mem. op.).

2. Evidence Factually Insufficient to Establish (D)

Child was born in August 2008 and lived with her Mother, Father, and maternal grandMother in her grandMother's home. Child's older sister also resided in the home. Father was not the Father of child's older sister. In November 2008, Father moved out amid allegations of domestic violence between himself and Mother. He was permitted to continue visiting child and her older sister. Mother had been using drugs since she was eleven years old and admitted she was using drugs in 2009. In June 2009, she was investigated by the police for forging checks on her relative's accounts. A search warrant was obtained and on June 10, 2009, the police conducted a raid of grandMother's home. The Department was contacted and, following the raid, child was removed. The Department investigator testified that, at the time of the raid, grandMother's home

was "in disarray, had large black trash bags and debris scattered throughout and presented a hazardous environment for young children." Mother's uncle testified that the children were living in "filth and trash" and that bags of trash would pile up "for weeks in the kitchen and living room" and that the "bottoms of [older sister's] feet were black from filth." The home also contained controlled substances and drug paraphernalia. There were drugs in the bathroom which were in easy reach of older sister. As a result of the raid, Mother was charged with endangering a child, to which she pleaded guilty and was granted deferred adjudication and placed on community supervision for five years. At the time of the raid Father was serving a twenty-two month sentence for evading detention. His sentence had been imposed in April 2009, and he was scheduled to be released in February 2011.

The Amarillo Court of Appeals found that the Department did not provide any evidence demonstrating Father's knowledge of the conditions of the home after he moved out in November 2008. The Court stated that Father showed that he did not live in the home at the time of the raid, was not connected to the drugs or forgeries, and had no input regarding child's care while she was in the care of her Mother and grandMother. The Court reasoned that Father expressed concern for child in November 2008, after discovering that Mother was breastfeeding the child while abusing methamphetamines, but not "because of [child's]' living environment." The Court noted that Father threatened to leave Mother if she did not get clean and that Father testified that he contacted the Department and the police Department to report Mother's drug abuse. Father attempted to remove child, but when he placed child's car seat in his car, Mother accused him of stealing the car seat and the police prevented him from leaving with the child. Under these facts, the Amarillo Court of Appeals held that the evidence was factually insufficient to establish that Father knowingly placed or allowed the child to remain in conditions or surroundings that endangered the child's emotional or physical well-being. *In re I.G.H.*, No. 07-10-0458-CV (Tex. App.—Amarillo Mar. 6, 2012, no pet.) (mem. op.).

3. Unexplained Injuries

Mother and Father became involved in July 2007; they began living together immediately and D.W. was born in April 2008. On April 27, 2009, Mother took one-year-old D.W. to the emergency room. He was transferred to another hospital where he was admitted for cellulitis, and abscess to his right buttock with redness and swelling extending to his scrotum. D.W. was given medication but his abscess had to be drained surgically. There were signs of a prior abscess, which Mother treated with antibiotics. While still in the hospital, a physician became concerned about "greenish" bruises on his forehead and "purple and red" bruises on his ear and requested that the hospital's CARE team evaluate D.W. for abuse. The pediatric nurse practitioner that evaluated whether D.W. was the victim of physical abuse testified:

> [T]hat multiple bruises on young children raise a suspicion of non-accidental trauma and that bruising on the ear is difficult to get accidentally because of how a one-year-old falls. D.W. had multiple bruises to his forehead, "pinpoint" bruising to his lower right earlobe and below the ear, bruising to the inner surface of the right ear, and a linear abrasion to the right lower cheek, all in different stages of healing.

Mother explained that the ear bruising was the result of D.W.'s falling into the corner of a coffee table. The head bruising was caused by D.W. falling off the bed the prior week. Mother and Father later told a caseworker that a ceramic doorstop may have fallen on D.W.'s head. The nurse practitioner thought the coffee table explanation was "not consistent" with the ear bruises. A skeletal study for broken bones and a head CAT scan for skull and brain injuries was ordered. The CAT scan revealed a healed fracture to the back of the skull, the thickest part of the skull. The nurse practitioner testified that it would "take a tremendous force" to cause that type of fracture, and a fall could not have caused that type of injury. Both parents said they did not know how D.W. received the skull fracture. The nurse practitioner testified that it was possible that Mother did not know what happened to D.W. to cause the skull fracture, but with the force necessary to cause such a fracture, D.W. would have been crying really hard from the pain. As a result of its investigation, the Department found "reason to believe" for physical abuse of D.W. by an unknown perpetrator. The court of appeals affirmed termination of Father's parental rights under (D). It held that the evidence is legally and factually sufficient, "especially given D.W.'s unexplained skull fracture." *In re D.M., A.M, A.J., and D.W.*, No. 10-11-00163-CV (Tex. App.—Waco Jan. 18, 2012, pet. denied) (mem. op.).

C. TFC 161.001(1)(E)

1. Failure to Take Psychiatric Medications

Mother had been diagnosed with paranoid schizophrenia and was regularly prescribed various anti-psychotic medications to help control her symptoms. She was also diagnosed with depression and prescribed medications for that condition. Mother had not regularly taken her medications. Mother's first daughter was removed from her custody due to Mother's physical abuse and volatile behavior. Daughter went to live with her Father and Mother retained her parental rights. In January 2010, Mother gave birth to a second daughter and the hospital contacted the Department due to concerns about Mother not taking her medications and sleeping with the baby in a physically unsafe manner. Mother admitted she had stopped taking her medications without being advised to do so by her physician and that she did not intend to start taking them again until the summer. She also failed to appreciate any risks to her child. The Department removed the baby from Mother's care. Mother required hospitalization due to a mental health crisis in July 2010. However, she did not resume taking her medications until October or November 2010. There was further evidence of Mother's failure to treat her mental health issues including the fact that she suffered from manic episodes, delusions, hallucinations, and had been hospitalized for her conditions three times during the two-to-three year period preceding trial. Mother's evaluating psychologist related that Mother's plan was to only take her medications when she believed the symptoms were recurring. The psychologist indicated that this was extremely dangerous because Mother's symptoms would most likely come back suddenly and severely.

The Austin Court found that there was substantial evidence that Mother was unwilling or unable to appreciate the consequences of failing to treat her mental illness as evidenced by testimony from Mother and the psychologist that Mother downplayed the significance of her symptoms and the failure to take her medications. Evidence showing Mother's repeated and ongoing failure to take her psychiatric medications and failure to appreciate the consequences of failing to treat her mental illness was therefore factually sufficient to support termination under (E). *Maxwell v. Tex. Dep't of Family and Protective. Servs.*, No. 03-11-00242-CV (Tex. App.—Austin Mar. 23, 2012, no pet.) (mem. op.).

2. Drug Use During Pregnancy

Mother appealed the termination of her parental rights, challenging the sufficiency of the evidence to support termination under TFC 161.001(E). Mother had a long history of substance abuse, failing to seek recommended drug treatment, and engaging in criminal actions in order to obtain drugs or while under the influence of drugs. GrandMother testified that when Mother became pregnant, Mother "would fall asleep talking to you. She would miss the seat. You know, things that it would be obvious she was not—not in control of herself. She at that time then really quit seeing me very much." Mother testified that she used marijuana the day before the child was born and all throughout her pregnancy. She also admitted that the child was born addicted to methadone and marijuana, had problems because of the drugs, and had a seizure right after she was born. After the child was removed, Mother slept through several visits with the child. Mother explained at trial that she fell asleep during a visitation because she was "coming off drugs." Although her doctors recommended drug counseling, Mother failed to seek treatment. Mother admitted that she could not care for the child and stated that she was not trying to have the child returned to her nor was she seeking visitation; rather, she just did not want to be excluded from the child's life. The Texarkana Court of Appeals held that the evidence was sufficient to establish that Mother engaged in conduct which endangered the physical or emotional well-being of the child and so supported a finding under TFC 161.001(1)(E). *In re I.H.R.*, No. 06-11-00121-CV (Tex. App.—Texarkana Mar. 9, 2012, no pet.) (mem. op.) ; *see also In re B.R.*, No. 02-11-00146-CV (Tex. App.—Fort Worth Nov. 10, 2011, no pet.) (mem. op.) (court held that drug use during pregnancy constitutes endangering conduct).

3. Severe Neglect

Mother gave birth to S.I.H. in February 2008. Mother testified that the child had no special medical conditions at that time. In 2009, Mother and S.I.H. began living with Jacqueline. Mother left the child with Jacqueline in 2010. In June 2010, Jacqueline called the Department, stating she was unable to care for S.I.H. because she had psychotic issues, post-traumatic stress disorder, substantial history of drug abuse, and "many suicide attempts." The Department removed S.I.H. based on its concern that Mother abandoned him.

At removal, S.I.H. had a "'a normal weight', but he was 'significantly delayed.' His head was flat on one side and looked 'grossly misshapen.'" The Department's investigator took the child to the children's hospital. At the hospital, she and another investigator "were able to play with [S.I.H.]; they sang to him while he learned the song, danced, and smiled, which indicated to [the investigator] that he could learn but had been severely neglected." The investigator testified that a doctor diagnosed S.I.H. to be suffering from severe neglect. The investigator testified that S.I.H.'s head "looked much more normal" after she saw him "sometime after his removal". This indicated to her that the misshaping was caused by neglect and was not a deformity. S.I.H. also had "drooping" on the left side of his face and tooth decay attributable to neglect, based on diagnoses received by the Department. In finding the evidence factually sufficient to support termination of Mother's parental rights under (E), the court reasoned: "The trial court could have justifiably based its endangerment finding on [S.I.H.'s] physical issues at the time of his removal." *In re S.I.H.*, No. 02-11-00489-CV (Tex. App.—Fort Worth Mar. 15, 2012, no pet.) (mem. op.).

4. Child's Emotional Issues

Mother left S.I.H. in Jacqueline's care. Jacqueline called the Department and said that she could no longer care for S.I.H. The Department removed S.I.H. due to concerns that he had been abandoned by Mother. After his removal, it was determined that S.I.H. "had significant developmental delays, and he had to wear a helmet because he would 'throw tantrums and bang his head on the floor.'" The evidence at trial showed that after he was removed from Mother's care "for an extended period", S.I.H. was no longer throwing such tantrums. In finding the evidence factually sufficient to support termination of Mother's parental rights based on a finding under (E), the court stated: "[S.I.H.'s] apparent emotional issues that he developed while in appellant's care also support the trial court's endangerment finding." *In re S.I.H.*, No. 02-11-00489-CV (Tex. App.—Fort Worth Mar. 15, 2012, no pet.) (mem. op.).

5. Lack of Stability

During the pendency of the case, Mother was homeless, and at other times, she stayed with friends. Mother could not give the Department's caseworker the addresses of the places she was living. In finding the evidence factually sufficient to support termination of Mother's parental rights under (E), the court reasoned: "more than a year after [S.I.H.'s] removal, [Mother] still could not offer him stable housing or reliable transportation; she recognized that she was not prepared to take him home. The trial court could have relied on these facts to find endangerment." The court continued: "[Mother's] employment history (or lack thereof) also casts doubt concerning her ability to adequately provide for [S.I.H.], which factors into our review of the trial court's endangerment finding." *In re S.I.H.*, No. 02-11-00489-CV (Tex. App.—Fort Worth Mar. 15, 2012, no pet.) (mem. op.).

6. Failure to Visit

After the Department removed S.I.H. in June 2010, Mother was granted one-hour weekly visits with S.I.H. However, Mother stopped visiting S.I.H. after January 2011; the termination trial was held in November 2011. The Department's caseworker testified that Mother missed her weekly visits with S.I.H. after January 2011 "because she 'was busy, she had a job interview, or she didn't have transportation.'" The caseworker said that he had tried to persuade Mother to use public transportation or to walk to visits if necessary. In finding the evidence factually sufficient to support termination of Mother's parental rights under (E), the court reasoned that Mother's "failure to attempt to visit [S.I.H.] for several months during the pendency of this case supports the trial court's finding of endangerment of [S.I.H.'s] emotional well-being." The court cited to the caseworker's response when asked what affects a parent's lack of contact has on the child. The caseworker replied: "It's a huge impact. You know, children thrive on consistency. And if they don't have that, especially something as important as their parental relationship, it can be very damaging." *In re S.I.H.*, No. 02-11-00489-CV (Tex. App.—Fort Worth Mar. 15, 2012, no pet.) (mem. op.).

7. Evidence Factually Insufficient that Appellant Sexually Abused Children

Following a bench trial, Father's parental rights to three children were terminated under TFC 161.001(1)(D) and (E) grounds and best interest. Prior to removal, the children lived alternatively with Mother, Father, and a maternal aunt, from whom they were removed for neglectful supervision. At one point while living with their Mother, the children's household included Mother's live-in boyfriend. After removal, the oldest and middle children tested positive for herpes, nonspecific type (not specific for oral or genital herpes). Later test results indicated that the

oldest and middle children were positive for oral herpes and negative for genital herpes. The youngest child tested negative for genital herpes. Several months later, Father tested positive for genital herpes.

After removal, the middle child, who was four years old at the time, made outcries that her "Father showers with her", and told a forensic interviewer at a children's assessment center (CAC) that her "Daddy and mommy bit [her and licked [her]," pointing to her genitals and bottom, and that "Father" rubbed her genitals. She described his genitals as "red and green." She also stated that "her Father" urinated in front of her and "sneaked" into the bathroom when she was in it, and her " 'daddy' pulled out his penis and peed on [a house] fire."

At trial, the forensic interviewer testified that she interviewed the middle child because "they tested positive for herpes." She admitted that she did not establish who the child was referring to when she used the term "daddy" or "Father." The interviewer also acknowledged that she did not know if the child was referring to the man that Mother had been living with or to Father. Evidence was presented that a fire occurred at a home in Galveston in which the children lived in with Mother and her live in-boyfriend; Father did not live at that home. The forensic interviewer testified that she unable to say whether the children were sexually abused.

The children's licensed professional counselor testified that the middle and youngest children referred to their foster Mother as "Mommy," and the oldest child referred to her Father as "daddy." The counselor admitted that the Mother had a boyfriend, she did not get a specific name for the man that the oldest child referred to as "daddy," and she did not determine the living arrangements the children had with the Mother's boyfriend.

A forensic services supervisor at CAC, who had no direct contact with the children, testified that the children were referred for forensic interviews because they "had tested positive for herpes 1 and 2, and one of the children had disclosed they were taking a bath with their Father." The supervisor indicated that the middle child, who made the initial outcry gave a forensic interview, and subsequently had five more forensic evaluations ten months after the first forensic evaluation. The supervisor agreed that she could not identify Father (appellant) as "daddy", nor was the context clear regarding any touching that occurred. Although the supervisor's summary of the initial forensic interview stated that the middle child "disclosed details that are highly suggestive of sexual victimization and exposure. That is, her dad was rubbing her when she was rubbing him," she was not able to identify any place in the interview where that specific incident was described. Finally, the supervisor admitted that CAC was not able to identify who "daddy" is.

A Department caseworker testified that all three children tested positive for "[h]erpes one and two." She acknowledged that on a second test, the children all tested negative for genital herpes, but she felt that the youngest child displayed symptoms of genital herpes because her aunt reported that she had "marks" or "bumps" near her genital areas. She also explained that pediatricians told her that "herpes is hard to detect" because an infected person had to be having an active outbreak in order to test positive.

A Department case specialist answered affirmatively when asked if she had been "informed by anybody" that each of the children had been diagnosed "positive for herpes one and two", and she testified that the Department did not have copies of each positive test result for herpes on the children. She also testified that the children had "[a]t least three" "positive herpes test[s]." She acknowledged that she had signed off on a treatment plan for the middle child from a children's center that stated "bio Father has been cleared of any charges related to the sexual abuse of [the children.]"

Father testified that Mother's live-in boyfriend had threatened to sexually abuse the children, and he had reported this to the police and the Department.

The Houston First Court of Appeals noted that the caseworker's testimony that all three children tested positive for "herpes one and two" was not supported by the medical records introduced at trial. The medical records admitted at trial suggested that the oldest and middle children tested positive for "unspecified" herpes (not specific to oral or genital), then tested positive for oral herpes, and all of the children tested negative for genital herpes. No testimony by any medical experts was offered at trial.

The Houston First Court of Appeals found that because there was un-objected-to testimony that the children had oral and genital herpes, the evidence was legally sufficient to support termination. However, the appeals court found that the evidence was factually insufficient to support termination under TFC 161.001(1)(E). It noted that: (1) there was no documentary evidence that any of the children

have genital herpes or any sexually transmitted disease; (2) the medical records indicated that only appellant tested positive for genital herpes—all three children tested negative for genital herpes; (3) the oldest and middle child tested positive only for oral herpes and there was no evidence regarding oral herpes for the youngest child; (4) there was no evidence that Father had oral herpes; (5) no evidence was offered at trial regarding whether any other individuals who had lived with the children or associated with them had been tested for herpes; and (6) there was no expert medical testimony concerning the transmission of the two types of the virus or whether either could be contracted apart from sexual contact.

The court of appeals acknowledged that the "record is replete with statements that the children tested positive for both oral and genital herpes, including references to other tests and hearsay statements from pediatricians regarding the detection of herpes[.]" However, it also noted that the Department did not provide direct evidence that the children's references to sexual abuse by "dad" and "daddy" referred to appellant, the treatment plan for the middle child indicated that Father had been cleared of sexual abuse charges, and the guardian ad litem had never heard any outcries from any of the children or heard about any abuse or neglect. Finally, the court noted that, although the Department introduced evidence of Father's prior criminal conduct, the only offenses occurring after the oldest child's birth were misdemeanors, and the Department did not argue that those offenses occurred in the children's presence or caused the children to suffer any "actual injury."

With regard to (D) ground, the Houston First Court found that after the Mother and appellant separated, the children lived with the Mother or a maternal aunt. During the time when the children lived with the Mother or the aunt, a fire occurred and Mother's then-boyfriend threatened to molest the children. However, there was no evidence that Father knew the fire happened, and there was evidence that he reported the threat to the police and to the Department. The appeals court noted that the Department's brief referenced exhibits that were admitted, but not discussed at trial. These exhibits included the Mother's psychological evaluation, which included the statement that the children witnessed appellant being physically, verbally, and sexually abusive to the Mother. The Court wrote, "We do not dispute that the exhibits are in evidence. But it shocks our conscience for DFPS to suggest that a judgment can be factually sufficient based on evidence never discussed or argued to the fact-finder." The appeals court found the evidence factually insufficient to support both TFC 161.001(1)(D) and (E), reversed the judgment and remanded the case for a new trial. *S.H.R. v. Tex. Dep't of Family and Protective Servs.*, __ S.W.3d __, No. 01-10-00999-CV (Tex. App.—Houston [1st Dist.] 2012, no. pet. h.).

NOTE: A concurring opinion and a dissenting opinion were also issued. On June 14, 2012, the court of appeals issued a supplemental opinion on rehearing in which it set aside the judgment issued on April 20, 2012, and issued a new judgment reversing only the portion of the trial court's final order affecting the termination of appellant's parental rights, thus leaving intact the portion of the final order granting the Department permanent managing conservatorship of the children.

D. TFC 161.001(1)(F)

1. Ability to Pay

Mother challenged the legal and factual sufficiency of the evidence to support a finding under TFC 161.001(1)(F) that she failed to support the children in accordance with her ability during the requisite statutory period. However, at trial, Mother testified that she "always" provided the children "things to substitute for my child support" that were worth more than the $282 a month that she had been ordered to pay, even when she did not visit the children. She also testified that she felt that the "gifts" or "things that [she] bought" for the children "would substitute for" for the court-ordered child support. The Houston Fourteenth Court of Appeals held that this evidence that Mother "always" bought the children items in lieu of paying child support would support a finding that Mother had the ability to pay some child support during the requisite statutory period. The court of appeals noted that Mother's primary support obligation was to pay the court-ordered child support, but Mother had ignored this responsibility by providing certain necessities directly to the children, thus circumventing the ability of the Department and the foster families to recoup money they were spending to support the children. The appellate court concluded that because Mother had the ability but chose not to pay at least some amount of child support, the trial court could have reasonably made a finding under TFC 161.001(1)(F), and the evidence was legally and factually sufficient to support that finding. *In re D.M.D., T.S.D.,*

T.M.D., D.M.D. a/k/a D.D., 363 S.W.3d 916 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

2. Duty to Support Exists Regardless of Paternity Having Been Adjudicated

Child was born in May 2007. At the time of child's birth, Father was not present. Mother put another man's name on the birth certificate because she "wasn't really sure" who the Father was because she had been living with her boyfriend for four months. Father completed DNA testing and the results confirmed that Father was child's biological parent. Father visited child one to two times per week for approximately three or four months after his birth but then stopped visiting. In September 2008, Father filed a pro se petition to establish parentage. In March 2009, the trial court ordered three supervised visits per week for Father. Father only went to one visit. On July 1, 2009, Mother's boyfriend partner filed a "First Amended Counter-Petition to Adjudicate Parentage" seeking to terminate Father's parental rights to child. A trial was held in December 2009 after which the trial court announced its decision to terminate Father's parental rights. The parties stipulated during trial that Father was child's biological parent. In February 2010, the trial court entered an order adjudicating Father as child's Father, terminating Father's parental rights, and appointing Mother and her boyfriend as joint managing conservators of child. TFC 161.001(1)(F) allows involuntary termination in cases where the parent has failed to support the child in accordance with the parent's ability for one year ending within six months of the filing of the petition. The court defined the relevant twelve-month period of non-support as twelve consecutive months from January 1, 2008 to July 1, 2009, the date that Mother's boyfriend filed his counter petition seeking to terminate Father's parental rights.

Father argued on appeal that he had no duty to support the child until his paternity was established. The Fort Worth Court rejected this argument holding that a parent's duty of support exists from the moment he recognizes the child as his own, not from the adjudication of parentage. The Court reasoned that since Father had been recognized as being child's Father since receiving the DNA test results; the parties stipulated to this fact at trial; Father had visited child and provided support for him; and had never doubted or disputed his paternity, his duty to support the child for purposes of 161.001(1)(F) began as early as January 1, 2008. *In re A.S.L.*, No. 02-09-00452-CV (Tex. App.—Fort Worth May 26, 2011, no pet.) (mem. op.).

E. 161.001(1)(K)

1. Feeling Pressured Is Not Coercion

During a jury trial, parents' counsel asked for and was granted a recess to "finalize" a conversation with his clients. About four hours later, parents' counsel informed the court that his clients were waving their right to proceed with the jury trial and were signing affidavits of relinquishment with respect to their two children. The Department then moved for and was granted a trial amendment to proceed under TFC 161.001(1)(K) ground. The Department then conducted a bench trial on the basis of the affidavits of relinquishment and a rule 11 agreement in which the foster parents agreed to allows the parents "access" to the children four times a year. The parents testified that they had consulted with their attorney before signing the affidavits of relinquishment, their signing of the affidavits was in the children's best interest, they signed the affidavits voluntarily, and knew that they could not change their minds once they had signed them. The court granted the termination under (K) ground and best interest.

The parents complained, in part, that they had not signed their affidavits voluntarily because they felt pressured, believed they had no other choice, and were "confused." The Houston First Court reiterated that once a voluntary affidavit of relinquishment of parental rights has been properly executed under 161.103, that is prima facie evidence of its validity, and the burden then shifts to the party contesting its validity to prove by a preponderance of the evidence that the relinquishment was executed as a result of fraud, coercion, or duress. The court found in this case that the parents had four hours to discuss their relinquishment with their attorney, they testified that they had signed the relinquishments voluntarily, and an interpreter was present throughout the four-hour discussion with their attorney and at trial. The court held that although the parents may have felt "pressured" to execute the relinquishments and "forced" to sign them, there was no evidence of any "threat" that would have rendered them unable to withhold consent. The judgment was affirmed. *Montes v. Tex. Dep't of Family and Protective Servs.*, No. 01-10-00643-CV (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.) (mem. op.).

2. Reasons to Invalidate Voluntariness Rejected

Father appeals the trial court's termination of his parental rights based on his irrevocable affidavit of relinquishment. Father was in prison at the time of removal and throughout the case. Father was bench warranted from prison to attend a permanency hearing scheduled two weeks before the final trial. The day of the permanency hearing, Father was given several hours to consider whether he wanted to sign an affidavit of relinquishment of his parental rights or move forward with a jury trial. During that time, Father met with his Mother, Mother of the child, the proposed adoptive Father, and his attorney. Father decided to sign the relinquishment in exchange for the adoptive parents agreeing to send him semi-annual photos and updates on the child. Father then waived the jury trial that was scheduled in two weeks.

At the final hearing, Father's attorney announced that Father wanted to withdraw his affidavit and proceed to trial at a later date. The trial court allowed Father to testify regarding the reasons why he wanted to withdraw his affidavit of relinquishment. Father testified that he had not taken his prescribed medications for two days prior to the execution of the affidavit, he was not thinking clearly that day, and he felt pressured to sign the affidavit by the child's Mother and his past. He changed his mind because the adoptive parents had made an agreement with the Mother for visitation if certain conditions were met, which he had just found out about and with which he did not agree. Father informed no one—family members visiting him in jail or his attorney—of his decision to change his mind until the day of the final hearing.

On appeal, Father does not argue that the affidavit was involuntary because of fraud, duress, or coercion. He complains that his affidavit was involuntary because he had not taken his medications for the two days prior to its execution and therefore, he was not thinking clearly. The court noted that Father still had not taken his medication as of the day of trial, and that Father acknowledged he was thinking "more clearly" the day he signed the relinquishment than he was the day of the hearing. However, there was no evidence describing the effects of Father not taking his medication or in what way he was affected beyond not thinking clearly. The court found that Father failed to meet his burden of proving he did not voluntarily execute the affidavit of relinquishment. Despite his complaint that he "felt pressured" to sign the relinquishment, there was no evidence of overreaching or fraud, and nothing to rise to the level of coercion. The court held that the evidence was legally and factually sufficient to support the finding that the affidavit was voluntarily executed. *In re C.L.*, No. 10-11-00228-CV (Tex. App.—Waco Nov. 16, 2011, no pet.) (mem. op.).

F. TFC 161.001(1)(L)

TFC 161.001(1)(L) provides for termination of parental rights of a parent who has been found guilty of serious bodily injury to a child under section 22.04 of the Texas Penal Code. Father argued on appeal that because his conviction for this offense was in the process of being appealed, it was not final and therefore it could not be used as the basis to terminate his parental rights under TFC 161.001(1)(L). The Amarillo Court of Appeals rejected Father's argument and adopted the analysis of the Austin Court of Appeals in *Rian v. Tex. Dep't of Family and Protective Servs.*, No. 03-08-00155-CV (Tex. App.—Austin July 31, 2009, pet. denied) (mem op). The Amarillo Court recognized that the *Rian* court "specifically addressed whether or not termination under subsection (L) had a finality of conviction element" and "'concluded that the legislature intended to permit termination under section 161.001 based on conviction without regard to whether appeals were exhausted.'" It noted that in *Rian*, the conviction at issue was being appealed, and the appellant contended that the evidence of the conviction was not admissible because the conviction was not final. According appellant, this meant that the evidence was insufficient. The *Rian* court disagreed and found "no requirement of finality for the use of a conviction to support an allegation of violation of subsection (L)." The Amarillo Court found the *Rian* court's analysis "dispositive of [Father's] challenge" and overruled Father's challenge to the sufficiency of evidence to support termination under TFC 161.001(1)(L). *In re T.C.C.H. and E.S.K.H.*, No. 07-11-00179-CV (Tex. App.—Amarillo Dec. 22, 2011, no pet.) (mem. op.).

G. 161.001(1)(N)

1. Reasonable Efforts to Return and Failure to Visit

On October 29, 2008, about two months before the birth of her youngest child, the Department received a referral of neglectful supervision regarding the Mother and her seven children. The report alleged that Mother was incar-

cerated for sexual abuse of a minor child and that her boyfriend was the only caregiver. The report also alleged that the boyfriend blew crack-cocaine smoke in the faces of two of the children. The Mother was interviewed in jail on October 31, 2008. She agreed to place her children with her sister and signed a safety plan agreeing to have supervised visitation with the children. On December 12, 2008, the Department's investigator was informed that Mother had bonded out of jail and had taken the three youngest children while the aunt's daughter was babysitting them. Because of Mother's violation of the safety plan, the Department filed a petition for the protection of the children.

On January 8, 2009, an adversary hearing was held which resulted in the appointment of the Department as the temporary managing conservator of the children. Placement was maintained with aunt, and service plans were ordered for the parents. The services plans were reviewed at the status hearing on February 10, 2009. Another service plan was created for Mother on March 5, 2009, with the goal of reunification. A permanency plan and progress report of June 1, 2010, less than two weeks before trial, reflected that Mother had not started any of the services requested by the Department and had not provided proof of her residence or employment. At trial, a caseworker testified that Mother was required to complete a psychological evaluation, a substance abuse assessment, submit to random drug tests, attend parenting classes, and provide stable housing and verifiable income. Mother did not comply with any of the requirements of the service plan. Further, she had only seen the children twice during the pendency of the case. The trial court terminated her parental rights under TFC 161.001(1)(N) and (O) ground and best interest.

On appeal, Mother claimed that the evidence was legally and factually insufficient to support a finding under TFC 161.001(1)(N) ground, inter alia, because: (1) the Department did not make reasonable efforts to return the children to her; and (2) her lack of contact with the children was not willful or intentional.

Mother first contended that the Department "never seriously considered returning the children to her" because it assumed that she was guilty. The evidence at trial demonstrated that service plans were prepared with a goal of reunification, and Mother acknowledged that proof of the preparation and administration of a service plan for a parent constitutes reasonable efforts to return a child to the parent. However, Mother claimed that "there is no credible evidence that the agency made any reasonable attempt to administer the plan" because there was nothing in the case file at trial to prove that service authorizations were sent. She asserted that when there was a change in caseworkers, the new caseworker made no attempt to set up services for her or to talk to her about services. The court of appeals held that the trial court could have chosen to believe the testimony of the caseworker, who explained that the referral information might only be in the Department's computer and not in the case file, and also her testimony that she knew Mother had received the referrals. The court of appeals also noted that Mother actually received the referral information twice: once when the first caseworker was assigned to the case and again when the second caseworker was assigned to the case.

Mother next argued that she made the Department aware that she had financial problems, but the Department's only accommodation was to change the location of her services to one that was easier to reach by bus rather than giving her bus tokens or otherwise providing transportation to her. The court of appeals noted that Mother cited no authority requiring the Department to provide transportation to her, and that even if the Department had, there was little evidence that she would have taken advantage of such assistance. Further, Department representatives testified that they were unable to contact Mother because she was homeless, and Mother admitted that she was homeless for a year. The evidence also revealed that she made not attempts to contact the Department, even though she acquired a phone, and she admitted to "sometimes" having a way to pay for a bus ticket.

Next, Mother argued that her lack of contact with the children was not willful or intentional because she was initially prohibited from visiting the children by court order, and, once she was acquitted, the Department did not tell her for some time that she could visit them. She also contended that after that time, she could not see the younger children due to her poverty as she lacked transportation. The court of appeals observed that although the Department acknowledged that there was a period of time when the Mother was prevented from visiting the children, there was no evidence that she attempted to maintain contact with them by sending the children letters, birthday cards, or small gifts.

The Houston Fourteenth Court held that the evidence was legally and factually sufficient to support termination of the Mother's parental rights under (N) ground. *In re J.T.G., O.M.G., M.T.G., J.R.G., D.N.G., L.G., and M.G.*,

No. 14-10-00972-CV (Tex. App.—Houston [14th Dist.] Jan. 19, 2012, no pet.) (mem. op.).

2. Evidence of Environment Required

Father is the adjudicated Father of A.J.N. and has paid child support for A.J.N.'s care. A.J.N. was sexually abused by Mother's boyfriend while in Mother's care. The Department sought to terminate Mother's and Father's rights to A.J.N. At the time of trial evidence was presented that Father had joined the U.S. Army. Evidence at trial established that Father had been served by publication, had received some notices from the Department concerning the case, had filed an answer, had communicated with the Department caseworker by phone, and was aware that he was named in the proceeding. Father was not current on his child support payments and did not visit A.J.N. for the six month period she was in the Department's custody. The trial court issued a judgment notwithstanding the verdict (JNOV) in which the court did not terminate the rights of Father. In its JNOV, the trial court found that there was not clear and convincing evidence that Father had constructively abandoned A.N.J. The Department appealed.

In order to prove constructive abandonment under (N), there must be clear and convincing evidence that (i) the Department has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment. TFC 161.001(1)(N). The Beaumont Court found that although Father was behind on his child support payments and had not made any effort to visit A.N.J., there was no evidence concerning whether he would be unable to provide A.N.J. with a safe environment. The JNOV was affirmed. *In re A.N.J., J.A.D., and J.M.M.*, No. 09-10-00006-CV (Tex. App.—Beaumont July 28, 2011, no pet.) (mem. op.).

3. Inability to Care Due to Mental Incapacity

Mother was diagnosed with mental retardation. She and her boyfriend brought her infant child to a Department office indicating that they believed he had sickle cell anemia and they could not take care of him. The Department worker attempted to offer Mother assistance and services which would allow Mother to continue caring for her child, but she insisted on leaving him with the Department. The Department set up a service plan for Mother, and a guardian ad litem was appointed to Mother to assist her through the process. Mother did not complete her services and did not visit the child for the first two months that the child was in the Department's care, despite having transportation assistance available to her. Mother stopped visiting the child several months before trial and changed her residence eight times during the time that the child was in the Department's care. Mother failed to inform the Department of her location during three of her moves, although she remained in a single residence for five months of that time. A clinical psychologist testified that he administered an intelligence test to Mother. After examining her, the psychologist related that Mother's "understanding of the role of parenting was limited to direct physical interactions with the child." The psychologist went on to explain that "while she was probably capable of providing basic care to a young child, anything that would arise that required difficult judgment, she was unable to do, to figure out, to talk about" and that "she could not independently care for a child between two and eighteen years of age." The psychologist did not believe that "Mother "could take care of herself" and opined that she "definitely could not independently take care of a child" and, at best, could co-parent with a competent healthy caregiver who assumed the primary child caring responsibility. In his opinion, Mother had "severe limitations in her ability to do competent parenting" and the child was "at risk for needing even more competent parenting than a regular person would have." Summarizing, the psychologist related that "to give the child back to [Mother] would be to award custody of a child who cannot take care of itself to an adult who was unable to take care of even herself." The Texarkana Court found that this evidence was legally and factually sufficient to support termination pursuant to TFC 161.001(1)(N). *In re D.W.*, 353 S.W.3d 188 (Tex. App.—Texarkana 2011, pet. denied).

H. 161.001(1)(O)

1. Removal for Abuse and Neglect / Judicial Notice

Mother complains on appeal that the evidence was legally and factually insufficient to support termination under (O) ground because there was no evidence that the child was removed due to abuse or neglect. Mother argues that the child was removed because of a breakdown in her voluntary placement of the child with a friend. However, the Houston Fourteenth Court found that Mother acknowledged that the investigator was reviewing the child's condition because "there was an allegation of physical abuse

of the child by Mother." Further, the family service plan admitted into evidence alleged that the Mother was hitting the child in the face, back, and arms for touching a "pipe." Mother allegedly grabbed A.W.B. "again" and started to "beat her." The allegation was ruled "reason to believe" by the Department. The court also noted that a family evaluation admitted as an exhibit at trial, contains substantially the same facts; it also notes the offense date was September 23, 2009, less than a month before the trial court's Chapter 262 order. The Fourteenth Court also noted that the temporary order entered after the adversary hearing contained the requisite language in 262.201. Accordingly, the Fourteenth Court found that the child was removed from Mother for abuse and neglect and that the evidence was legally and factually sufficient to support termination under (O) ground. Mother also complained that there was no evidence of a court order setting forth the actions necessary for Mother to obtain the return of the child because the court did not announce that it was taking judicial notice of its prior orders in the file. The appeals court addressed this issue by restating its position in *In re J.J.C.*, 302 S.W.2d 436, 446 (Tex. App.—Houston [14th Dist.] 2009, pet. denied), that a "trial court is presumed to judicially know what it has previously taken place in the case tried before it, and the parties are not required to prove facts that the court judicially knows." *In re A.W.B.*, No. 14-11-00926-CV (Tex. App.—Houston [14th Dist.] Mar. 27, 2012, no pet.) (mem. op.).

2. Removal for Abuse or Neglect -- Insufficient

After police arrested Mother for physically abusing daughter, the Department removed son, who was not present at the time of the daughter's abuse. After son was removed, the Department discovered that son was "very behind in his immunizations." Mother failed to complete her court-ordered services and her parental rights to son were terminated under TFC 161.001(1)(O). At trial, the caseworker testified that the son was removed "due to the risk of [son] being physically abused by the Mother," based on her abuse of the daughter. On appeal, Mother challenged the legal and factual sufficiency of the evidence to support a finding that son was removed from her care because of her "abuse or neglect" of him as required for a finding under (O).

The Houston First Court of Appeals agreed and sustained Mother's legal sufficiency challenge, reiterating that evidence of abuse or neglect of a sibling does not support termination under (O). While Mother's abuse of daughter may have endangered son and so would be evidence supporting termination under (E), it was not evidence that the son "actually sustained abuse or was neglected" by Mother as required under TFC 161.001(1)(O). The court of appeals emphasized that there must be specific allegations of abuse or neglect of the child in the record. The appellate court rejected the Department's attempt to use the son's late immunizations as evidence of removal for abuse and neglect because the record did not show that this factor or any other allegation of abuse or neglect of the son led to his removal. The court of appeals also rejected the use of vague statements in the family service plan that "last year" Mother was "moving house to house," because, without more details, such as the relevant dates and whether the son, rather than the daughter, had been in an unsafe or unstable living environment, such statements could not be considered evidence of abuse or neglect of the son. *In re E.C.R.*, ___ S.W.3d ___, No. 01-11-00791-CV (Tex. App.—Houston [1st Dist.] 2012, no pet.).

3. Substantial Compliance and Excuses

On appeal, Father claimed that he "'either initiated, participated in, and/or completed all services' required by the service plan and court order, or that he should be excused from failing to comply because of intervening causes that prevented him from completing the services." The court reiterated well-established case law holding that "substantial compliance with the provisions of a court order is not sufficient to avoid a finding under section 161.001(1)(O)." However, despite citing to case law holding that (O) does not make provisions for excuses, the court considered the sufficiency of Father's offered excuses in its analysis. The court found his "excuses to be insufficient to justify [his] failure to comply with the requirements of the trial court's order." Termination under (O) was affirmed. *In re Y.G. and Z.G.*, No. 07-11-00349-CV (Tex. App.—Amarillo Feb. 29, 2012, no pet.) (mem. op.).

I. 161.001(1)(Q)

1. Possibility of Parole or Participation in Pre-release Program

"Evidence of the availability of parole is relevant to determine whether the parent will be released within two years of the date the termination petition was filed. However, mere introduction of parole-related evidence does not prevent a fact-finder from forming a firm conviction or belief that the parent will remain incarcerated for at least

two years. Parole decisions are inherently speculative, and while all inmates' doubtless hope for early release and can take positive steps to improve their odds, the decision rests entirely with the parole board. Evidence of participation in a pre-release program does not preclude a finding the parent will remain incarcerated." *In re S.J.P.P.*, No. 07-10-00476-CV (Tex. App.—Amarillo Aug. 19, 2011, no pet.) (mem. op.); *see also In re V.D.Y.*, No. 07-11-0388-CV (Tex. App.—Amarillo Mar. 1, 2012, no pet.) (mem. op.) (holding evidence legally and factually sufficient to support termination under TFC 161.001(1)(Q) where there was no evidence that Father would be eligible for parole and even if he was, his parole eligibility would be beyond two years from the date the Department filed its petition).

2. Previous Denials of Parole

In challenging the sufficiency of the evidence pertaining to TFC 161.001(1)(Q), Father argued the evidence was legally and factually insufficient to support termination of his parental rights under TFC 161.001(Q) because there was no evidence that his convictions would result in confinement for at least two years from the date of the filing of the petition. Father was sentenced to six years in prison. The sentence commenced in November 2006. He was also serving a six-year sentence for aggravated assault, which commenced in December 2006. Father's sentence was not going to be discharged until the fall of 2012. Father argued that because he was up for parole in May 2011, and believed that his chances for parole were good, his confinement would not be for the requisite two year period under TFC 161.001(1)(Q). Father had twice been denied parole during these convictions. The Texarkana Court rejected Father's argument, reasoning that given that Father "was twice denied parole, the jury was free to disregard [Father's] optimistic testimony." The Court went on to hold that because it was uncertain whether he would be released on parole, the evidence was clear and convincing that he would remain incarcerated for two or more years from the date of the filing of the petition. *In re T.E. and A.E.*, No. 06-11-00048-CV (Tex. App.—Texarkana Nov. 23, 2011, no pet.) (mem. op.).

3. Ability to Care

In June 2010, the Department removed the child from her home due to concerns about her parents' drug use; the child was placed with her great aunt. In July 2010, Father was arrested for possession and intent to deliver methamphetamine and was sentenced to ten years in TDCJ. Father testified that he is eligible for parole in January 2013, but he did not know whether he would be paroled. Great aunt testified that she wants to adopt child. Both of child's parents indicated that they wanted child to be placed with Mother, but they agreed that great aunt could provide child with a safe home. Father also testified that great aunt would care for child and raise her properly. The Court-Appointed Special Advocate (CASA) supervisor assigned to the case testified that Father cannot provide child with emotional, physical, or financial support either now or in the immediate future. The CASA supervisor and the Department caseworker assigned to the case related that great aunt could provide child with "a safe and stable" environment and that Father has not demonstrated the ability to provide for child's needs. The trial court terminated Father's parental rights under TFC 161.001(1)(D) and (Q) grounds and best interest.

The Beaumont Court of Appeals noted that under TFC 161.001(1)(Q), once the Department has established that a parent is incarcerated for at least two years from the date of the termination petition, the parent must produce some evidence as to how he would provide or arrange to provide care for the child during that period. The Court found that the Department filed its petition on June 7, 2010, that in September 2010, Father was sentenced to serve ten years in prison, and that Father will not be eligible for parole until January 2013, although parole is not guaranteed at that time. Father argued on appeal that the evidence demonstrated his ability to provide for child during his incarceration, given great aunt's testimony that she was willing to care for child. The Beaumont Court noted that in support of his contention that great aunt could care for child, Father cited cases discussing incarcerated parents' provisions for support of their children by the parent's family or someone who has agreed to care for the child. The Beaumont Court found that in this case, although great aunt testified that the child should have a continuing relationship with her parents, she also believed that the parental rights should be terminated, and she wanted to adopt the child. The Court found that great aunt did not testify that "she agreed to assume [Father's] obligation to care for child during his incarceration." The Beaumont Court concluded that the evidence was legally and factually sufficient to support a finding under TFC 161.001(1)(Q). *In re K.N.N.*, No. 09-11-00317-CV (Tex. App.—Beaumont Dec. 1, 2011, no pet.) (mem. op.).

4. Finality of Conviction Not Required

In challenging the legal and factual sufficiency of the evidence pertaining to 161.001(1)(Q), Father argued that the termination of his parental rights under (Q) was erroneous because his conviction and 20-year sentence for indecency with a child by exposure was "not final." The Amarillo Court disagreed, holding that finality of conviction is not required to support termination under (Q). *In re V.D.Y.*, No. 07-11-0388-CV (Tex. App.—Amarillo Mar. 1, 2012, no pet.) (mem. op.).

J. TFC 161.004

The Department filed a petition to terminate Mother's parental rights in 2008. The trial court denied the termination, appointed the Department as permanent managing conservator of the child, and dismissed the termination suit. In 2009, the Department filed a second petition to terminate Mother's rights, alleging as predicate grounds for termination TFC 161.001(1)(F), (K), (M), (N), and (O). Mother's rights were terminated under TFC 161.001(1)(N) and (O). On appeal, Mother argued that the Department failed to plead or prove termination under TFC 161.004 ("Termination of Parental Rights after Denial of Prior Petition to Terminate"), and she asserted that the evidence was insufficient to prove a material change in circumstances since the prior denial. The Department responded that because termination was proper under TFC 161.001, it was not required to prove, and the trial court was not required to find, that termination was established under TFC 161.004.

The Fort Worth Court of Appeals rejected Mother's contention that TFC 161.004 is the "only way" that a parent's rights can be terminated when there has been a prior order denying termination. Rather, the court of appeals explained, TFC 161.004 is the exclusive means by which termination of parental rights may be based on the evidence presented at the prior hearing at which termination was denied. Even if there has been a prior denial of a petition for termination, the Department is not precluded from seeking termination of parental rights under TFC 161.001 grounds based on new evidence. If the Department seeks termination under TFC 161.001, it is not required to also plead or prove the grounds of TFC 161.004 in addition to the TFC 161.001 grounds. *In re K.G.*, 350 S.W.3d 338 (Tex. App.—Fort Worth 2011, pet. denied).

VII. BEST INTEREST

A. Best Interest Evidence Factually Insufficient

In September 2008, the Department received a referral that a Mother was neglecting her three children. The investigator testified that she found Mother's residence to be very hazardous to children, having things everywhere, animal urine and feces covering the floor, and an unknown substance in the area where the children ate. The children were dirty, had colds, and ran around "with no shoes, nothing on." Mother had been diagnosed with bipolar disorder and neither parent was employed. The Department provided Mother with homemaker and child care services. Following a report from the children's daycare that they were dirty every day and had bumps and scratches, the Department placed the children with their aunt where the children's condition did not improve. The Department filed a petition for protection and was appointed the children's temporary managing conservator in June 2009.

Mother did not do any of her court-ordered services. Mother failed to provide proof of employment and refused to submit to random drug tests. Due to Mother's lack of compliance, the Department's plan was termination of her parental rights.

Mother offered a diagnostic review form at the November 2010 trial, which indicated that she was diagnosed as having mixed anxiety disorder from being separated from her children, but she was not diagnosed as having any mental health problems. Mother testified that when the Department originally came to her house, she was going through a rough time, but that she is currently engaged to her boyfriend who has agreed to help her raise the children. She admitted that she did not complete any of her services, but testified that she had gone to counseling every Wednesday but had not gotten the paperwork to verify her attendance and that she attended AA meetings every Thursday. Mother's boyfriend testified that he has been employed at the same company for thirteen years, receives a salary of $3100.00 per month with full insurance benefits, and is financially willing and able to support Mother and her children. He also testified that he had recently been to Mother's house and it was clean and suitable for children.

At the time of trial, the children were ages three, four, and five and all were living in separate homes. The Department's plan was for all three children to live in one home, but that had not occurred as of the time of trial. The trial

court terminated Mother's parental rights to all three children under (D) and (O) grounds and best interest.

On appeal, Mother challenged all termination grounds and best interest. The Houston First Court found that there was some evidence to show that termination of Mother's parental rights was in the children's best interest: (1) the Mother's neglect; (2) abusive relationship with her husband; (3) refusal to submit to random drug tests; and (4) lack of housing and employment. The appeals court concluded that the best interest evidence was legally sufficient to support the finding. However, the Houston First Court found the evidence was factually insufficient to support the best-interest finding because: (1) although the initial observations showed that the house was dirty and unsanitary, there was no evidence that the children suffered from any illness, malnutrition, or physical abuse; (2) although Mother did not complete services, it "was not due to indifference or malice toward her children"—Mother visited with her children while they were in the Department's custody, contacted the Department many times concerning the children, and made attempts to comply with the requirements of the service plan since her husband moved out of state; (3) the children are bonded to Mother; (4) she had a plan to raise the children with her boyfriend who testified that he agreed to provide for them; and (5) the children were currently separated from each other in non-adoptive placements. The court concluded that, "Given the nature of the Mother's offending behavior and the bond between her and her children, coupled with the children's uncertain future in regard to an adoptive placement, the factfinder could not have reasonably formed a firm belief that terminating the parental rights of the person with whom the children have the best chance of being together, is in their best interest." The case was reversed and remanded as to the termination, but was affirmed as to conservatorship. *In re R.W., E.W., and B.W.*, No. 01-11-00023-CV (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mem. op.); *compare In re J.P., T.J., and D.F.*, No. 02-10-00448-CV (Tex. App.—Fort Worth Feb. 23, 2012, no pet.) (mem. op.)(evidence factually insufficient to support best interest finding where Father was bonded to child, consistently financially supported child, visited child regularly, child had difficulty dealing with his best friend's death, Father had a stable employment history, child was not likely to be adopted due to his age and mental health issues, and Father had not abused child).

B. Children's Desires Implied by Bonding with Foster Family

Mother essentially "just disappeared from the children's lives" after their removal by failing to maintain consistent contact with them and not sending them any written communications. During this time, the children remained with a foster family for fifteen months and bonded with the foster family. When Mother visited with the children just before trial, one of the children did not refer to her as "mom" and appeared confused by her presence. In rejecting Mother's challenge to the legal and factual sufficiency of the evidence supporting the best interest finding, the Amarillo Court of Appeals held that the children's bonding with the foster family "at least implied that the child[ren]'s desires would be fulfilled by adoption by the foster family." *In re T.C.C.H. and E.S.K.H.*, No. 07-11-00179-CV (Tex. App.—Amarillo Dec. 22, 2011, no pet.) (mem. op.).

C. Failure to Complete Home Study

Father argued that the evidence was legally and factually insufficient to support the trial court's best interest finding because the Department had not conducted a home study of his aunt as a possible placement for the children. The Houston First Court of Appeals noted that courts of appeals have held that the failure to conduct or obtain a home study pursuant to TFC 262.114 is not a bar to termination. The court of appeals held that "the lack of a home study is not outcome determinative," and it considered other factors in deciding whether the evidence at trial supported the best interest finding. *In re DC, KR, CR, RR, JC, MR, and JR.*, No. 01-11-00387-CV (Tex. App.—Houston [1st Dist.] Mar. 1, 2012, pet. denied) (mem. op.).

D. Recent Turnaround

Mother who had a history of physical abuse toward children, including a conviction for injury to a child, argued that the evidence was legally and factually insufficient to support the best interest finding because she had made improvements during the pendency of the case. Mother cited to her testimony that she had completed anger management, domestic violence, and parenting classes, had learned from her participation in services and was willing to continue taking classes, had participated in individual therapy and marriage classes on her own initiative and at her own expense, had paid some child

support, and was now attending college. The Houston First Court of Appeals acknowledged that there was "some evidence . . . weighing against the best interest finding," specifically, evidence that Mother had "taken steps both to improve her life and to be a good parent," but it stated that "[n]onetheless, evidence cannot be read in isolation; it must be read in the context of the entire record." The appellate court held that "the fact finder could have reasonably inferred that [Mother] would continue her pattern and practice of physically abusing her children as she had over the years" as well as infer that "as the two younger children became older, they might also be subject to abuse." Such an inference "relates directly to [Mother's] ability to provide a stable and suitable home" for the children and "indicates that the children's physical and emotional well-being may be endangered in the future." The appellate court held that the evidence was legally and factually sufficient to support the best interest finding, concluding that the jury could have reasonably inferred that the children were at risk for abuse should they be placed with Mother and that Mother could not provide them with a safe and stable home. *C.H. and L.L.G. v. Dep't of Family and Protective Servs., K.D.G. and L.L.G. v. Dep't of Family and Protective Servs.*, Nos. 01-11-00385-CV, 01-11-00454-CV, 01-11-00455-CV (Tex. App.—Houston [1st Dist.] Feb. 23, 2012, no pet.) (mem. op.).

E. Financial Benefits of Adoption Considered

A trial court may consider evidence of access to financial benefits if adoption is granted after parental rights are terminated in its consideration of meeting the children's needs and protecting them from danger now and in the future. *E.F. v. Tex. Dep't of Family and Protective Servs.*, No. 03-11-00325-CV (Tex. App.—Austin Dec. 30, 2011, no pet.) (mem. op.).

F. Mental Incapacity

Mother had been diagnosed with mental retardation. The evidence established that, due to her own mental deficiencies, Mother could not care for the three-year old child now or in the future. Additionally, evidence that Mother could not care for the child without the assistance and direction of another person demonstrated that her parenting abilities were so limited that she could not meet the child's needs. The Texarkana Court reasoned that even though Mother's acts or omissions, which were attributable to her mental incapacity, were beyond her control, they still had to be considered in the best interest determination. The court concluded that the evidence was legally and factually sufficient to allow a factfinder to determine that termination was in the best interest of the child. *In re D.W.*, 353 S.W.3d 188 (Tex. App.—Texarkana 2011, pet. denied).

VIII. APPEALS

A. Notice of Appeal

The trial court entered its judgment on December 22, 2011. On December 28, 2011, appellants filed a request for findings of fact and conclusions of law, which the court entered on January 4, 2012. However, appellants did not file their notice of appeal until March 9, 2012.

On appeal, appellants asserted that they did not receive actual notice of the judgment until February 28, 2012, and under TRAP 4.2(a)(1), their time for filing their notice of appeal did not begin until the time they received actual notice of the judgment. Therefore, they contended their March 9, 2012 notice of appeal was timely. TRAP 4.2(a)(1) is governed by TRCP 306(a)(5) , which provides that the application of the rule extending time is invoked by filing a sworn motion with the trial court during the period of its plenary power over the judgment, measured from the date the movant establishes he or his counsel first learned of the judgment.

The court explained: "The sworn motion establishes a prima facie case that the party lacked timely notice and invokes a trial court's otherwise-expired jurisdiction for the limited purpose of holding an evidentiary hearing to determine the date on which the party or its counsel first received notice or acquired knowledge of the judgment. After the trial court hears this motion, the trial court is required to sign a written order that finds the date when the party first received notice or acquired actual knowledge that the judgment or order was signed." (Internal citations omitted).

The Amarillo Court allowed appellants time to supplement the clerk's record with the trial court's order reflecting the date the appellants or their counsel first received actual notice of the judgment. Because appellants failed to supplement the record with the order, and the filing of findings of fact and conclusions of law does not extend the time for filing a notice of appeal, the Amarillo Court found that the appellants' March 9, 2012 notice of appeal was untimely and dismissed their appeal. *In re P.L.S.*, No. 07-

12-00104-CV (Tex. App.—Amarillo Apr. 25, 2012, no pet. h.) (mem. op.).

B. Trial Court Cannot Instruct Attorney Not to File Notice of Appeal

After the trial court signed a judgment terminating Father's rights, Father's trial counsel filed a motion to substitute counsel, seeking the appointment of appellate counsel. In his motion, trial counsel acknowledged that he had not been able to contact Father. The Department opposed the motion, arguing that appellate counsel should not be appointed until Father expressed a desire to appeal and that a notice of appeal should not be filed until that time. The trial court entered an order finding that trial counsel had no duty to file a notice of appeal until hearing from Father that he wanted to appeal. The trial court further ordered trial counsel not to file a notice of appeal unless Father first communicated his desire to appeal. A petition for writ of mandamus against the trial court was filed the following day.

The Fort Worth Court of Appeals conditionally granted the writ of mandamus, holding that the trial court had abused its discretion and Father had no adequate remedy by appeal. The court of appeals determined that it had jurisdiction to issue the writ because the writ was necessary to protect the appellate court's jurisdiction. It pronounced that the question of whether Father's trial counsel had the authority to file a notice of appeal "is one for this court, not the trial court." The appellate court held that when there is a factual dispute concerning a lawyer's authority to file a notice of appeal on behalf of a client because the client may not have expressed a desire to appeal, the dispute must be resolved by the court of appeals. Such a dispute is typically resolved after an abatement, limited remand to the trial court for an evidentiary hearing, and the filing of supplemental findings of fact or conclusions of law. The appellate court wrote: "[t]he trial court does not, however, have the authority to interfere with [the appellate court's] jurisdiction by prohibiting a party from filing a notice of appeal." *In re J.R.J.*, 357 S.W.3d 153 (Tex. App.—Fort Worth 2011, orig. proceeding).

IX. MISCELLANEOUS

A. Mandamus

The Department investigator testified at the adversary hearing that the Department received a referral that Mother was unwilling to take care of her child, the child constantly screams, and the Mother "acts" as if she is going to shake him. When the investigator visited the home, she found the Mother on the porch with three roommates. At the investigator's request, the Mother showed her the bedroom where the Mother and child slept. The investigator observed that the child's bed was a play pen with a "boppy", a crescent shaped pillow used for breast feeding, had two blankets on either side, and a very large coat was hanging over the railing. The investigator was concerned that the child could be sMothered by these things in the crib. It was also observed that there was a bottle that had very thick rice cereal in it that was grainy and building up on the sides. The investigator testified that it was very easy for a child to choke on the cereal, especially if the child was not supervised. Finally, the investigator related that she had been a conservatorship worker in a 2009 case with this Mother involving an older child and was concerned because some of the allegations in the current case mirrored those in the 2009 case. In the 2009 case, Mother was diagnosed with bipolar disorder, had an inability to control her anger, and lacked parenting skills. The Texarkana Court found that 262.201(b)(3) "affords the trial court discretion to determine what efforts are 'reasonable' to enable the child to return home. However, there was no evidence presented at trial that the Department undertook any efforts to return the child home. This requirement may be waived 'if the court finds that the parent has subjected the child to aggravated circumstances." The Texarkana Court further found that the record is devoid of any proof that there was an urgent need for protection that required immediate removal of the child. Finally, evidence regarding danger to the physical health or safety of the child was "virtually non-existent." The appeals court granted conditional mandamus requiring the trial court to vacate its temporary orders. *In re Tonya Allen*, 359 S.W.3d 284 (Tex. App.—Texarkana 2012, orig. proceeding).

B. Sovereign Immunity

A petition was filed alleging delinquent conduct against a child under the permanent managing conservatorship of the Department. The petition also alleged that the child's caseworker had, by willful act or omission, contributed, caused, or encouraged the delinquent conduct. The petition requested that the Department and caseworker be held liable for any costs, fees, and restitution imposed against the child. The child pled "true" to the petition. After finding the child delinquent, the trial court conducted

a disposition hearing and ultimately ordered the Department or the caseworker to perform certain monitoring requirements, such as ensuring that the child attended school and complied with his curfew, and ordered the Department or the caseworker to pay restitution, court costs, attorney's fees, and a monthly probation fee. The Department filed a motion asking the trial court to vacate the orders directed at the Department or caseworker because both were immune from the orders due to sovereign immunity. The motion was overruled by operation of law and the Department appealed.

The San Antonio Court of Appeals reversed the trial court's orders and remanded the case to the trial court with instructions to eliminate any provisions in the orders imposing obligations on the Department or the caseworker. The appellate court explained that sovereign immunity has two components: immunity from suit and immunity from liability. Immunity from suit prohibits suits against the State unless the State expressly consents to suit, and it defeats a trial court's subject matter jurisdiction. The court of appeals observed that although no suit had been brought against the State in this case, the juvenile "proceeding nonetheless has coercive effects on the State in that the State must now bear various obligations mandated by a court order." The court of appeals held that a "suit whose effect or purpose, whether directly or indirectly, is to coerce the State to perform some act, is effectively one against the State." The appellate court wrote that the State is not subject to those coercive measures which may be employed against an individual litigant and that the policies and principles that preclude a direct suit against the State without proper consent would be defeated if the trial court's orders were allowed to stand. The court of appeals held that the trial court was without jurisdiction to impose obligations on the Department or caseworker because both were immune from the trial court's imposition of obligations on them, including the assessment of financial obligations in connection with the delinquency proceedings. *In re R.L.*, 353 S.W.3d 524 (Tex. App.—San Antonio 2011, no pet.); *see also In re J.L.S.*, No. 04-11-00030-CV (Tex. App.—San Antonio Sept. 21, 2011, no pet.) (mem. op.) (reversing on basis of sovereign immunity citing *In re R.L.*, 353 S.W.3d 524 (Tex. App.—San Antonio 2011, no pet.)).