TERMINATION CASE LAW UPDATE

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I. PRE-TRIAL ISSUES

A. Associate Judge's Child Support Order Did Not Establish Court of Continuing Jurisdiction

Mother alleges that an order terminating her parental rights is void for lack of subject matter jurisdiction on the basis that the 146th District Court did not have jurisdiction to render the termination order because a different Bell County district court, the 169th, had continuing, exclusive jurisdiction.

It is undisputed that in 2007, an associate judge presiding for the 169th Judicial District Court of Bell County signed a child support order involving one of the children to the subsequent termination suit, and that the parents were appointed as joint managing conservators of that child in the order. At the adversary hearing in the Department-initiated SAPCR, "all parties were aware that there had been a prior child-support order somewhere", but it was not known if the order was a final order and what court had rendered it. Further, the termination case proceeded without any party seeking to transfer the suit or challenging the district court's jurisdiction to render the termination order.

After the termination order was rendered, mother filed an amended motion for new trial in which she asserted a "plea to the jurisdiction" and a motion to dismiss, claiming for the first time that the 169th Judicial District Court of Bell County was the court of continuing, exclusive jurisdiction and that the 146th District Court "lacks the subject matter jurisdiction to enter a decree of termination in this case." Mother filed a copy of the 2007 child support order in the termination case. In response, the Department filed a motion to consolidate the child-support case with the termination case, and the motion was granted. The court denied mother's motion for new trial, motion to dismiss, and pleas to the jurisdiction. Mother appealed.

The appellate court considered that the children were found in Bell County, and therefore it was permissible for the Department to file its termination suit in both the 146th and 169th Judicial District Courts under TFC § 262.002 ("A suit brought by a governmental entity requesting an order under this chapter—Procedures in Suit by Governmental Entity—may be filed in a county with jurisdiction to hear the suit in the court in which the child is found"). Therefore, the termination order would be "void" only upon a showing that a different court had continuing, exclusive jurisdiction. "It is undisputed that the Department filed suit in the 146th District Court in accordance with local rules of procedure, which authorize child-protection cases to be filed in that court."

The appellate court determined that the district court did not err or abuse its discretion in this case because a court acquires continuing, exclusive jurisdiction over a child on the rendition of a final order. In this case, the order signed by the associate judge could become a final order "only on the referring court's signing the proposed order or judgment" pursuant to TFC § 201.013(b). Here, the court noted that there is nothing in the record indicating what happened regarding the child support order. The court held that the trial court's "implied failure to find that [mother] made the required showing that the 169th District Court was the court of continuing, exclusive jurisdiction was supported by legally and factually sufficient evidence. Accordingly, the district court did not err in denying mother's plea to the jurisdiction and motion to dismiss and did not abuse its discretion in overruling her motion for new trial." *S.C. v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00518-CV (Tex. App.—Austin Jan. 10, 2013, pet. denied) (mem. op.).

> Note: TFC § 201.2041(a), which applies to associate judges for Child Protection cases reads: "(a) If a request for a de novo hearing before the referring court is not timely filed or the right to a de novo hearing before the referring court is waived, the proposed order or judgment of the associate judge becomes the order or judgment of the referring court by operation of law without ratification by the referring court."

B. Service of Process

1. Service by Publication Invalid

On May 25, 2007, the Department filed its petition for termination. Mother's four children were removed and the Department was named temporary managing conservator of the children. Several months later, the Department sought termination of mother's parental rights. After an unsuccessful attempt at personal service, the Department sought to serve mother by publication. The caseworker checked internal databases and numerous other diligent search websites for locating information on mother. The worker outlined these efforts in the requisite affidavit, filed with the trial court on August 24, 2007, before citing mother by publication.

TFC § 102.010(a) permits service by publication for individuals who cannot be served personally or through the mail, or if a person's name is unknown.

Mother did not appear at the October 25, 2007 trial. At trial, the caseworker testified that she had mother's phone

number but no permanent address at which to serve her. However, the caseworker had contact with mother by phone, the caseworker also notified mother of two court hearings, which she attended, and mother had visited the children in "August or September" 2007, a month prior to the trial, at the Department's office. Mother's "publication attorney" stated that mother was served by publication and the publication was "ripe" on October 15, 2007. The publication attorney never had contact with mother and learned for the first time at the final hearing that mother had visited the children at the Department's office. The trial court terminated mother's parental rights.

Mother filed a motion for new trial within two years of the judgment pursuant to TRCP 329(a)(authorizing trial court to grant motion for new trial within two years of judgment if judgment rendered on service by publication and defendant did not appear in person or by attorney of her own selection). In her motion, mother claimed that citation by publication was obtained by fraud and was invalid because she was in contact with the caseworker and visited the children while the Department was attempting to serve her. Mother also claimed that she informed the caseworker that her address was the same as her mother's address, which the caseworker already had. The caseworker admitted that she met mother in her office for a prescheduled meeting. The court denied mother's motion, and she appealed.

On appeal, the Department argued that the six-month bar to collateral attack under TFC § 161.211 precluded mother's collateral attack on the judgment. A divided court of appeals agreed, holding that TFC § 161.211's six-month deadline was dispositive because it clearly states that there can be no collateral or direct attack on a judgment of termination of parental rights, including a motion for new trial, more than six months after the termination order is signed. The appellate court also held that because mother had not raised a constitutional challenge at trial, it was not preserved for appellate review.

In its dissent, the appellate court concluded that the six-month deadline applied "only to people who were *validly* served by publication" and because service on mother was invalid, the deadline was inapplicable. The dissent stated that "it was the intent of the legislature in enacting subsecion 161.211(b) to bar attacks on parental termination orders only in situations where the parent was actually 'served.'"

The Supreme Court granted mother's petition for review.

In reviewing the history of citation by publication as a form of service, the Court stated "we can distill a common principle: when a defendant's identity is known, service by publication is generally inadequate." The Court further considered the due process implications of stated statues that restrict the time for challenging a judgment, reviewing numerous authorities, and concluding that "due process prevails over a state law time limit, even one imposed on challenges to termination of parental rights or adoption."

In discussing the requirements for service by publication in a parental-termination case, the Court noted that under TFC § 161.107(b), "If a parent of a child has not been personally served in a suit in which the Department of Family and Protective Services seeks termination, the department must make a diligent effort to locate the parent." It continued: "A lack of diligence makes service by publication ineffective" and that "diligence is measured not by the quantity of the search but by its quality." The Court also noted that "[i]f personal service can be effected by the exercise of reasonable diligence, substituted service is not to be resorted to."

In analyzing the basis for citation by publication in this case, the Court reasoned that "[a] diligent search must include inquiries that someone who really wants to find the defendant would make", the "uncontroverted evidence here establishes a lack of diligence", and the caseworker "neglected 'obvious inquiries' a prudent investigator would have made." The Court further explained that the caseworker: (1) "did not pursue other forms of substituted service that would have been more likely to reach [mother], such as leaving a copy with [grandmother]" and (2) "[e]ven if [mother's] address was not 'reasonably ascertainable,' an address was unnecessary for personal service on [mother]" as mother "attended at least two court hearings", visited the children at the Department offices, and the Department was able to reach mother by telephone or communicate with her family members. The Court concluded that, "Here, it was both possible and practicable to more adequately warn [mother] of the impending termination of her parental rights, and citation by publication was therefore constitutionally inadequate." The Court held that service on mother by publication deprived her of due process.

The Court next decided whether the six-month bar under TFC § 161.211 would preclude mother's collateral attack given the constitutional infirmity of the citation by publication. In doing so, the Court stated: "A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time." Therefore, the

Court held that, "[TFC § 161.211] cannot place a temporal limit on a challenge to a void judgment filed by a defendant who did not receive the type of notice to which she was constitutionally entitled. Despite the Legislature's intent to expedite termination proceedings, it cannot do so at the expense of a parent's constitutional right to notice." *In re E.R., J.B., E.G., and C.L.*, 385 S.W.3d 552 (Tex. 2012).

2. Citation by Publication – Conservatorship Determination under TFC § 161.208

TFC § 161.208 requires the Department to show that it exercised diligence in locating a missing parent and a relative of that parent before it can be named as the permanent managing conservator of a child. On appeal, mother argued that the appellate record did not demonstrate the Department's due diligence "in its efforts to locate her". Citing *In re E.R., J.B., E.G., and C.L.*, 385 S.W.3d 552 (Tex. 2012), the appellate court reiterated that: "A lack of diligence makes service by publication ineffective." The Department conceded that there was no affidavit demonstrating the Department's due diligence in the record. Accordingly, mother's issue was sustained and the termination of her parental rights was reversed and remanded for a new trial. *In re A.M.C., J.M.C. III, C.D.C. and H.D.C.*, No. 09-12-00314-CV (Tex. App.—Beaumont Dec. 6, 2012, no pet.) (mem. op.).

3. Service By Posting Invalid

On June 21, 2011, the Department removed the child from mother. The Department's petition asserted that the location of alleged father was unknown and sought determination of parentage and termination. Pursuant to TFC § 102.010 and TRCP 109a, the trial court signed an order authorizing citation of father by posting a copy of the citation on the courthouse door. The appellate record did not contain a motion for substitute service on father or a return of service.

In July 2011, the trial court held an adversary hearing during which counsel for the Department indicated that the Department had recently learned that father had a different name than that identified in the original petition. The Department then completed a search of the bureau of vital statistics paternity registry and did not locate anyone claiming paternity of the child.

During an August 2011 status conference, the Department caseworker indicated that she had learned from mother that father had been deported to Mexico and that the Department had contacted the Mexican consulate in an effort to locate father. In December 2011, the caseworker reported that father had been located in Mexico and that his service plan had been sent to him through the consulate.

On April 16, 2012, the trial took place without father's or his attorney *ad litem's* attendance. During trial, the Department's caseworker testified that search results from the paternity registry had been filed and that father had failed to register with the paternity registry. In addition to the predicate ground findings, the trial court's order found that: (1) father was served with citation or waived service; and (2) did not respond by filing an admission of paternity, a counterclaim for paternity, or a request for voluntary paternity to be adjudicated.

On appeal, father argued that the termination order should be reversed because he was not properly served. TFC § 102.010 requires "that a statement of the evidence of service, approved and signed by the court, be filed with the papers in the cause." The appellate court noted that the "record does not contain either the section 102.010(d) statement of the evidence or a return of service" and that despite having learned father's correct name and location four months before trial, the Department "did not attempt to serve him by any means, even though he had not waived service or appeared." The appellate court considered precedent that "[i]n a direct attack on a judgment rendered without the defendant's appearance, the record must show strict compliance [—"literal compliance with the rules governing issuance, service, and citation"—] with the rules regarding service of citation" and "[s]ervice by publication directed to a party using an incorrect name is not in strict compliance with the rules and does not effect valid service." The court found that based on the absence in the record of a return of service or the required statement of evidence, "the record [did] not show strict compliance with the rules of service and the service was invalid."

The Department argued on appeal that valid service was not material because the Family Code authorizes termination of an alleged father in some circumstances without service of citation, which the appellate court construed to be a TFC § 161.002(b)(2) argument. The appellate court acknowledged that TFC § 160.404 authorizes termination, without notice, of the parental rights of a father who did not timely register with the bureau of vital statistics and that TFC § 161.002(b)(2), read in conjunction with TFC § 161.002(c-1), authorizes the trial court to terminate an alleged father's rights without service of citation if: (1) the child was over one year of age when the petition was filed; (2) the father had not registered with the paternity registry; and (3) the

father's identity and location are unknown. "However, subsection (b)(2) does not authorize an order terminating the parental rights of an alleged father when his identity and location are known to the Department at the time of the final hearing and order." The appellate court held that because the Department was aware of father's location and identity and was in contact with him for more than four months before trial, and because child was over one year of age when the petition was filed, TFC § 161.002(b) did not apply and father's rights could not be terminated without valid service or waiver of service. *In re J.M.*, 387 S.W.3d 865 (Tex. App—San Antonio 2012, no pet.).

C. TFC § 102.006 – 90-Day Limitation Period for Relatives Does Not Confer Standing

After mother's and father's parental rights had been terminated, the child's foster parents and paternal grandparents filed separate petitions to adopt the child. Foster parents filed a motion to dismiss grandparents' petition for lack of standing under TFC § 102.005. The trial court found that although grandparents had not established sufficient substantial past contact to bring their suit under TFC § 102.005(5), they still had standing to bring their suit under TFC § 102.006(c) and denied foster parent's motion.

On appeal, foster parents argued that standing to file a petition for adoption must be established pursuant to TFC § 102.005 and that TFC § 102.006 does not confer standing in itself but merely establishes limitations on those who would otherwise qualify for standing under TFC § 102.005.

In this case, the applicable standing provision under TFC § 102.005 that would have given grandparents standing to bring an "original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption" was subparagraph (5), which confers standing to "another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so." TFC § 102.006 "Limitations on Standing" provides, in part, that if the parent-child relationship has been terminated, an original suit may not be filed by a family member of either terminated parent. The limitations of TFC § 102.006 do not apply to a grandparent of the child if the grandparent "files an original suit or suit for modification requesting managing conservatorship of the child not later that the 90th day after the date the parent-child relationship between the child and parent is terminated" in a Department-initiated suit.

The appellate court agreed with foster parents, stating that a review of the plain text of TFC §§ 102.005 and 102.006 shows that "in order for a party to have standing to bring an original petition for adoption, the party must first meet the standing requirements of section 102.005. Section 102.006 does not confer standing, but instead limits which parties have standing to file a petition pursuant to section 102.005." The appellate court therefore held that the trial court erred in finding that grandparents, who did not meet the requirements of TFC § 102.005, had standing to bring their petition under TFC § 102.006(c) and reversed the trial court's order and rendered judgment that the grandparent's suit be dismissed for lack of jurisdiction. *In re J.C.*, ___ S.W.3d ___, No. 04-12-00116-CV (Tex. App.—San Antonio 2012, no pet.).

D. Vienna Convention on Consular Relations – Applies to Foreign National Children

Two fathers had their parental rights terminated to their respective children, born to the same mother. Both fathers appealed contending, *inter alia*, that the evidence was factually insufficient to prove that the Department exercised due diligence in locating them because the Department failed to comply with the Vienna Convention on Consular Relations' requirement that the Department give notice to the Mexican consulate.

The appellate court explained that "A Texas court may terminate an alleged father's parental rights even if he and his child are both foreign nationals if the proceeding complies with applicable treaty requirements." It continued:

> Under the Vienna Convention on Consular Relations (VCCR), the Department must notify the foreign consul of a parental termination proceeding affecting a foreign national child. . . . With such notice, the sending State's consul may act to "safeguard[ ], within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity *who are nationals of the sending State*, particularly where any guardianship or trusteeship is required with respect to such persons.". . . However, the VCCR does not otherwise alter the receiving State's procedural or substantive laws controlling the matter.

Therefore, "under the VCCR, the Department was required to notify the Mexican consulate of the parental termination suit only if the child that is the subject of the suit was a Mexican national." The record did not indicate, nor did

either father assert, that the children were Mexican nationals. Accordingly, the appellate court held that because there was "no evidence that any of the children were Mexican nationals, the Department had no obligation to notify the Mexican consulate of the suit." *In re R.J., et al.*, 381 S.W.3d 619 (Tex. App.—San Antonio 2012, no pet.).

E. Appointment of Trial Counsel

1. Parent Failed to "Trigger" Mandatory Appointment of Counsel

Father complained that the trial court abused its discretion when it failed to provide him with an attorney at the final hearing "because he was indigent and opposed the Department's petition to terminate his parental rights." The appellate court explained that TFC § 107.013(a) "provides indigent parents with a statutory right to be represented by court-appointed counsel in parental-termination suits initiated by the Department. However, in order to be entitled to court-appointed counsel, a 'parent who claims indigence under Subsection (a) must file an affidavit of indigence in accordance with Rule 145(b) of the Texas Rules of Civil Procedure before the court can conduct a hearing to determine the parent's indigence under this section.'" The appellate court continued: "As one court explained, a parent's filing of an affidavit of indigency is 'the act which would trigger the process for mandatory appointment of an attorney ad litem. . .'."

In determining that father did not "'trigger' the process by which he could obtain counsel", the appellate court considered the following: (1) the Department's attorney and mother's attorney advised father months before the trial that he needed to contact the court to request appointed counsel; (2) father was advised that he could request counsel at a status hearing that was held weeks before trial; (3) father did not attend that status hearing; (4) father admitted that he was advised that he needed to contact the court to request counsel; and (5) father did not file an affidavit of indigency prior to the final trial or at the trial.

The appellate court explained: "Absent an affidavit of indigency, the trial court was under no obligation to conduct a hearing to determine whether [father] was indigent." Accordingly, it held: "Because [father] failed to trigger the process by which he could receive court-appointed counsel, we cannot conclude that the trial court abused its discretion in failing to provide him with counsel." *S.M.M. and K.A.M. v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00585-CV (Tex. App.—Austin Feb. 26, 2013, no pet. h.) (mem. op.).

2. Timing of Appointment of Counsel Upheld

The child was removed due to mother's incarceration for drug possession and because no appropriate caregiver could be found for the child. Mother did not complete any court-ordered services and visited the child only three times during the case. She did not visit the child or contact the Department for more than a year prior to trial. Further, mother: (1) failed to attend any hearings; (2) did not file an affidavit of indigence; and (3) did not request counsel. The trial court appointed the mother an attorney five months prior to trial on its own motion. Mother's appointed counsel could not locate mother, and the trial court provided counsel funds to hire a private investigator to locate mother. Mother's counsel was able to locate her and informed her of the trial date and time by telephone, but was unable to arrange a meeting with her. Mother was not present at trial and her counsel announced that he was not ready to proceed, but the trial court proceeded with trial and terminated her parental rights.

On appeal, mother argued that the trial court violated due process in "waiting" until less than five months prior to trial to appoint her an attorney.

The appellate court overruled her issue, citing well established precedent from other appellate courts, that "the timing of appointment of counsel is a matter within the trial court's discretion." In looking at mother's "history" in the case, the appellate court held that "the trial court did not abuse its discretion or violate due process", because mother: (1) did not complete any court-ordered services; (2) did not attend any hearings; (3) never met with her lawyer; (4) did not contact the child or the Department for more than a year prior to trial; and (5) never filed an affidavit of indigence or requested appointment of counsel. In citing case law from Fort Worth, the court reiterated: "a court deciding whether due process requires the appointment of counsel need not ignore a parent's plain demonstration that she is not interested in attending a hearing." *In re B.K.*, No. 10-12-00311-CV (Tex. App.—Waco Dec. 27, 2012, no pet.) (mem. op.); *see also In re C.R. and L.R.*, No. 09-11-00619-CV (Tex. App.—Beaumont May 31, 2012, no pet.) (mem. op.) (trial court appointed counsel three months prior to trial).

II. TRIAL PRACTICE

A. ICWA - Trial Court Must Know or Have Reason to Know of an "Indian Child"

On appeal, appellants argued that the trial court violated

the verification and notice provision of the Indian Child Welfare Act (ICWA) because the trial court "ha[d] reason to know that an Indian Child" was involved in this case due to "[paternal grandmother's] testimony that [one child] is 'half-Indian'." Appellants asked that the case be remanded to the trial court "so that proper notice and verification [could] be sought" and a hearing could be conducted to determine whether the children were "Indian" children as defined under ICWA. The Department agreed that the case should have been remanded for that determination.

In rejecting the request to remand, the court wrote: "[w]e disagree that the case should be remanded and abated, however, because we do not believe that the trial court 'kn[e]w or ha[d] reason to know that an Indian child' was involved in the case." It continued: "The only evidence adduced regarding [one child's] heritage was [paternal grandmother's] statement that [she] is 'half Black Foot' and that mother is 'half Cheyenne.'" Citing § 1903(4) of ICWA, which defines an "Indian Child" as an unmarried person under eighteen who either: (a) is a member of an Indian tribe; or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, the court reasoned that paternal grandmother "did not state that either [mother], [father], [the children] or herself were 'members' of an Indian tribe, and she did not state that 'either child' would be 'eligible for membership' in an Indian tribe." *In re C.T. and K.T.*, No. 13-12-00006-CV (Tex. App.—Corpus Christi, Dec. 27, 2012, no pet.) (mem. op.); *see also B.O. and T.S. v. Tex. Dep't of Family Protective Servs*., No 03-12-00676-CV (Tex. App.—Austin Apr. 12, 2013, no pet. h.) (mem. op.) ("The ICWA applies to all state child-custody proceedings involving an Indian Child when the court knows or has reason to know an Indian Child is involved.").

B. Mediated Settlement Agreement Not Compliant with TFC § 153.0071(d)

Prior to trial, all parties attended mediation, except for mother, who participated by telephone. Mother's court-appointed attorney attended the mediation on her behalf. A mediated settlement agreement (MSA) was reached, father relinquished his parental rights, and findings were agreed upon that: (1) mother had failed to comply with provisions of her service plan under TFC § 161.001(1)(O); and (2) termination of her parental rights was in the best interest of the child. Mother's trial counsel and other parties signed the MSA, but mother did not. Pursuant to the MSA, a bench trial was held the next day in which limited testimony was given and mother's counsel did not appear. The court adopted and incorporated the terms of the MSA into the final order and terminated mother's parental rights pursuant to findings under TFC § 161.001(1)(O) and best interest.

On appeal, mother argued: (1) the trial court abused its discretion by admitting an MSA that lacked mother's signature; (2) the failure of mother's trial counsel to appear at trial constituted ineffective assistance of counsel; and (3) the MSA was invalid because it did not contain her signature.

An MSA under TFC § 153.0071(d) is binding on the parties if the agreement: (1) provides prominently that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney who is present at the time the agreement is signed. The Department argued that despite the absence of mother's signature, there was a rebuttable presumption that mother's attorney had actual authority to enter into a settlement on her behalf. The Department sought to show that this authority existed based on the attorney's: (1) representation of mother; (2) presence at mediation; and (3) signatures on the MSA and final order. The appellate court disagreed, reasoning that the absence of mother's signature created doubt as to whether she consented to the agreement and whether she was adequately informed of its terms. The court further found that "the plain language in section 153.0071(d)" applied, and citing precedent from other appellate courts, held that "strict compliance with section 153.0071(d)'s requirements is essential to forming a binding and irrevocable mediated settlement agreement in" SAPCR proceedings. The court of appeals further held that the trial court improperly relied on an MSA that did not satisfy TFC § 153.0071(d) as evidence to terminate mother's parental rights, finding that the improper MSA was a "significant, if not determinative factor" in the trial court's termination of mother's parental rights. *Lockwood v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00062-CV (Tex. App.—Austin June 26, 2012, no pet.) (mem. op.).

C. Disabled Juror – Proceeding with Less Than Twelve Jurors

On the second day of trial in district court, a juror's grandfather died. The juror testified that it would be difficult to concentrate, his "mind would not be here," and he would not be able to "give full attention and consideration to the instructions of law and the testimony presented" if he remained on the jury. The trial court determined the juror was disabled, excused him, and proceeded with the remaining eleven jurors, who rendered a unanimous verdict of termination. Father appealed and

argued that the trial court abused its discretion in allowing the jury trial on the termination of his parental rights to proceed with fewer than twelve jurors.

Although a district court jury must consist of twelve original jurors, as few as nine may render and return a verdict if the others die or become "disabled from sitting." TEX. CONST. art. V, § 13; TRCP 292. The appellate court found that the juror's testimony regarding his mental capacity to understand or concentrate on the evidence supported the finding of disability because it showed he suffered more than "mere mental distress," but also was "emotionally and psychologically disabled from sitting." The court acknowledged that "Trial Courts have broad discretion in determining whether a juror is disabled from sitting when there is evidence of constitutional disqualification." In affirming the trial court's judgment, the appellate court held that "we cannot say that the trial court abused its discretion in concluding that the juror was disabled and dismissing him, denying [father's] motion for mistrial, and proceeding with eleven jurors." *In re A.P., K.P., and E.P.*, No. 10-11-00409-CV (Tex. App.—Waco May 30, 2012, no pet.) (mem. op.).

> Note: TRCP 292 allows for the rendition of a verdict "by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve."

D. CASA Is Not Subject To "The Rule"

TRCP 267 (also known as "The Rule") provides for the exclusion of witnesses from the courtroom during trial. Father complained on appeal that when the Rule was invoked, CASA supervisor, who was the organization's representative at trial, "should have been excluded from the courtroom because she was not officially designated as a representative by any party to the case." The appellate court overruled father's issue, reasoning that: (1) the trial court noted that CASA was the guardian *ad litem* and the CASA supervisor was its representative; and (2) pursuant to TFC § 107.002(c)(4), "a guardian ad litem is entitled to appear at all hearings." The court held that "[b]ecause a guardian ad litem is entitled to appear at all hearings, we do not believe that the Rule operates to exclude the guardian ad litem from the courtroom." *In re H.D.B.-M.*, No. 10-12-00423-CV (Tex. App.—Waco Feb. 28, 2013, no pet.) (mem. op.).

III. EVIDENTIARY ISSUES

A. Blanket Hearsay Objection

At trial, mother and father objected to the admission of the Department's investigative report and supporting affidavit. Mother initially objected: "There's hearsay contained, hearsay statements within the affidavit itself." She then objected: "My objection to the [ ] business record, it's not the document itself. I understand it is a business record; however, [that] does not make [the] hearsay statements contained within that hearsay admissible because they're still hearsay statements. Even though the document itself may be admissible, the statements contained in them are not necessarily admissible." Father joined mother's objection.

Because mother only asserted that the investigative report is a "hearsay document" and father only said: "I object to the hearsay", and they did not "specifically identify the statements in the affidavit that they claim were impermissible hearsay", they did not preserve their complaints that the report and the affidavit contained hearsay statements. The appellate court explained that "[a] blanket hearsay objection that does not identify which parts of a document contain hearsay is not sufficiently specific to preserve error with respect to those parts." *L.M. and Y.Y. v. Dep't of Family and Protective Servs.*, No. 01-11-00137-CV (Tex. App.—Houston [1st Dist.] July 12, 2012, pet. denied) (mem. op.).

B. Police Reports Admissible – TRE 803(8)(B); Hearsay within Hearsay

Mother and father complained that the trial court erred by admitting a California police report containing a domestic violence incident because "it contained hearsay statements and improper conclusions drawn by the authoring police officer" and therefore "did not qualify as a public record exception" under TRE 803(8). The appellate court explained that "the exclusion of matters observed by police officers and other law enforcement personnel, as found in subpart (B), applies only to criminal proceedings." Accordingly, the trial court did not err in admitting the police report because it was admissible as a public record.

Mother and father also argued that the police report "was inadmissible because it contains 'statements made by people other than the speakers.'" The appellate court noted that the report contained statements from mother's co-worker, which do not qualify under the public-records exception in TRE 803(8). However, neither mother nor father "specifically indicate[d], either in the trial court or

on appeal, which statements they contend are inadmissible." The appellate court explained that "a general objection to evidence as a whole, which does not point out specifically the portion objected to, is properly overruled if any part of that evidence is admissible." It held: "Because much of the police report was admissible under the public record exception, and [mother and father] did not specifically indicate which portions of the report were not admissible, we conclude that the trial court did not abuse its discretion by overruling [mother's and father's] objections to the police report." *L.M. and Y.Y. v. Dep't of Family and Protective Servs.*, No. 01-11-00137-CV (Tex. App.—Houston [1st Dist.] July 12, 2012, pet. denied) (mem. op.).

C. Privileged Communication – TFC § 261.202

Father argued that the trial court erred because it allowed evidence to be heard by the jury "that consisted of his communications with a clergyman, in violation of the communications-to-clergyman privilege of [TRE] 505." In holding that father "was not entitled to invoke the clergy privilege," the appellate court explained that, under TFC § 261.202, "in a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client." It further explained that, because the Legislature "chose the broad term 'proceeding,'" TFC § 261.202 applies "to any proceeding, criminal or civil." *In re W.B.W.*, No. 11-11-00269-CV (Tex. App.—Eastland July 12, 2012, pet. denied) (mem. op.).

D. Judicially Noticed Documents are Not Evidence

Father appealed challenging the legal and factual sufficiency of the trial court's TFC § 161.001(1)(D) finding, the Department argued that father's incarceration "resulted in his selecting a caregiver—his sister—who was unable to appropriately parent the children." The appellate court disagreed, noting that the Department had approved the placement with the aunt, and that the Department's allegations of the children's "deplorable conditions with their aunt" were "based on hearsay statements of the family who took possession of the children from their aunt, none of which were admitted at trial. The individuals who made these statements to the Department did not testify at trial, and the Department introduced no evidence of the actual physical surroundings or conditions of the children's environment." The court also found "scant evidence" regarding the aunt's Department history, and that there was no evidence regarding: (1) the paternal aunt's intellectual abilities; (2) "the circumstances of removal or when it happened"; (3) father's requisite knowledge under TFC § 161.001(1)(D) "during the time [paternal aunt] cared for the children"; or (4) father's awareness of the removal.

In concluding that the evidence was legally insufficient to support the trial court's (D) finding as to father, the court of appeals also noted that: "To support some of the allegations in this case, the Department refers to documents filed in the clerk's record, which include third-party statements regarding the children's living conditions with their aunt and statements from Department employees that provide further details about [father's] sister's intellect and the prior 'CPS history' of the children's mother and [father's] sister. Although the trial court took judicial notice of its file, this is not evidence we can consider as part of a legal-sufficiency review." *Rios v. Tex. Dep't of Family and Protective Servs.*, No. 03-11-00565-CV (Tex. App.—Austin July 11, 2012, no pet.) (mem. op.).

IV. TERMINATION GROUNDS

A. TFC § 161.001(1)(C) – Failure to Support and Remaining Away for Six Consecutive Months

On October 27, 2010, the Department received a referral of neglectful supervision alleging: (1) the children had been left with their great-grandmother; (2) the parents did not provide adequate support; and (3) the children were found wandering a few blocks away from the home.

On January 10, 2011, the great-grandmother's APS caseworker informed the CPS caseworker that mother had taken the children, who were now being cared for by maternal grandmother. The Department investigator visited grandmother on February 1, 2011, and was informed that mother left the children with grandmother without birth certificates, shot records, or social security cards. Grandmother did not know mother's whereabouts. On May 19, 2011, grandmother was informed that mother was incarcerated, was about to be released, and upon her release would live with grandmother and the children.

The caseworker testified that when the case began in January 2011, the parents were living in a shelter, and the children were residing with grandmother. She related that mother was "still incarcerated on March 27, 2012, the day of trial, for forgery, and [mother] was scheduled to be released in November 2012." Further, mother had not seen the children since July 2011. The caseworker also testified that mother had not provided any money or support for the children and had not maintained significant

contact with the children, although she admitted that mother had written letters to the children.

Grandmother testified that she has taken care of the children since January 2011, mother did not provide any financial support and had not come to visit the children until July 2011. She related that mother had sent the children two letters a week to inquire about the children's well-being. Mother's parental rights were terminated under TFC §§ 161.001(1)(C), (E), and best interest.

On appeal, mother argued that the evidence was legally and factually insufficient to support termination under TFC § 161.001(1)(C) based upon her contention "that by leaving the children with [grandmother], who demonstrated that she can care for the children, [mother] provided 'adequate support' of the children under section 161.001(1)(C)." Mother based her argument on *Holick v. Smith*, 685 S.W.2d 18, 21 (Tex. 1985), which held that a parent is merely required "to make arrangements for adequate support rather than personally provide support" under TFC § 161.001(1)(C).

In rejecting mother's argument, the appellate court concluded that there was no evidence that at the time mother left the children with grandmother, she made any arrangements to provide any assistance or had reached an agreement with grandmother that no such support was needed. Rather, the evidence established that mother dropped off the children with no birth certificates, shot records, or social security cards, and failed to inform grandmother of her whereabouts. Further, mother never provided any support when such support was needed. The court held that mother remained away for six consecutive months from January until July 2011, and affirmed termination of her parental rights under TFC § 161.001(1)(C). *In re T.L.S. and E.A.S.*, No. 01-12-00434-CV (Tex. App.—Houston [1st Dist.] Dec. 13, 2012, no pet.) (mem. op.).

B. TFC § 161.001(1)(D)

1. Unexplained Injuries

Father stated that while he was changing the child's diaper, he lifted the child by the ankles with one hand and the child's "leg simply popped". As a result, mother and father took the child to the hospital where it was "determined that he had a spiral break of his left femur." The child underwent X-rays that revealed he had three partially healed broken ribs and he had suffered a spiral fracture of his other leg. According to the child's doctor, "all of the injuries appeared to be non-accidental." However, mother and father denied any knowledge of the child's injuries or how they had occurred.

The Department initiated an investigation because the parents' explanation of the injuries "did not comport with the nature of the injury." At the end of the Department's investigation, "the Department was unable to determine whether Mother had committed physical abuse or neglect, but it found that there was reason to believe Father had committed physical abuse and neglect of the child." It was learned by the Department investigation that: (1) mother had no prenatal care; (2) neither parent took the child to his four-month vaccinations; and (3) the child had missed five physical therapy appointments.

In finding the evidence sufficient to support termination of mother's parental rights under TFC § 161.001(1)(D), the appellate court considered that: (1) mother and father failed to take the child for his four-month vaccinations; (2) they failed to take him to five of his weekly physical therapy appointments in June and July 2011; (3) when they took the child to the hospital in July 2011, "it was determined that he had suffered a non-accidental spiral break of his leg"; (4) radiological studies showed that the child had previously suffered broken ribs and a spiral break of the other leg and these breaks were in various stages of healing; (5) testing determined that the child did not have brittle bone disease or any condition that would have caused unusual fragility; (6) the child did not have any broken bones while in foster care; and (7) mother and father denied having any knowledge of the child's injuries or how they happened.

In both its legal and factual sufficiency analyses, the court discussed that a reasonable inference could be made that mother did not take the child to his medical appointments because she knew the child had suffered these injuries and "feared" the injuries "would be discovered" by medical personnel. *C.H. v. Tex. Dep't of Family and Protective Servs.*, 389 S.W.3d 534 (Tex. App.—El Paso 2012, no pet.).

2. No Evidence of Actual Physical Surroundings or Conditions

In 2008, father was incarcerated for violating the conditions of probation on his burglary conviction. Because both parents were incarcerated, the Department became involved, and although the Department later alleged that paternal aunt had a "low IQ and a prior CPS history involving the removal of her own children", it approved the parents' placement of the children with her in 2009, "based in part on a physician's recommendation. . .

." A year later, while father was still incarcerated, the Department became involved again after learning that paternal aunt had voluntarily relinquished custody of the children to a foster family. The foster family informed the Department that "they could not adequately care for the [children] because their aunt failed to provide their Medicaid information and documents necessary to enroll them in school." Based on documents in the trial court's file, that were not admitted at trial, the Department contended that the foster parents reported that when they "picked up the children from their aunt's residence in Tennessee", the children had been living in a "filthy trailer", were "lice ridden", and had "peculiar marks on their bodies." The trial court terminated father's parental rights.

On appeal, father argued that the evidence was legally and factually insufficient to support the trial court's TFC § 161.001(1)(D) finding, and the appellate court agreed. The Department argued that father's "most recent incarceration resulted in his selecting a caregiver—his sister—who was unable to appropriately parent the children." The court of appeals disagreed, noting that it was undisputed that: (1) "the Department approved placement of the children with [paternal aunt]"; and (2) paternal aunt was unable to adequately care for the children and "voluntarily relinquished custody to third parties, unbeknownst to the children's parents and the Department." The court further noted that the Department's allegations of the children's "deplorable conditions with their aunt" were "based on hearsay statements of the family who took possession of the children from their aunt, none of which were admitted at trial. The individuals who made these statements to the Department did not testify at trial, and the Department introduced no evidence of the actual physical surroundings or conditions of the children's environment." The court also found there was: (1) no evidence of paternal aunt's intellectual abilities; (2) "scant evidence" concerning her CPS history, consisting of a Department witness reading a statement from a report that said paternal aunt's children had been removed and not returned to her custody; (3) no evidence "regarding the circumstances of removal or when it happened"; (4) no evidence that father had "acquired the knowledge required under section 161.001(1)(D) during the time [paternal aunt] cared for the children"; and (5) no evidence that father was aware of the removal. The court held that the evidence was legally insufficient to support the termination under TFC § 161.001(1)(D). *Rios v. Tex. Dep't of Family and Protective Servs.*, No. 03-11-00565-CV (Tex. App.—Austin July 11, 2012, no pet.) (mem. op.).

C. TFC § 161.001(1)(E)

1. Criminal Course of Conduct – Legally Insufficient

At trial, the Department relied on the following "virtually undisputed" evidence regarding father to "prove endangerment": (1) father acknowledged that he was convicted in Wisconsin of an offense involving a minor when he was younger; (2) father received probation for this offense, "long before" the children were born; (3) after mother and father separated, father tried to obtain a green card and was arrested for violating the terms of his probation; and (4) father was deported. The Supreme Court stated that the appellate court "took this limited evidence and surmised an endangering course of conduct, beginning with the offense in Wisconsin and ending in deportation."

The Court acknowledged that father's conviction, probation violation, and deportation are all factors that may be considered under TFC § 161.001(1)(E); however, it found the evidence legally insufficient to support termination of father's parental rights. The Court explained: "the Department bears the burden of showing how the offense was part of a voluntary course of conduct endangering the children's well-being". Other than Department reports stating: "criminal activity involving sex with a minor", the Department "did not offer evidence concerning the Wisconsin or deportation proceedings." In a footnote, the Court stated: "While the statements are certainly very serious, given that the statements supply no details, that [father] was given a probated sentence, that the events occurred at least eight years before [father] was deported and at least thirteen years before the Department initiated these termination proceedings, and that in the long interim there is evidence [father] consistently demonstrated his desire to care and provide for his children, the brief statements in the Department's records cannot be considered clear and convincing evidence of endangerment."

The only evidence concerning the conviction came from father's own testimony wherein he admitted he "got in trouble in Wisconsin" because his "girlfriend was underage". The Court noted that "The Department asked no questions about this issue on cross-examination" and that "[t]he record does not contain the Wisconsin judgment, probation terms, or the charges brought. The Department presented no evidence concerning the date, circumstances, or offending conduct, or the girl's age." While following its own precedent "that an offense occurring before a person's children are born can be a

relevant factor in establishing an endangering course of conduct", the Court held that the evidence supporting TFC § 161.001(1)(E) was legally insufficient because "the Department bears the burden of introducing evidence concerning the offense and establishing that the offense was part of a voluntary course of conduct that endangered the children's well-being", and the Department did not meet its burden. *In re E.N.C., J.A.C., S.A.L., N.A.G. and C.G.L.*, 384 S.W.3d 796 (Tex. 2012); *see also In re A.M.C., J.M.C. III, C.D.C. and H.D.C.*, No. 09-12-00314-CV (Tex. App.—Beaumont Dec. 6, 2012, no pet.) (mem. op.) (in holding that the findings under TFC § 161.001(1)(D) and (E) were legally insufficient, the appellate court explained that: "The State did not fully develop the record regarding Father's alleged drug use or Father's alleged criminal history." Consequently, as relief requested by father, the court removed the endangerment findings from the final order and modified the trial court's judgment "to delete the [(D) and (E)] findings").

2. Prior Criminal Conduct and Drug Use – Legally Insufficient

Following a jury trial in which parents' rights were terminated, mother challenged the legal and factual sufficiency of the jury's finding under TFC § 161.001(1)(E).

The court of appeals considered evidence of mother's: (1) history of methamphetamine use; (2) addiction to "both methamphetamines and marijuana"; (3) relapse after inpatient drug treatment on three different occasions; (4) criminal history related to her drug use; (5) prior Department involvement regarding older children, due to her methamphetamine use in their presence and while driving the children; (6) admission of methamphetamine use while pregnant with the subject child, and her drug use during a prior pregnancy; and (7) probation violation due to her methamphetamine use, resulting in her incarceration and giving birth to the subject child while incarcerated. The court also noted testimony that mother did not regularly attend Narcotics Anonymous and that the CASA supervisor believed that two of mother's negative drug test results were "questionable."

However, the court cited the following "[u]ndisputed facts" as not supporting the jury's finding: (1) the child was born free of birth defects and did not test positive for controlled substances; (2) neither the Department nor CASA recommended termination of mother's parental rights to her older children and she obtained joint managing conservatorship of those children nine months prior to trial and had unsupervised overnight visits with those children; (3) mother tested negative on all drug tests during the case and testified that she had been sober for fourteen months at the time of trial; (4) mother attended Narcotics Anonymous and had a sponsor; (5) mother's therapist, psychologist, and drug counselor each testified as to her likelihood of relapse based on her one year of sobriety; (6) mother worked full time during the pendency of the case; (7) CASA supervisor's testimony that termination of mother's rights "was not CASA's original goal", but changed its recommendation so that the child's foster family could adopt the child, from which the court inferred that CASA's recommendation "was not based on [mother's] continuing to engage in endangering conduct"; and (8) Department supervisor's testimony that if the child "was older, CPS would not be seeking termination of [mother's] parental rights."

The appellate court found that the evidence was legally insufficient to support termination of mother's parental rights under TFC § 161.001(1)(E), holding that "[t]he evidence at trial shows that [mother] had engaged in endangering conduct before [the child] was born. But the undisputed evidence shows that, once [the child] was born, [mother] did not continue to engage in a course of conduct that would endanger [the child's] well-being." The court continued: "This was confirmed by [mother's] expanded rights to her oldest children. . . . The testimony at trial from both CASA and CPS employees confirmed they did not believe [mother] was continuously engaging in endangering conduct upon her release from state jail." The court concluded that "no reasonable trier of fact could form a firm belief or conviction that [mother] engaged in a continuous course of conduct or placed [the child] with persons who engaged in conduct that endangered [the child's] physical and emotional wellbeing." *In re H.L.F.*, No. 12-11-00243-CV (Tex. App.—Tyler Nov. 30, 2012, pet. denied) (mem. op.); *compare In re J.E.*, No. 07-12-00449-CV (Tex. App.—Amarillo Feb. 5, 2013, no pet.) (mem. op.) (Appellate court held that despite undisputed evidence that mother had "refrained from drug use for about a year", was gainfully employed, and had an apartment, the trial court "is not required to consider conduct shortly before trial as negating evidence of a long pattern of endangering conduct.").

3. Endangerment Due to Caregiver's Mental Impairment

Grandmother legally adopted the child who had lived with her since he was an infant. The eleven-year-old child was diagnosed with bipolar disorder and ADHD, and had a tendency to become violent when not given his medication. The Department removed the child from his

grandmother's home after he had attacked grandmother on two occasions. During the second assault, the child used a knife and threatened to cut off his penis. The Department caseworker testified that she also observed threatening notes in grandmother's home "that were written about killing [grandmother] and [the child] and ghosts." Grandmother claimed the notes were written and placed in the house by the child's father. However, the caseworker testified that father was incarcerated. There were also concerns that grandmother was not properly administering the child's psychiatric medications.

After the removal, the evidence demonstrated that grandmother frequently forgot appointments and would often come to the Department's office, demanding visits when none where scheduled. She also became irate while at the Department's office, requiring the intervention of a security officer. The Department requested that grandmother submit to a psychological evaluation. The psychologist reported that grandmother exhibited "some pretty significant impairments in memory and some slight impairments in visual conception" and diagnosed her with mild cognitive impairment "that [could] indicate possible dementia." The psychologist explained that "mild cognitive impairment 'is generally related to memory issues' and '[i]f a person can't remember to take a child to a doctor's appointment, give them medication, those kinds of things, that is a concern.'" Grandmother also submitted to a psychiatric evaluation and was prescribed medication for "mild cognitive impairment". During trial, Grandmother insisted that she had seen incarcerated father several times since September 2008, and that he had been putting notes under her doors. She also provided incoherent responses to her counsel's questions concerning her willingness to work with the court in the future. When asked about the child's "medical needs", grandmother responded "they gave him medication for the ADD thing, the pills." When she was "further pressed to describe the child's 'diagnoses' or 'diseases,' she responded, 'Today I am here, so I wouldn't know.'" The Department caseworker "opined that [grandmother] was not properly administering the child's medications."

The appellate court took note of the evidence of grandmother's memory impairment and possible dementia diagnosis, as well as her incoherent responses during testimony. Additionally, the appellate court found that grandmother's testimony regarding the child's medical needs reflected that she may have not been able to appreciate the severity of the child's mental illnesses. In holding that the evidence was legally sufficient to support termination under TFC § 161.001(1)(E), the appellate court stated that grandmother "suffers from a mental illness that caused her to improperly administer the child's medication, which considering the child's attacks on [grandmother], threats to harm himself, and his own mental illness, endangered the child's physical and emotional well-being."

In holding the evidence factually sufficient to support termination under TFC § 161.001(1)(E), the court considered grandmother's psychologist's testimony that, with support and medication management, grandmother could improve. However, the appellate court continued: "[d]espite some favorable testimony from [grandmother's psychologist], the trial court could have noted that she last evaluated [grandmother] one year before trial. In addition, from appellant's own testimony and behavior at trial and her continued belief that she had seen [father] in her apartment when other evidence indicated he was incarcerated, the trial court could have reasonably concluded that she endangered the child." The court also considered that the trial court could have reasonably concluded that grandmother's failure to properly manage the child's medication prompted his attacks on her. *E.J. v. Dep't of Family and Protective Servs.*, No. 01-11-00763-CV (Tex. App.—Houston [1st Dist.] May 3, 2012, no pet.) (mem. op.).

4. Lack of Insight into Mental Illness

Mother had an extensive history of child protection investigations and psychiatric hospitalizations which began in 2001. Mother was diagnosed with bipolar disorder and was not taking her prescribed medication. In 2009, mother was diagnosed with substance-induced psychotic disorder and, after her second psychiatric hospitalization, was released in February 2009. Mother was hospitalized again in March 2009, during which, her behavior was described as "disoriented" and "more bizarre" than it had been the first time.

After mother's release, the Department received a referral in April 2009, alleging mother's neglectful supervision of the children. When the caseworker went to the home to investigate, mother exhibited abrupt changes in her moods, concocted "elaborate stories" about celebrities, and yelled at the caseworker. However, mother agreed to participate in the Department's Family-Based Safety Services program and to leave the children in the care of grandmother. In May 2009, the Department learned that grandmother had been admitted to the hospital, and mother still had not obtained mental health treatment. Accordingly, the Department sought emergency removal of the children and placed them in foster care.

Mother began visiting the children in June 2009. During the visits, mother exhibited bizarre behavior including "mumbling chants" to the children and "telling [her daughter] that she belonged to God and when she turns 18 that God will take her away". In September 2009, mother was again hospitalized in a psychiatric facility. Her hospital records reflected that mother was "hostile", "disheveled", had "thought content with suicidal ideation" and "religious delusions", and that she had poor insight into her mental illness. While being treated, mother was diagnosed with "schizophrenia, paranoid type"; however, treatment records reflected that mother denied having any psychiatric symptoms at that time.

Although mother was referred by the Department multiple times for a psychiatric evaluation, she failed to attend her evaluation appointments. However, mother testified that she had been seeing a psychiatrist regularly and was taking Lithium.

Mother's psychologist testified that he did not see any reason why mother could not function and parent effectively if she stayed on her medication and was monitored by a mental health professional. He also testified that mother could not provide a "reasonably accurate history of her mental health treatment", "lacked complete awareness of the severity of her mental health problems", and had a history of discontinuing her medications.

The appellate court found that pursuant to TFC § 161.001(1)(E), "[mother's] history of delusional behavior, together with multiple reports indicating that she lacked insight into the severity of her mental health condition, and her failure to properly seek treatment and take medication constituted a course of conduct that endangered the physical and emotional well-being of her children." The appellate court also held that despite the evidence that mother said she was being treated and mother's evaluating psychologist's testimony that she could parent effectively with medication and monitoring, "a reasonable factfinder could have found that [mother's] history of mental illness and failure to recognize its severity demonstrated that consistent improvement is unlikely." *L.F. v. Dep't of Family and Protective Servs*., No. 01-10-01148-CV (Tex. App—Houston [1st Dist.] May 3, 2012, pet. denied) (mem. op.).

5. Exposure of Child to "Serious Medical Conditions"

Mother admitted to taking hydrocodone the day before she gave birth to the child; however, mother denied using drugs or alcohol during pregnancy. The child was born premature and was in a neonatal intensive care unit on breathing apparatus. Due to their concern that the Department would remove the child, mother was not forthcoming regarding the father's identity and father provided the Department with a false identity.

The Department learned that father had been convicted twice of the aggravated sexual assault of his fourteen-year-old cousin, served fifteen years in the Texas Department of Criminal Justice, was a registered sex offender, and was labeled with a moderate risk of re-offending. In addition, the Department discovered that father was "HIV-positive and had Hepatitis C at the time of [the child]'s conception." At trial, mother was terminated under TFC §§ 161.001(1)(D), (E), (O), and best interest.

In addressing mother's legal and factual sufficiency challenge to the evidence supporting the jury's finding under TFC § 161.001(1)(E), the appellate court noted that "the record reflects several actions taken by [mother] that endanger the physical or emotional well-being of [the child]", including: (1) mother was aware that father was HIV positive and had Hepatitis C when they first began dating; (2) "[d]espite the harm that could have resulted to the child, [mother] chose to have sexual intercourse with [father]; and (3) the record indicated that there were complications with the child's birth, necessitating a stay in the neonatal intensive care unit. The appellate court held that "[c]learly, this evidence suggests that [mother] deliberately exposed herself and the child to the possible complications associated with [father]'s serious medical conditions." The court also considered that, despite mother's knowledge that father had two prior criminal convictions for the sexual assault of children, she maintained a romantic relationship with him and relied upon his family for support. The appellate court affirmed mother's termination under TFC § 161.001(1)(E). *In re H.D.B.-M*., No. 10-12-00423-CV (Tex. App.—Waco Feb. 28, 2013, no pet.) (mem. op.).

6. Sporadic, Chaotic Visitation

During the pendency of the case, mother's attendance at scheduled visits with the children was "sporadic at best." By her admission, some visits went well, but others went poorly. She did not correct the children's frequent "disruptive behavior", and offered no explanation for her failure to do so. Mother claimed to have left phone messages for the caseworker when she was going to miss visits, and complained of the hardship in attending visits while relying on buses and rides from others. In finding the evidence legally and factually sufficient to support

termination of mother's parental rights under TFC § 161.001(1)(E), the appellate court concluded that evidence of her "inconsistent participation in visitation with the children also supports the trial court's finding that she engaged in conduct which endangered the children's physical or emotional well-being." The court reasoned that mother's "sporadic, chaotic visitation" failed "to provide the children with consistency and security," which combined with her long history of unemployment and financial instability "indicate an inability to provide for her five children, a relevant consideration in the trial court's finding of endangerment." *In re R.M., C.C., C.C., P.C., A.C., B.C. and K.C.*, No. 07-12-00412-CV (Tex. App.—Amarillo Dec. 11, 2012, no pet.) (mem. op.).

D. TFC § 161.001(1)(D) and (E) – Endangerment Evidenced by Mental Health Considerations

Mother was diagnosed with bipolar disorder. She had an extensive Department history which began in 2007, when she was hospitalized following an attempt to overdose on medication while pregnant. Over the next two years, mother vacillated between staying on her psychiatric medication and participating in services with the local MHMR office and stopping her medication and being non-compliant with MHMR. In July 2009, mother resumed taking her medications and in October 2009, her Department case was closed. Later that same month, mother gave birth to a fifth child, and because she tested positive for marijuana during the pregnancy, the Department opened another FBSS case and provided services to her. When these services began, all of mother's children were living with her. However mother stopped taking her medications again in December 2009. Thereafter, mother missed her scheduled psychological evaluation and mother's boyfriend told the Department caseworker that mother was using drugs and had told him that she did not need her psychiatric medication. By February 2010, mother had stopped attending her MHMR appointments. In March 2010, the Department received a new referral. A Department caseworker and investigator responded to the referral and were concerned after observing mother having significant mood swings. Mother also told the investigator that she was not taking her bipolar medication. Mother's then ex-boyfriend expressed concern for the children's safety and told the investigator that mother "was a time bomb waiting to go off" and was "oblivious to reality".

On April 1, 2010, the children were again removed. Although mother said she would take her medication and participate in Department services including being more engaged with MHMR services, she failed to consistently do so. She also exhibited emotionally volatile behavior during a visit, and continued to have mood swings.

At trial, mother's psychologist testified that "[Mother's] disorders are treatable but that they require honesty and 'a great deal of work.' When asked to give his outlook for Mother after being informed that she had continued to not take her medication and to have anger and explosive behaviors two and one-half years later, [the psychologist] testified that his prognosis would change from 'favorably-guarded' to 'poor.'"

In finding the evidence sufficient to support termination under TFC § 161.001(1)(D) and (E), the appellate court reiterated that a parent's failure to take medication can create an environment or expose a child to an environment that endangers the child's emotional or physical well-being. The court also considered, among other evidence, that mother: (1) had a "guarded long-term prognosis without medication"; (2) engaged in drug use during her two pregnancies; (3) had drugs in the home; (4) exhibited aggressive behavior; and (5) had criminal convictions, therefore the evidence was legally and factually sufficient to support termination under TFC § 161.001(1)(D) and (E). *In re L.L.F., T.L.F., K.D.B., II, A.A.H., and N.C.H.*, No. 02-11-00485-CV (Tex. App.—Fort Worth July 19, 2012, no pet.) (mem. op.).

E. TFC § 161.001(1)(L)

1. Emotional Injury Is Serious Injury

TFC § 161.001(1)(L) provides for termination of parental rights of a parent who has been convicted or placed on community supervision for the serious injury of a child under specified sections of the Texas Penal Code, including section 21.11 (indecency with a child). In 2011, pursuant to an agreement, the trial court appointed the Department PMC and father and mother possessory conservators of the children. Four months later, father was arrested for indecency with a child for engaging in sexual contact with one of his daughters. The Department filed a petition for modification and termination of father's and mother's parental rights. Father pled guilty to indecency with a child and was placed on deferred adjudication community supervision. The indictment charging father with intentionally or knowingly engaging in sexual contact with his daughter and the final judgment and conviction were admitted into evidence. The therapist of the victimized child testified that the child suffers from severe anxiety issues and from enuresis and encopresis, requires medication, and was treated in a mental hospital. The therapist also testified that the child did not want to see her

father, expressed anger toward him, and feared returning to her prior home.

The trial court terminated father's parental rights under TFC § 161.001(1)(L)(iv). Father appealed, contending the evidence was legally and factually insufficient to prove that his criminal conduct caused the serious injury of a child.

While recognizing that "serious injury" in this context has not been defined, the appellate court held that "the injuries suffered by this child certainly support a finding that she suffered serious injury." The appellate court disagreed with father's contention that the therapist's testimony did not make a causal connection between the sexual abuse and the child's hospitalization, reasoning that although the therapist did not specifically attribute "all of [the child's] problems to the sexual abuse, she did testify that sexual abuse was a factor." The court found no authority "suggesting that sexual indecency must be the sole cause of serious injury." Thus, the appellate court held that the evidence of the child's emotional injuries was legally and factually sufficient to support the trial court's finding that the child suffered serious injury as a result of father's indecent conduct. *R.F. v. Tex. Dep't of Family and Protective Servs.*, 390 S.W.3d 63 (Tex. App.—El Paso 2012, no pet.).

2. Serious Injury Given Ordinary Definitions

The child was removed from her home after her aunt and uncle found her in the care of mother and father suffering from serious untreated burns on her legs. It was later determined that the child had sustained the burns while being forced to stand in "boiling water". Mother admitted that she and father did not take the child to the hospital out of fear that the child and her five siblings would be removed from the home. Mother also admitted that she knew the burns were infected. Mother later pled guilty to reckless injury to a child and was sentenced to two years in the Texas Department of Criminal Justice. Mother's parental rights were terminated under TFC § 161.001(1)(L), which provides for termination of parental rights of a parent who has been convicted for being criminally responsible for the serious injury of a child under specific sections of the Penal Code. The Family Code does not define the term "serious injury". One of the Penal Code sections enumerated under TFC § 161.001(1)(L) is Penal Code section 22.04, (involving injury to a child, elderly individual, or disabled individual), which states that a person has committed this offense if she intentionally, knowingly, recklessly, or with criminal negligence causes serious bodily injury or injury to a child.

Although mother admitted she was convicted of reckless injury to a child under Penal Code section 22.04, she argued on appeal that the evidence was insufficient under TFC § 161.001(1)(L) because her conviction for this offense did not establish that the child suffered "serious injury" resulting from the burns on her legs. Mother emphasized that her conviction under Penal Code section 22.04 required a showing of "serious bodily injury" or "bodily injury". Mother argued that the appellate court should adopt the Penal Code definition of "serious bodily injury" as the standard for defining "serious" injury under TFC § 161.001(1)(L).

The appellate court rejected mother's argument and held that "demonstrating 'serious injury' to a child under subsection (L) does not require a showing of 'serious bodily injury' as defined by the Penal Code." The appellate court went on to cite well-established case law, which holds that when a term is not defined in a statute it is given its ordinary meaning. In adopting the approach of the First Court of Appeals, the court stated "[o]ur sister court in Houston has adopted a dictionary definition of 'serious injury' to be applied in this context, which we also adopt." The court cited Webster's Dictionary definitions of the terms "serious" ("having import or dangerous possible consequences") and "injury" ("hurt, damage, or loss sustained") and concluded that the evidence was legally and factually sufficient to support the finding that mother committed "serious injury" to child as required under TFC § 161.001(1)(L). *In re A.L.*, *M.L.*, *and J.Y.R.*, 389 S.W.3d 896 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

F. TFC § 161.001(1)(N)

1. Evidence of Reasonable Efforts to Return Child Insufficient

In order to prove constructive abandonment under TFC § 161.001(1)(N), there must be clear and convincing evidence that (1) the Department has made reasonable efforts to return the child to the parent; (2) the parent has not regularly visited or maintained significant contact with the child; and (3) the parent has demonstrated an inability to provide the child with a safe environment. Father challenged the termination of his parental rights under this ground, asserting that the evidence was legally and factually insufficient to prove the Department made reasonable efforts to return the child. The Department argued that it met this requirement by creating a family service plan. The appellate court stated that the

Department's implementation of a family service plan is considered reasonable efforts to return a child to the parent "if the parent is given a reasonable opportunity to comply with the terms of the plan."

Father was incarcerated on a burglary charge before the child's birth and during the entire case. On December 2, 2011, the Department's caseworker visited father in jail and explained the service plan to him. The record did not indicate any other contact between father and the Department. The termination hearing began on January 6, 2012, thirty four days after father received the family service plan. When asked at trial, the caseworker affirmed that the Department was giving father only thirty four days to complete his service plan, and was willing to go forward and not give father a chance to work any services "[i]n order for [the child] to seek permanency."

The service plan required father to submit to random drug tests, complete a parenting class, complete individual counseling, engage in a psychosocial evaluation, attend weekly AA/NA meetings, obtain and maintain employment and stable and appropriate housing, and complete a drug assessment. The appellate court reasoned that the "record contains no evidence that appellant was provided with a reasonable opportunity to enroll in, much less complete, any of the requirements that he could have complied with while incarcerated." The court therefore concluded that the evidence was legally insufficient to support the trial court's finding that the Department made a reasonable effort to return the child to the father under TFC § 161.001(1)(N). *In re A.Q.W.*, 395 S.W.3d 285 (Tex. App.—San Antonio 2013, no pet.).

2. New Service Plan Not Required to Establish Reasonable Efforts to Return Upon Modification and Termination

The child was removed from mother in April 2010. The Department first contacted father, who was living in California, approximately five months later. In February 2011, father was adjudicated to be the father of the child. In May 2011, the trial court issued an order naming the Department as the child's managing conservator and naming mother and father as possessory conservators. The Department requested that home studies be completed in California on the homes of father and father's aunt. The California Department of Child and Family Service (CDCFS) denied both homes as a placement for the child. The Department filed a petition seeking to modify the prior order and terminate the parent-child relationship, after a bench trial, the trial court terminated father's parental rights.

On appeal, father challenged the trial court's finding under TFC § 161.001(1)(N), in part, on the basis that the Department did not make reasonable efforts to reunify because it did not create a new service plan for him as required under TFC § 263.102. The appellate court rejected father's argument noting that he did not cite any authority to support his claim and that the record reflected that the Department created a service plan for father, which his first caseworker reviewed with him. The appellate court also recognized that father's second caseworker sent him an updated service plan after he was adjudicated to be the father of the child, reviewed the plan with him, and attempted to assist him with finding services in California.

The appellate court also discussed the Department's efforts to return in light of the Department "exhausting all of its options for placing [the child] with [father's] relatives" and its "initiative" in requesting that home studies be completed on father's home and his aunt's home. However, both home studies were denied by CDCFS. The court held that the evidence was legally and factually sufficient to support the finding that the Department made reasonable efforts to return child to father under TFC § 161.001(1)(N). *H.N. v. Dep't of Family and Protective Servs.*, ___ S.W.3d ___, No. 08-11-00364-CV (Tex. App.—El Paso Mar. 13, 2013, no pet. h.).

3. Court Order Abating Visits Does Not Preclude a Finding that Mother Failed to Regularly Visit

Child was removed four days after birth. At the time of the child's birth, mother's three other children had already been removed upon findings of "reason to believe" that she had sexually abused one of the children and neglectfully supervised all three. Mother's parental rights were terminated under TFC §§ 161.001(1)(N), (O), and best interest. On appeal, mother complains that the evidence is legally and factually insufficient to support TFC § 161.001(1)(N)(ii) because "she regularly visited [the child] until her visitation rights were abated by the court on October 20, 2011."

The caseworker testified that over eleven months, mother only visited the child five times for a total of eight hours. Two visits occurred during scheduled court hearings. One visitation was missed because mother claimed that her brother had a flat tire. The caseworker received no response from mother after she sent mother a text message to inform her of a hearing regarding her visitation rights. When mother failed to attend the hearing, it was postponed for a week. The caseworker said she sent another text

message and a letter to mother about the rescheduled visitation hearing and mother failed to show for the second hearing. Consequently, her visitation rights were abated "until she could come to court and tell [the Judge] why she didn't come to court." At the time of trial, mother had not seen the child for four-and-one-half months.

Mother argued that she would have visited the child more but for her transportation and financial problems. She also alleged "that the four and a half months during which she failed to maintain contact with [the child] cannot be counted against her because the court had abated her visitation." The appellate court was unconvinced by this argument because mother's visitation rights were abated as a result of her failure to attend two court hearings. Mother claimed she set up a conference call with her caseworker through the therapist and passed a message to her caseworker through a courtesy worker. However, the caseworker testified that she never received a response from mother after advising her that her visitation rights were abated. The court concluded that the evidence was "sufficient for the factfinder to determine that [mother] failed to regularly visit or maintain significant contact with [the child]." *Nuyen v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00147-CV (Tex. App.—Austin Aug. 23, 2012, no pet.) (mem. op.).

G. TFC § 161.001(1)(O)

1. Removal for Abuse or Neglect

On appeal, father complained that the evidence was insufficient to support termination of his parental rights under TFC § 161.001(1)(O) because the child was not removed as the result of abuse or neglect "on his part" since the child was removed from mother's home. In finding father's argument without merit, the appellate court held: "subsection (O) does not require that the parent who failed to comply with a court order be the same parent whose abuse or neglect of the child warranted the child's removal." *In re D.R.A. and A.F.*, 374 S.W.3d 528 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see also In re M.D. and L.D.*, No. 10-13-00005-CV (Tex. App.—Waco Apr. 11, 2013, no pet. h.) (mem. op.).

2. Removal for Abuse or Neglect Sufficient – But Courts Split on Use of Temporary Order Findings to Prove Same

Father appealed the trial court's termination of his parental rights, arguing that the evidence was legally insufficient to support a finding under TFC § 161.001(1)(O). Father argued, in part, that termination under TFC § 161.001(1)(O) was improper because the child was removed on "concerns" of abuse or neglect, and not for "abuse or neglect." The appellate court disagreed, citing precedent from other courts of appeals in considering: (1) evidence that the Department had become involved with the child because it "received two referrals alleging neglectful supervision and physical abuse"; (2) the family service plan, which had been admitted as an exhibit at trial, stated "that the reason for the Department's involvement was the referrals and notes that [father] had a history of domestic violence and alcohol abuse"; (3) the Department investigator's testimony that she reached a disposition of "reason to believe" for neglectful supervision "due to allegations of alcohol abuse and domestic violence"; and (4) the appellate "record contains the trial court's temporary order following adversary hearing, which appointed the Department as temporary managing conservator and included the findings required by section 262.201 of the family code." The court of appeals held that "there were allegations of neglectful supervision specific to [the child] by [father] that prompted the Department's investigation and subsequent removal of [the child]" and concluded that the evidence was legally sufficient to support the trial court's finding under TFC § 161.001(1)(O). *L.Z. v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00113-CV (Tex. App.—Austin Aug. 23, 2012, no pet.) (mem. op.); *see also In re A.O.*, No. 04-12-00390-CV (Tex. App.—San Antonio Nov. 14, 2012, no pet.) (mem. op.) (court of appeals held that trial court's judicial notice of temporary orders supports finding that child "had been removed for abuse or neglect"); *but see In re C.B.*, 376 S.W.3d 244 (Tex. App.—Amarillo 2012, no pet.) (appellate court concluded that "temporary order following the full adversary hearing", of which trial court took judicial notice, "does not provide the evidence of abuse or neglect required for termination under the subsection (O) ground").

3. Removal for Abuse or Neglect Due to Violation of Safety Plan

Mother challenged the sufficiency of the evidence supporting termination of her parental rights under TFC § 161.001(1)(O) arguing that "even if she did not complete the service plan, there is no evidence this failure endangered the physical and/or emotional well-being of [the children]." The evidence showed that mother violated the Department's safety plan, which required that mother not allow her boyfriend, who had been accused of sexually abusing another of mother's children, to have any contact with the children. Mother was specifically informed that the restriction prohibiting boyfriend's access to the children was for the children's safety. Despite this

admonition, mother allowed boyfriend to continue residing in the home with the children and allowed him to drive two of the children and mother to an investigative interview concerning boyfriend's sexual abuse of the other child. Further, the boyfriend was found in the home on the day the children were removed. In considering mother's argument, the appellate court held, "[t]o the extent that her argument implicates 'the removal for abuse or neglect' language in section 161.001(1)(O) there is clear and convincing evidence in the record that [mother] violated the [Department's] safety plan by allowing [boyfriend] to have contact with the children." The court held that the evidence of mother's violation of the safety plan, which had been implemented for the children's protection, established that the children were removed as a result of "abuse or neglect" under TFC § 161.001(1)(O). *In re J.C., J.C., Jr., J.C. III and S.C.*, No. 09-12-00092-CV (Tex. App.—Beaumont Oct. 18, 2012, no pet.) (mem. op.); *see also In re H.S.V., C.M.V. and T.M.V.*, No. 04-12-00150-CV (Tex. App.—San Antonio Aug. 22, 2012, pet. denied) (mem. op.) (children were removed for abuse or neglect because mother neglected them by leaving them with a man accused of child abuse in contravention of her safety plan).

4. Intellectually Challenged Parent

Father complained on appeal that the evidence was legally and factually insufficient to support termination under TFC § 161.001(1)(O). The trial court entered an order for actions necessary for father to obtain the return of the child. At trial, father testified that he was twenty six years old, lived with his mother, did not know how to drive, had never had or applied for a job, and received disability checks, but was not sure of the amount. He also testified that he had not been diagnosed with a mental illness or mental retardation. When father was asked if he "remember[ed] being in court and a judge order[ing] him to do stuff for [him] to be able to get [the child] back," he answered, "Yes."

In addition to not completing other court-ordered services, father admitted that he had been ordered to have a psychological evaluation, but excused his noncompliance on transportation issues. The psychologist testified that she never evaluated father because he missed several appointments and refused to participate when he finally did appear. He denied that he ever refused to participate, but claimed that he did not understand the questions. The psychologist also testified that she had reviewed an MHMR psychologist's report in which father had been diagnosed with mild retardation. Regarding a mentally retarded parent's failure to complete court-ordered services, the psychologist opined that regardless of mental retardation, the standard should be "whether or not [the parent] [was] able to successfully complete those required components to demonstrate they can parent effectively."

The appellate court held that legally and factually sufficient evidence supported the trial court's finding under TFC § 161.001(1)(O) because father failed to comply with several provisions of the order, including refusing to perform a psychological evaluation and failing to provide information from which the Department could determine whether he could provide for the child's basic or heightened medical needs, given the child was developmentally delayed and had visual impairment. *In re C.J.G.*, No. 02-12-00293-CV (Tex. App.—Fort Worth Jan. 4, 2013, no pet.) (mem. op.); *see also In re A.W.C. and G.A.C.*, No. 11-12-00070-CV (Tex. App.—Eastland July 12, 2012, no pet.) (mem. op.) (appellate court held evidence legally and factually sufficient to support termination under TFC § 161.001(1)(O) of father diagnosed with moderate mental retardation (IQ of 51) and mother (IQ of 70) who was determined to have significant limitations in "many areas of her life" and "her level of insight into her deficits appears to be very limited").

5. Substantial Compliance and Excuses – No Bar to (O) Ground Termination

Mother appealed the termination of her parental rights, complaining in part that the evidence was legally and factually insufficient to support termination under TFC § 161.001(1)(O).

The appellate court considered undisputed evidence that mother did not complete "every requirement" in her service plan. Mother did not contest the validity or the content of the court order requiring her to complete services, including "complying with her medications as prescribed and . . . not self medicat[ing] with illegal or mind altering substances." Mother conceded that she tested positive for methamphetamine and used it more than once during the pendency of the case, even after completing drug treatment. Mother did not produce a certificate of completion for parenting classes and she was discharged by two counselors for missing sessions.

In affirming the termination of mother's parental rights under TFC § 161.001(1)(O), the court restated the long-standing doctrine that the courts "do not consider 'substantial compliance' to be the same as completion for the purposes of subsection (O) of the Family Code, nor does that subsection provide for excuses for failure to complete court ordered services." "At most, any excuse

for failing to complete a family service plan goes only to the best interest determination." *In re R.N.W. and T.M.W.*, No. 10-11-00441-CV (Tex. App—Waco June 6, 2012, no pet.) (mem. op.).

H. TFC § 161.001(1)(P) – Legally Insufficient

Father challenged the legal and factual sufficiency of the evidence to support the trial court's finding under TFC § 161.001(1)(P), which allows a trial court to order termination if it finds by clear and convincing evidence that the parent has used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and the parent: (i) failed to complete a court-ordered substance abuse treatment program; or (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance.

The only evidence of father's drug use was his mother's testimony that he was "not a consistent drug user", but he had a history of drug use over the past three or four years, it was a disease, and that incarceration had given him time to "clean out his system." The appellate court reasoned that because father was incarcerated for the entire six and one-half months from the child's birth to the termination hearing, "he could not have 'used a controlled substance . . . in a manner that endangered the health or safety of the child.'" Additionally, because father received his service plan only thirty four days before trial, the court determined that there was no evidence father "was provided with an opportunity to enroll in, much less complete, 'a court-ordered substance abuse treatment program' while incarcerated," as required under TFC § 161.001(1)(P)(i). Finally, the court concluded that there was also no evidence that father "continued to abuse a controlled substance" as required under TFC § 161.001(1)(P)(ii).

The Department argued that father's drug use was a course of conduct that endangered the child's health and safety by subjecting the child to being left alone because the parent is once again incarcerated or committed to a drug treatment facility. The appellate court rejected this argument, finding nothing in the record to support such "speculation" because there was no evidence that father had been "jailed repeatedly or been in and out of drug treatment of any type." As a result, the court held that the evidence was legally insufficient to support the trial court's finding under TFC § 161.001(1)(P). *In re A.Q.W.*, 395 S.W.3d 285 (Tex. App.—San Antonio 2013, no pet.).

I. TFC § 161.001(1)(Q)

1. (Q) Insufficient – No Evidence of Confinement for Two Years

The Department filed a termination petition on September 9, 2010, after removing the children from mother. Father was incarcerated in California when the petition was filed, and appeared at trial through counsel. The trial court terminated father's parental rights under TFC § 161.001(1)(Q). Father complained on appeal that the evidence was legally and factually insufficient to support the trial court's finding under TFC § 161.001(1)(Q). The Department was required to prove by clear and convincing evidence that father's confinement or imprisonment would end no sooner than September 9, 2012.

In its findings of fact and conclusions of law, the trial court found that:

> "[Father] provided no direct evidence concerning his incarceration, but sought at trial to rely on what he himself had communicated to Department workers. It appears that [father] was incarcerated sometime in 2007. In his Family Service Plan dated November 10, 2010, [father] writes that he expects to be released in July 2012. In the Permanency Progress Report dated May 23, 2011, his worker states that he told her he had seventeen months on his sentence, which would put the release date sometime in October of 2012. Then in a letter dated July, 2011, he again states the July 2012 date. There is no evidence of when, if ever, [father] would have the ability to provide for the children after his release from prison, whenever that might be."

The trial court also found that the Department "made a diligent effort to obtain specific, confirmed information concerning [father's] incarceration from the appropriate authorities of the California penal system with very little success."

The appellate court described the evidence most favorable to the finding as: (1) Department investigator testimony that mother told her father was in prison in California and would be serving "a few more years"; and (2) Department caseworker's May 23, 2011 permanency plan and progress report in which the caseworker stated, "[father] has been

incarcerated in California since 2007. He informed me that he still has 17 months left in his sentence."

The court then recounted the evidence contrary to the finding including: (1) Department's investigator and caseworker admission that they never obtained documentation or records showing father's incarceration in California; (2) investigator had no personal knowledge of father's release date; (3) the caseworker's testimony that father was still incarcerated and that she "[b]elieved" he told her he was to be released in August 2012; (4) father's filed service plan which contained the statement: "As soon as I'm released out of prison on 7/11/2012 or sooner, then I will make every effort possible to provide a stable place for both [children]"; and (5) the caseworker's confirmation of her receipt of a July 7, 2011, letter in which father stated, "My release date is on 07/11/2012". The appellate court also noted an exchange between the trial court, the Department's attorney and caseworker, regarding whether the July 2012 date given by father was his release date or a possible parole date. After the exchange, the trial court stated: "If it's just his first consideration [for parole], then I'm not going to accept that as a release date," and continued, "without knowing for certain that that is an absolute release date, and having only his word on it, I'm not going to find him credible. I don't even get to talk to him or see him." Thus, regarding father's release date, the trial court said "it's all speculation on all sides, it seems to me."

In its analysis, the appellate court noted the trial court's findings that father "provided no direct evidence regarding his incarceration" and that the Department "made a diligent effort to obtain" such information "from the appropriate authorities of the California penal system, with very little success." It continued: "[n]otwithstanding these findings, the Department, and not [father] had the burden to show by clear and convincing evidence that [he] would not be released within two years from the date the Department filed its petition." The court found that "the Department offered no evidence from any authoritative source in the California penal system to establish that [father] would be released after September 9, 2012." Despite Department's counsel's statement regarding the information obtained from a California computer database concerning the father's incarceration, the court stated that Department counsel's unsworn statement was not evidence.

The appellate court stated: "Whether it was reasonable for the trial court to disregard all of [father's] consistent statements regarding his release date does not affect our conclusion regarding the sufficiency of the evidence to support termination under Section 161.001(1)(Q)." However, the appellate court discussed how the trial court relied on the Department caseworker's progress report "to support its conclusion that [father] would be incarcerated more than two years after the Department filed its original petition; which "admittedly came from [father]."

The appellate court concluded that it agreed with the trial court's "pronouncement that there was nothing more than 'speculation' regarding [father's] release date, and acknowledgement that the record did not show a specific release date for [father]." The court found "the deficiency of the Department's proof is illuminated in the trial court's finding" that "[t]here is no evidence of when, if ever, [father] would have the ability to provide for the children after his release from prison, *whenever that may be.*" Consequently, the court held that the evidence was legally insufficient to support the trial court's finding of termination under TFC § 161.001(1)(Q). *In re A.E.G. and J.D.G.*, No. 12-11-00307-CV (Tex. App.—Tyler Sept. 28, 2012, no pet.) (mem. op.).

2. Burden Shifts to Parent to Show How Parent Would Care for Child

The Department became involved with mother after an allegation of the sexual assault of the four-year-old child by mother's roommate. When the case commenced, alleged father had not yet been located. At the status hearing, the Department revealed that it had located father, who was incarcerated in an Iowa prison. Father's parental rights were terminated under TFC §161.001(1)(D), (E), (Q), and best interest. Father appealed.

In his challenge to TFC § 161.001(1)(Q), father complained that the evidence was legally and factually insufficient to support termination of his parental rights under TFC § 161.001(1)(Q) because there was no evidence of "the length of [father's] incarceration and its end date." The appellate court discussed the three elements of TFC § 161.001(1)(Q) in terms of which party has what burden of proof: (1) the party seeking termination must establish that the parent's knowing criminal conduct resulted in incarceration for more than two years; (2) the parent must produce some evidence as to how he would provide or arrange to provide care for the child during that period; and (3) the party seeking termination then has the burden of persuasion that the arrangement would not satisfy the parent's duty to the child.

Regarding the first element, father complained that there was no evidence establishing his date of incarceration and release date. The court rejected this argument because the

trial court took judicial notice of its file, which contained documents reflecting father's date of incarceration and release date, and that it "is expected he would remain [incarcerated] for two years from the filing of the petition seeking termination".

Next, the appellate court found that father "bore the burden of demonstrating how he would provide or arrange to provide care for [the child] during his incarceration" under TFC §161.001(1)(Q)(2). The record established that father never provided the Department with any family or kinship options for the child's placement or how he intended to provide support for the child. The court held that because father "failed to carry his burden, the Department was relieved of carrying its burden of persuasion" that the arrangement would not satisfy the parent's duty to the child under TFC §161.001(1)(Q)(3). *In re S.S.A.,* No. 02-11-00180-CV (Tex. App.—Fort Worth July 19, 2012, no pet.) (mem. op.); *see also In re E.J.F.*, No. 12-11-00197-CV (Tex. App.—Tyler Apr. 30, 2012, no pet.) (mem. op.) ("Once the Department has established a parent's knowing criminal conduct resulting in his incarceration for more than two years, the burden shifts to the parent to produce some evidence as to how he will arrange to care for the child during the period."); *In re K.G. and C.G.*, No. 11-12-00130-CV (Tex. App.—Eastland Aug. 31, 2012, no pet.) (mem. op.) ("lack of evidence showing that [father] had made a suitable arrangement to provide care for [the children] during his incarceration" once Department had established father's knowing criminal conduct resulted in his incarceration for more than two years, sufficient to support father's termination under TFC § 161.001(1)(Q)).

3. Father's "Preference" for Placement Insufficient to Show How He Would Care for Child

Father challenged the legal and factual sufficiency of the evidence supporting the termination of his parental rights under TFC § 161.001(1)(Q). After reviewing evidence that established father would be incarcerated for two or more years, the court stated that "the burden shifts to the parent to produce some evidence as to how he or she will arrange to provide care for the child during that period." In reviewing whether father met his burden, the court looked to father's testimony at trial, in which he "testified that his preference was for [the child] to be placed with his uncle, [father's] brother", and "that he could not provide for [the child] with a home or financial support." The court then looked to the Department's caseworker's testimony wherein she stated that "she was considering at the time of trial placement with [father's] brother and his wife; however, the wife had a CPS history with a reason to believe finding." Despite the negative CPS history, caseworker testified that she "was going to pursue her supervisor's approval to do a home study for placement with [father's] brother and his wife." The caseworker also testified that she "thought [father's brother] and his wife would be amenable to adopting [the child]." In finding the evidence legally and factually sufficient, the court stated that "[a]lthough there was evidence that [father's] brother was willing to care for [the child], there was no evidence that such care would be on [father's] behalf during his incarceration. In fact, there was some evidence that [father's] brother would be willing to adopt [the child]. And at the time of trial, there was no guarantee that [father's] brother's home would be a suitable placement." *In re K.G.B.*, No. 02-12-00291-CV (Tex. App.—Fort Worth Nov. 15, 2012, no pet.) (mem. op.).

4. Two-Year Period Begins from Date of Original Petition

Trial court terminated father's parental rights under TFC § 161.001(1)(Q). Father appealed, arguing that the trial court erred in its finding because his release date from prison was "less than two years from the date the [Department's] amended petition for termination was filed." The Department added TFC § 161.001(1)(Q) in its amended petition. The Department argued that the date of the filing of the original petition should control and that TFC § 161.001(1)(Q) is not a notice provision. The appellate court agreed with the Department, stating that "(Q) was enacted, not as a notice provision, but instead for the protection of children" and that "the petition", as referred to in (Q), refers to the original petition for termination. The court followed the Texas Supreme Court's precedent in *In re A.V. and J.V.*, 113 S.W.3d 355 (Tex. 2003), explaining that "subsection (Q) purports to protect children whose parents will be incarcerated for periods exceeding two years after termination proceedings begin." *In re D.J.H.*, 381 S.W.3d 606 (Tex. App.—San Antonio 2012, no pet.).

5. Final Conviction Not Required

On appeal, father challenged the sufficiency of the evidence supporting the termination of his parental rights under TFC § 161.001(1)(Q) arguing, "the evidence of his convictions was inadmissible because the convictions were being appealed and therefore were not final." In overruling father's complaint, the appellate court followed the Austin Court of Appeals' decision 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.), and agreed "that the legislature included no finality

requirement in [TFC] Section 161.001" and "that the legislature intended to permit termination under section 161.001 based on conviction without regard to whether appeals were exhausted." *In re W.B.W.*, No. 11-11-00269-CV (Tex. App.—Eastland July 12, 2012, pet. denied) (mem. op.).

J. TFC § 161.003 – Inability to Care

1. Evidence that Mother's Mental Illness Will Render Her Incapable of Caring for Children until Age 18

To support termination under TFC § 161.003 the Department must prove, among other things, that the parent suffers from a mental illness or deficiency and that such mental illness or deficiency will, in all reasonable probability, render the parent unable to provide for the child's needs until the child is eighteen years old.

During a nine-day trial, the jury heard extensive testimony about mother's mental illness, and that her mental illness rendered her unable to care for the children's needs until their eighteenth birthday. That evidence included mother's psychologist's testimony that she "displayed active paranoid ideation during the evaluation and voiced a number of concrete paranoid delusions, including that one child was sleeping with multiple family members and her attorney." During the psychological evaluation, Mother stated to her psychologist that she did not take her medications because she did not believe that her diagnosis of schizophrenia was correct. Mother also recounted to her psychologist a history of depression, suicidal ideation, and noncompliance with her medications. The psychologist opined that the prognosis for mother's mental condition "is very poor" and mother's condition rendered her unable to provide for the emotional, physical, and mental needs of a child and would continue to render her unable to provide for the children's needs until their eighteenth birthdays.

The jury also heard testimony from mother's psychiatrist, who recalled mother's mental health issues when she was pregnant with the youngest child. He related that mother heard voices telling her to kill herself. The psychiatrist reported that mother had been diagnosed with paranoid schizophrenia and had a history of going on and off her medications.

The maternal grandmother testified that mother's illness began to manifest when she was a teenager. She recounted mother's: (1) altercations with neighbors; (2) public intoxication; (3) physical altercation with a family member; (4) depression; and (5) and psychiatric treatment at a state hospital.

Mother testified that mental illness "does not last a long time", and she does not believe that her mental condition had any effect on the children. There was also evidence that mother has not missed any visits with her children, and her children are bonded to her.

Based upon the jury's finding under TFC § 161.003 and a finding that termination of her parental rights was in the children's best interest, the court terminated mother's parental rights. Mother appealed, complaining in part that the evidence was legally and factually insufficient to support the termination under TFC § 161.003.

In reviewing this case, the appellate court reiterated that mental illness, in itself, is not grounds for termination of the parent-child relationship. Rather, the court explained that the "issue is whether [mother's] mental illness renders her unable to provide for [the children] until their 18th birthday." The court elaborated, stating: "[t]he Department was not required to prove with certainty that [mother's] mental condition will continue to render her unable to provide for the children's needs until their 18th birthdays; rather the department was required to show by clear and convincing evidence that the mental illness in all probability will do so."

The appellate court held that the evidence was legally sufficient under TFC § 161.003 based upon evidence that mother's history reveals noncompliance with her medications, denial of the seriousness of her illness, psychiatric hospitalization, and a lack of commitment to taking her medications in the future. The court further found that the evidence established that mother's "condition would not resolve itself over time and that, if un-medicated, she would not be able to provide for the children's mental, emotional, and physical needs on a day-to-day basis". It continued: "a reasonable jury could have formed a firm belief or conviction that [mother's] mental condition renders her unable to provide for [the children's] needs and that that condition would continue to render her unable to provide for their needs until their 18th birthday."

The court also held that the evidence was factually sufficient to support termination of mother's parental rights under TFC §161.003, holding that: "Although there was evidence that [mother] had been taking her medications recently and that when medicated she did care for her children, that the children are bonded to her, and that [mother] has not missed any opportunities to visit her children and has performed the services recommended by

the Department, viewing the evidence as a whole we conclude that a reasonable fact-finder could have resolved any conflict in the evidence of whether [mother's] mental condition rendered her incapable of caring for her children's needs until their 18th birthday." *W.C. and L.H. v. Tex. Dep't of Family and Protective Servs*, No. 03-12-00495-CV (Tex. App.—Austin Jan. 8, 2013, no pet.) (mem. op.).

2. Reasonable Efforts to Return under TFC § 161.003

Mother complained that the evidence was factually insufficient to support the trial court's finding that the Department made reasonable efforts to return the child under TFC § 161.003(a)(4). She argued "that because the Department proffered testimony from only one witness associated with Child Protective Services . . . . we have only this testimony to determine if there is sufficient evidence that the Department made reasonable efforts to reunify [the children] and [mother]."

The appellate court explained: "when the Department makes efforts to provide a parent with training, classes, assistance with her medical or mental needs, and information to address those needs, the Department has made reasonable efforts at reunification even if the parent fails to make significant improvement with regard to the goals of reunification." In this case, the Department prepared a service plan and mother was court-ordered to participate and comply with it. In finding the evidence factually sufficient to support the finding that the Department made reasonable efforts to return the child to mother, the appellate court considered the Department's "implementation of the family service plan." It reasoned: "The evidence simply shows those efforts were unsuccessful, due in great part to appellant's failures to deal with her physical and mental conditions." *In re S.J.S.*, No. 04-12-00067-CV (Tex. App.—San Antonio June 27, 2012, pet. denied) (mem. op.).

K. TFC § 161.004 – Termination after Denial of Prior Termination

1. TFC § 161.004 v. TFC § 161.001

In 2009, the Department filed an original petition seeking to terminate mother's parental rights and those of the children's respective fathers. In October 2010, the parties entered a mediated settlement agreement and the trial court signed a final order incorporating the agreement. The order denied the Department's request for termination, appointed the Department PMC of the children, appointed mother possessory conservator with supervised visitation, and ordered mother to complete a number of services. In 2011 and 2012, the Department filed amended petitions for termination and motions to modify the final order. Among other termination grounds, the Department alleged that mother constructively abandoned the children under TFC § 161.001(1)(N). The trial court's order terminated mother's parental rights under several grounds, including TFC § 161.001(1)(N).

In addition to challenging the sufficiency of the evidence supporting the termination of her parental rights under TFC § 161.001(1)(N), mother argued that TFC §161.004, not TFC § 161.001(1), applied because the case was tried as a petition to terminate on a motion to modify after termination had previously been denied. Mother argued that: (1) under TFC § 161.004, the relevant time period for proving a predicate ground, such as constructive abandonment, was before October 2010, the date of the order incorporating the mediated settlement agreement; and (2) there was no evidence showing the circumstances of the parties in October 2010 to show a change since then. The court rejected mother's arguments, holding: "The Department's evidence of constructive abandonment . . . . showed actions and conduct occurring after the October 2010 order. Because we have concluded that this evidence was sufficient to support termination under section 161.001, evidence to support termination under section 161.004—such as evidence of changed circumstances or constructive abandonment prior to October 2010—was not required." *J.M. v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00161-CV (Tex. App.—Austin June 26, 2012, no pet.) (mem. op.).

2. Material and Substantial Change

In 2009, the children were removed from mother's and father's care, placed with paternal aunt, and the Department filed a petition to terminate mother's and father's parental rights. In 2010, the trial court signed a final decree appointing the Department PMC and mother possessory conservator. The trial court's order found that appointment of father as the children's possessory conservator was not in their best interest and denied him possession of, or access to, the children.

In 2011, the children were removed from aunt's care due to allegations of domestic violence and placed in foster care. Additionally, since the rendition of the final decree: (1) father was adjudicated guilty of burglary of a habitation and was sentenced to two years in prison; (2) mother failed three drug tests; (3) mother had entered drug treatment for the fourth time; and (4) the children were

improving in foster care but were also exhibiting anxiety due to their lack of stability and permanence. Two months after the children's removal from their aunt's house, the Department filed an original motion to modify based on the fact that there had been a material and substantial change in circumstances since the final decree. The Department also sought termination of mother's and father's parental rights. In 2012, the trial court found that "[t]he circumstances of the Children or Sole Managing Conservator, Possessory Conservator, or other party affected by the prior order . . . . have materially and substantially changed since the rendition of" the prior order and entered a decree of termination.

On appeal, father argued that the trial court erred in finding that there was a material and substantial change in his circumstances because his circumstances had not materially and substantially changed and he was not named possessory conservator of the children. The appellate court held that under TFC § 161.004 "a material and substantial change in circumstances is not limited to Father's circumstances as he seems to suggest. Here, the trial court could also find the requisite material and substantial change in the circumstances of Mother or the children." *In re C.A.C.*, *S.Y.C.*, *K.G.C.*, *and M.E.C.*, No. 14-12-00396-CV (Tex. App.—Houston [14th Dist.] Sept. 27, 2012, no pet.) (mem. op.).

V. BEST INTEREST

A. Desires of Child – Consideration of Response to Visits

1. Mother Showed No Bonding During Visits

Mother challenged the sufficiency of the evidence supporting the jury's determination that termination of her parental rights is in the child's best interest. In its best-interest analysis of the child's desires and parental abilities, the appellate court considered evidence from CASA that "during the parents' visits with [the three-year-old child] . . . . [the child] would sometimes scream, cry, and have to be comforted by CPS workers, who were strangers to him, because he wanted to get away from Mother and Father." It also considered testimony from the Department's caseworker that the child's visits with mother and father "often did not go well." The caseworker testified that when the child would go to visits, "probably 85 percent of the time, he's upset. He doesn't want to be there. He sometimes doesn't want to go to [mother] . . . . It takes time to get him calmed down to visit with her." The evidence also showed "that Mother could not comfort [the child] when he became upset." In rejecting mother's challenge, the appellate court found that the evidence showed that mother "had not demonstrated a bond with [the child] during the visits". *In re M.A.P.*, No. 02-11-00484-CV (Tex. App.—Fort Worth June 7, 2012, no pet.) (mem. op.); *see also In re. K.A.S.*, No. 07-12-0234-CV (Tex. App.—Amarillo Oct. 18, 2012, no pet.) (mem. op.) ("Although [the child] is too young to express his desires, . . [t]here is also evidence that, during [the child's] visitations with [father], there didn't appear to be any bonding and [father] was unresponsive to [the child's] needs."); *In re M.J.*, No. 11-12-00065-CV (Tex. App—Eastland Sept. 13, 2012, no pet.) (mem. op.) ("[Mother] had forty-eight supervised visits with [the child] after [the child] was removed from her care. [The Department's former caseworker] testified that [the child] cried constantly during the visits and that [the child] had not developed a bond with [mother].").

2. Child's Aggression Increased After Visits

The trial court heard evidence about "the physical abuse suffered by [the] three-year-old [child], allegedly at the hands of [mother's boyfriend], and after hearing testimony that [mother] had refused to acknowledge [boyfriend's] role in the abuse and to extricate herself from him, the trial court terminated [mother's] parental rights." On appeal, mother argued that the evidence was legally and factually insufficient to support the trial court's finding that termination of her parental rights was in the child's best interest. The appellate court disagreed. In its best interest analysis under the "desires of the children", the court noted that the "record does not disclose the desires of the children, but it does reflect that [child's] aggression increased after visits with [m]other." *In re J.D. and K.O.*, No. 02-11-00328-CV (Tex. App.—Fort Worth Aug. 2, 2012, no pet.) (mem. op.); *see also In re A.T.K., M.A.C., and S.A.C.*, No. 02-11-00520-CV (Tex. App.—Fort Worth Sept. 27, 2012, no pet.) (mem. op.) (court of appeals considered under "desires of the child" factor that child, "for two and a half months", "would defecate right before visits with her mother" and "would often need to be comforted after visitation").

B. Father's Failure to Be Part of Child's Life Due to Incarceration

Father, who had never met the child, testified that if he were released from prison, he would get a job and support the child. Father admitted that he: (1) had been convicted of three misdemeanors and five felonies between 1999 and 2009; (2) violated his community supervision; and (3) was twice denied parole. The caseworker testified that there is

nothing to show that father can support or meet the child's needs now or in the future.

Father argued on appeal that the evidence was legally and factually insufficient to support the court's best-interest finding. In analyzing the *Holley* factors, the court concluded that "a reasonable fact finder could have concluded that [father's] home was unstable, that he cannot support the child now or in the future, that he did not realize the effect his behavior had on his child, that he had recently been denied parole twice, that he violated his community supervision in the past, and had repeated convictions, confinements, and incarcerations." In rejecting father's complaint, the court also concluded: "A fact finder could have reasonably found that [father] failed to be part of the child's life through his continual convictions, incarcerations, and confinements, and that he had little insight into how his criminal behavior affected the child. . . ." *In re E.J.F.*, No. 12-11-00197-CV (Tex. App.—Tyler Apr. 30, 2012, no pet.) (mem. op.).

C. Mother's Absence at Trial Considered in Best Interest Determination

Mother did not appear at trial and after a bench trial, her parental rights were terminated. On appeal, mother argued that the evidence was legally and factually insufficient to support the trial court's best interest determination. The court of appeals overruled her issue. In its best interest analysis, the court considered mother's: (1) drug-related conduct and arrests; (2) failure to complete any court-ordered services; (3) failure to visit the child or remain in contact with the Department for more than a year; (4) failure to attend any hearings; (5) continued criminal conduct; and (6) failure to "attend the trial despite her lawyer's office telling her the date and time." *In re B.K.*, No. 10-12-00311-CV (Tex. App.—Waco Dec. 27, 2012, no pet.) (mem. op.); *see also In re T.S., B.M., and T.M.*, No. 07-12-0283-CV (Tex. App.—Amarillo Sept. 27, 2012, no pet.) (mem. op.) (appellate court considered mother's failure to attend trial in its best interest analysis); *see also In re A.V.*, No. 02-12-00001-CV (Tex. App.—Fort Worth June 7, 2012, no pet.) (mem. op.) (court of appeals considered that mother's whereabouts were unknown at trial); *compare In re J.A.S. Jr.*, No. 13-12-00612-CV (Tex. App.—Corpus Christi Feb. 28, 2013, pet. denied) (mem. op.) (mother walked out of trial, from which the trial court inferred "a willingness to abandon difficult situations." Trial court ordered termination based on the "totality of the evidence and the actions of the parties in this hearing." Appellate court held that "we conclude it was unreasonable for the trial court to give such weight to [mother's] action, in light of the very positive evidence that [mother] has matured and is improving in her ability to parent [child]. It appears that the trial court relied heavily on [mother's] action and disregarded all testimony about [mother's] recent improvement in this area.").

D. Best Interest Considered Separately for Each Parent

Mother challenged the legal and factual sufficiency of the evidence to support the trial court's finding that termination was in the best interest of the children. She argued that because the trial court did not terminate father's parental rights and the couple was able to reunite the family, the trial court "could not find that it was in the children's best interest to terminate her rights when she was living with [father] and 'stability' had returned." The appellate court stated that mother provided no authority to support this argument.

Mother also argued that because father's rights are not terminated, there was no plan for permanency. The appellate court also rejected mother's argument because: (1) she suggested placing the children with her, father, and his mother; and (2) "the court need not consider 'the couple' when addressing the parenting ability of each individual seeking custody."

Additionally, the court considered that the children's needs were "highly significant and of long standing duration." There was "clear and convincing evidence that the violent and aggressive behavior of the children—toward themselves and others—stemmed from more than a weak support system in the household." The evidence also showed "turbulence and domestic violence in the home." In rejecting mother's challenge, the court held: "That the trial judge may have been willing to give the father a second chance does not require a finding that termination of the mother was not in the children's best interest. We look only to the conduct, behavior, circumstances and reasons offered by the mother." After doing so, the court concluded that the evidence supporting termination of mother's parental rights was legally and factually sufficient. *C.V. v. Tex. Dep't of Family and Protective Servs.*, ___ S.W.3d ___, No. 08-12-00088-CV (Tex. App.—El Paso Apr. 30, 2013, no pet. h.).

E. Unknown Perpetrator Considered in Best Interest Determination

On appeal, mother challenged the legal and factual sufficiency of the evidence supporting the trial court's finding that termination of her parental rights was in the child's best interest. The evidence demonstrated a "history

of abuse" directed at the child "presumably by [mother's boyfriend], who kept [the child] while Mother worked or went to school and whom [the child] mentioned as the perpetrator." A witness testified that she had seen bruises on the child and that the child said [mother's boyfriend] "had hurt him." The same witness further testified that she saw the child with "a black eye on two occasions, that he came over with the whole side of his face black on one occasion, and that he [had] numerous injuries. . . ." The next day, the child was brought to the emergency room with "numerous bruises and abrasions over his whole body, including in his mouth; abdominal tenderness; elevated liver enzymes; and 'a compression fracture of his T-6 vertebral body.'" The child's many injuries "were not all explained by the instances that Mother and [mother's boyfriend] had described." Further, mother "denied seeing any bruises when she had bathed [the child]", despite that his bruises "were so numerous that his condition was ruled Battered Child Syndrome." The appellate court noted that mother "was aware that [the child] had told a Department employee that [mother's boyfriend] had hurt him", but "did not think [boyfriend] could have been the perpetrator of any of [the child's] nonaccidental injuries."

In finding the evidence legally and factually sufficient to support the trial court's best interest finding, the court considered that mother: (1) "would not consider that [her boyfriend] had abused [the child]"; (2) "admitted that she had failed to protect [the child], but her failure to acknowledge the danger that [her boyfriend] and his friends posed to [the child]–even after admitting that [boyfriend] had left bruises on [the child] while roughhousing and that she had repeatedly asked him to stop playing so rough with him–indicated an ongoing danger to [the child]"; and (3) she denied seeing any bruises when she bathed the child despite some of the bruises being inflicted up to a week before he was taken to the emergency room, when analyzing the physical and emotional needs of the child, mother's participation in services, and her parenting skills. *In re J.D. and K.O.*, No. 02-11-00328-CV (Tex. App.—Fort Worth Aug. 2, 2012, no pet.) (mem. op.); *see also In re A.T.K., M.A.C., and S.A.C.*, No. 02-11-00520-CV (Tex. App.—Fort Worth Sept. 27, 2012, no pet.) (mem. op.) (appellate court considered the "magnitude of [the child's] injuries and the lack of resolution in finding the perpetrator"); *see also C.H. v. Tex. Dep't of Family and Protective Servs.*, 389 S.W.3d 534 (Tex. App.—El Paso 2012, no pet.) (court's analysis of child's present and future emotional and physical danger considered that the child "suffered multiple broken bones during the twelve-week period he lived with mother and father following his release from the hospital, yet both parents claimed to have been unaware of those injuries").

F. Mental Health

Grandmother had "legally adopted" her grandson. Child was removed from her care following incidents in which the child attacked grandmother and threatened to harm himself. Child, who was diagnosed with multiple psychiatric illnesses, had a tendency to become violent when he did not take his medications. After the removal, notes were discovered in the home "that were written about killing [grandmother] and [the child] and ghosts." Grandmother insisted that the notes were written and personally placed under the door by child's incarcerated father. It was later determined that grandmother, who was suffering from significant cognitive and memory impairments, possibly had dementia. Grandmother also failed to properly administer the child's psychiatric medications. The evidence also showed that grandmother's behavior during visits was inappropriate and that she sometimes exhibited severe hostility towards Department employees. Additionally, grandmother gave incoherent responses to her attorney's questions regarding her willingness to cooperate with the trial court in the future. She also provided testimony which indicated that she did not fully comprehend the severity of the child's mental illnesses.

The appellate court found that although grandmother completed parenting classes, underwent psychological and psychiatric evaluations, and attended counseling as required under her service plan, "the trial court could have reasonably discounted the efficacy of these programs by noting her behavior and testimony during trial." The court also discussed the fact that grandmother's mental illness created instability in the home. In holding that the evidence was legally and factually sufficient to support the best interest finding, the court considered: (1) grandmother's inappropriate conduct during trial; (2) the fact that grandmother's own mental illness made caring for the child's complex needs "extremely difficult"; (3) that the child would be in danger if he continued living with grandmother; and (4) that the child's foster parent was willing to allow the child to continue to have a relationship with grandmother. *E.J. v. Dep't of Family and Protective Servs.*, No. 01-11-00763-CV (Tex. App.—Houston [1st Dist.] May 3, 2012, no pet.) (mem. op.).

G. No Best Interest Finding Required for Alleged Father under TFC § 161.002(b)(1)

Alleged father's parental rights were terminated pursuant to TFC § 161.002(b)(1), which allows for an alleged father to be terminated if "after being served with citation, he does not respond by timely filing an admission of paternity or a counterclaim for paternity under Chapter 160 of the Texas Family Code." The court of appeals found that father judicially admitted in his brief that he was an alleged father and that he did not respond in either method required by TFC § 161.002(b)(1).

Father complained on appeal that the Department failed to prove by clear and convincing evidence that termination of his parental rights was in the best interest of the children. The Department argued that TFC § 161.002(b)(1) does not require a finding that termination is in the children's best interest. The appellate court overruled father's point of error and cited precedent holding that the Department "was not required to prove best interest [where] father did not file an admission or counterclaim of paternity." *R.H. v. Tex. Dep't of Family and Protective Servs.*, ___ S.W.3d ___, No. 08-12-00364-CV (Tex. App.—El Paso Mar. 28, 2013, no pet. h.).

VI. ISSUES IN CONSERVATORSHIP

A. TFC § 263.404 – Appointment of Department as PMC after Denial of Termination

The trial court terminated mother's parental rights to youngest child. Without terminating mother's rights, it awarded the Department managing conservatorship of the two oldest children, and appointed mother possessory conservator. On appeal, mother challenged the legal and factual sufficiency of the evidence supporting the trial court's conservatorship determination under TFC § 263.404, which provides that a trial court may render a final order appointing the Department as a child's managing conservator without terminating parental rights if the trial court finds that: (1) a parent's appointment as managing conservator "would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development"; and (2) appointment of a relative of the child or another person would not be in the child's best interest.

The appellate court agreed with mother, citing the Supreme Court's precedent in *Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990), holding that "[t]he nonparent must affirmatively prove by a preponderance of the evidence that appointing the parent as managing conservator would significantly impair the child, either physically or emotionally." The court noted that only three witnesses testified at trial, and that the only damaging evidence against mother—her past drug use and the conditions of the home at the time of the removal—had been "remedied" "long before the final hearing." The court further considered evidence that mother had: (1) tested negative on all drug tests; (2) completed all services; (3) obtained a job; and (4) maintained an apartment for nine months, which the caseworker described as "decent." In addition, the court of appeals noted that despite the Department's "main concern"—that mother had allowed inappropriate people around the children during the course of a monitored return—the Department failed to administer a safety plan regarding such people until the same day the children were again removed from mother. The appellate court held that the "only evidence relating to the physical health of the children while in [mother's] care was that they had lice" and "[t]he Department offered no evidence of any significant physical or emotional impairment that would result from [mother's] appointment as managing conservator." *In re A.D.P., L.P., and M.R.B.*, No. 11-12-00273-CV (Tex. App.—Eastland Mar. 7, 2013, no pet.) (mem. op.).

B. Service Plan Not Required for Non Parent Managing Conservators

In 2008 grandparents were appointed PMC of their three grandchildren as the result of a Department-initiated SAPCR. Mother was appointed possessory conservator with her possession limited to times and places agreed to by grandparents. In 2011, the Department filed a petition seeking emergency possession of the children, a change of conservatorship, and termination of parental rights because grandparents were "unable to keep physical custody of the children or keep them away from their mother." The trial court issued an emergency order and set an adversary hearing. Grandparents appeared at the adversary hearing with counsel, and were represented throughout the case. After the hearing, the trial court issued a temporary order naming the Department temporary managing conservator and directing parents and grandparents to "comply" with service plans.

The Department prepared service plans for the fathers and alleged father, sought waiver of the service plan requirements as to mother due to aggravated circumstances, and did not prepare a service plan for grandparents. After each of the hearings, the trial court issued an order stating that it reviewed the service plans and permanency progress reports and found that "no

further plans or services were necessary." Grandparents did not object to these findings, nor did they complain that the Department did not prepare a service plan for them. Additionally, they never requested the Department prepare a service plan for them.

The final order terminated mother's parental rights and those of the fathers, named the Department the children's PMC, and did not appoint grandparents possessory conservators. Grandparents appealed, arguing that the trial court erred and that it was not in the children's best interest to remove grandparent's as conservators without giving them a service plan and a chance to comply.

The appellate court rejected grandparents' contention that the temporary order and TFC § 263.106 required the Department to prepare a service plan for them. The court reasoned that the language of the temporary order directed grandparents to "comply" with any service plan the Department may provide, and that TFC § 263.106, referred to in the temporary order, required the trial court to review and make needed changes to any service plans prepared by the Department. Thus, the appellate court held that neither the temporary order nor TFC § 263.106 required the Department to prepare a service plan for nonparent managing conservators.

The appellate court also rejected grandparents' argument that TFC § 263.102(e)'s requirement to provide "time-limited family reunification services" "to the child and the child's family, as applicable," required the Department to prepare a service plan for them. The appellate court held that "it is apparent from the language used in section 263.102, which sets out the requirements of service plans, and sections 263.103 and 263.104, which concern the signing and taking effect of original and amended service plans, that the service plans discussed in those sections are expressly intended for parents, not nonparent managing conservators." *In re K.A.H., M.N.H., and J.S.H.*, No. 04-12-00429-CV (Tex. App.—San Antonio Dec. 12, 2012, no pet.) (mem. op.).

VII. POST-TRIAL ISSUES

A. Voidable Order Not Subject to Collateral Attack

TFC § 155.104 provides: (a) if a request for information from the bureau of vital statistics relating to the identity of the court having continuing, exclusive jurisdiction of the child has been made under this subchapter, a final order, except an order of dismissal, may not be rendered until the information is filed with the court; and (b) if a final order is rendered in the absence of the filing of the information from the bureau of vital statistics, the order is voidable on a showing that a court other than the court that rendered the order had continuing, exclusive jurisdiction.

TFC § 155.103 provides in part that a court shall have jurisdiction over a suit if it has been, correctly or incorrectly, informed by the bureau of vital statistics that the child has not been the subject of a suit and the petition states that no other court has continuing, exclusive jurisdiction over the child.

In July 2009, the Department filed a petition in Williamson County seeking termination and conservatorship of two children who had previously been the subject of a Travis County case. Pursuant to TFC § 155.104, the Department filed a request with the bureau of vital statistics (BVS) to determine it the children were the subject of subject of a SAPCR in another court. Despite the fact that judgments involving the subject children had been rendered by a court in Travis County, the BVS sent a letter to the Department in August 2009, stating that according to the bureau's central record file, neither child had been the subject of a SAPCR in which a judgment was entered. TFC § 155.001(a) provides that a court acquires continuing, exclusive jurisdiction over SAPCRs on rendition of a final order. Thus, the Department was under the impression that there was no other court that had continuing, exclusive jurisdiction over the children. However, the Department failed to file the BVS response letter with the Williamson County court as required by TFC § 155.104.

In October 2010, intervenor filed a petition in intervention in the Williamson County case seeking to be appointed PMC of the children. Intervenor's petition was stricken in November 2010, and the Williamson County court entered a final order appointing the Department as PMC. Intervenor filed a motion for new trial, complaining *inter alia*, that the final order was voidable and should be set aside because the Travis County court had continuing, exclusive jurisdiction. Intervenor's motion for new trial was overruled and intervenor appealed. However, intervenor's appeal was dismissed.

Thereafter, intervenor filed two petitions to modify the Williamson County order in Travis County, asserting that the Williamson County order was "void" or "voidable" and had no effect. The Department countered that the Williamson County order naming the Department as managing conservator was issued by a court with jurisdiction over the children, and that intervenor had no standing because her intervention in the Williamson

County case was stricken. In a hearing before the Travis County court, the court ruled that because the Department failed to file its court-of-continuing-jurisdiction (CCJ) information with the court before it entered the final order, that the Williamson County order was voidable upon a showing that another court had continuing, exclusive jurisdiction. The trial court also found that a voidable order may only be set aside by a direct attack, not a collateral attack. The trial court concluded that intervenor's attack on the Williamson County order constituted an impermissible collateral attack. Intervenor appealed.

On appeal, intervenor argued that because the Travis County court never lost its continuing, exclusive jurisdiction, the Williamson County order was void. The appellate court acknowledged that a trial court may rely upon the CCJ information from the BVS even if the information is incorrect, provided that the court renders its final order after receiving the incorrect information under TFC § 155.004(b). But the appellate court found that because the Department failed to file its CCJ letter in this case, the Travis County court never lost its continuing, exclusive jurisdiction of the case. However, the appellate court rejected intervenor's argument that the Williamson County order was "void", stating, "the [L]egislature has, by statute, expressly provided that an order rendered under the circumstances presented [in this case] is voidable rather than void" and is "not subject to collateral attack at any time".

The court then addressed whether intervenor's attack was a direct or collateral attack. It stated that "a collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the judgment, but in order to obtain some specific relief against which the judgment currently stands as a bar. If a proceeding seeks to avoid the effect of a judgment but does not constitute a valid direct attack, it is a collateral attack."

In rejecting intervenor's argument, the appellate court held that intervenor's petitions in the Travis County court were an attempt to avoid the effect of the Williamson County order and constituted an impermissible collateral attack. *Jones v. Tex. Dep't of Family and Protective Servs.*, ___ S.W.3d ___, No. 03-12-00152-CV (Tex. App.—Austin Apr. 25, 2013, no pet. h.).

B. District Judge Not Limited to Associate Judge's Findings on *De Novo* Review

The associate judge terminated father's parental rights solely under TFC § 161.001(1)(Q) and a finding that termination was in the children's best interest. Father filed a request for a *de novo* hearing before the referring court, challenging the sufficiency of the evidence to support the termination of his rights. The district court subsequently conducted a trial *de novo*, the reporter's record from the trial before the associate judge was admitted into evidence, and it heard additional evidence. The district court terminated father's parental rights under TFC §§ 161.001(1)(D), (E), (Q), and a finding that termination is in the children's best interest.

On appeal, father argued that the district court was "not authorized to make findings on subsections (D) and (E) and the trial court's final order including those findings "failed to conform to a proper ruling."

The appellate court rejected father's argument, holding that the predicate termination grounds of TFC § 161.001(1)(D), (E), and (Q) were contained in the Department's pleadings and properly before the district court, and that the "district court had authority to decide whether the Department met its burden on each of those grounds, and was not limited to a review of the ground found by the associate judge." The court stated that father's argument "reflects a misunderstanding of the nature of the de novo hearing before the district court", which is governed by TFC § 201.2042 in a child protection case. Citing precedent from other courts of appeals, the court further held that: (1) "Judicial review by trial de novo is not a traditional appeal, but a new and independent action characterized by all the attributes of an original action"; and (2) "The trial court was authorized to consider all of the evidence from the trial before the associate judge and to hear new evidence on the issues identified in the request for a hearing." *In re J.L.S. and J.M.*, No. 04-12-00011-CV (Tex. App.—San Antonio Oct. 31, 2012, no pet.) (mem. op.).

C. Motion for New Trial Required to Preserve Factual Sufficiency Complaint as to a Jury Finding

Father claimed that the evidence was factually insufficient to support the jury's findings under TFC § 161.001(1) and (2). In holding that father's factual sufficiency complaints were not preserved for appeal, the appellate court cited TRCP 324(b)(2), which states: "The Texas Rules of Civil Procedure specify that the filing of a motion for new trial

is a prerequisite to present '[a] complaint of factual sufficiency of the evidence to support a jury finding.'" *In re O.M.H.*, No. 06-12-00013-CV (Tex. App.—Texarkana July 10, 2012, no pet.) (mem. op.); *see also In re R.M.V. and E.V.*, No. 10-11-00298-CV (Tex. App.—Waco Oct. 4, 2012, pet. denied) (mem. op.) (holding that to raise factual sufficiency complaint with respect to jury's finding on appeal, complaint must be preserved by inclusion in motion for new trial.).