Termination Case Law Update

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I. STANDING AND JURISDICTION

A. Personal and Subject Matter Jurisdiction — Insufficient Pleadings

1. No Pleading to Terminate

Although the Department's petition and affidavit made claims for removal and termination as to mother, it did not name father, allege termination grounds against him, or seek termination of his parental rights. Instead, the petition listed father as an alleged father and indicated he was deceased. Although father participated in a hearing and attended the trial by telephone due to his incarceration, the petition was never changed.

At the jury trial, without objection, the Department's counsel indicated that it was seeking termination of both mother's and father's parental rights. The trial court entered a partial instructed verdict as to (N) and (O), and the jury found that termination is in the child's best interest.

On appeal, father argued the Department's pleadings were fatally defective because they failed to request termination of his parental rights. Although father conceded he failed to object to the pleadings, the appellate court found that the issue could be raised for the first time on appeal as it was fundamental error. The court explained that jurisdictional defects represent fundamental error and can be raised for the first time on appeal. It reasoned that a judgment must be supported by the pleadings, and a trial court exceeds its jurisdiction if it renders a judgment in the absence of pleadings. Because a court's jurisdiction is invoked by the pleadings, without proper pleadings, the trial court is without jurisdiction, either as to the parties or the subject matter.

The Department argued that father received fair notice of its intent to seek termination of his parental rights and the issue was tried by consent. In rejecting the Department's argument, the court wrote "we conclude the trial by consent doctrine does not apply here, where there is no pleading whatsoever seeking to terminate [father's] parental rights." "In the absence of a pleading seeking affirmative relief, the trial court is without jurisdiction to render judgment." Accordingly, the portion of the judgment terminating father's parental rights was vacated and the cause dismissed as to father. *In re A.V. and I.V.*, No. 13-14-00620-CV (Tex. App.—Corpus Christi Apr. 30, 2015, no pet. h.) (mem. op.);

2. No Live Pleadings as to a Child

The Department filed a petition seeking termination of mother's parental rights to her two children. The Department later filed an amended petition that sought termination as to only one child. Although the second child was listed in the style of the case, all references to him were removed in the body of the amended petition, and the petition did not seek termination of mother's parental rights to him. After mother failed to appear for trial, the trial court held a prove-up hearing. Among other things, the order terminated mother's parental rights to the second child.

On appeal, mother argued that the termination of her parental rights to the second child was void because the Department's live pleadings did not request such relief and the issue was not tried by consent. The Department did not contest her issue.

The appellate court agreed with mother, citing well-settled precedent from the Texas Supreme Court that: (1) a portion of a judgment addressing a claim that is not supported by the pleadings or that has not been tried by consent is void; (2) when a party files an amended pleading, it supersedes the prior pleading, making the prior pleading a nullity; and (3) an amended pleading that omits a party or claim operates as a voluntary dismissal as to that party or claim.

The court explained that "[b]ecause the Department's amended petition did not request the termination of Mother's parental rights with respect to [the second child], there was no pleading to support the trial court's termination of Mother's parental rights to [the second child] or its appointment of the Department as [his] permanent managing conservator." The court also found no indication in the record that the issues were tried by consent. Thus, the court concluded that the portions of the order terminating mother's parental rights to the second child and appointing the Department as his permanent managing conservator were void. *In re C.L., Jr. and A.J.L.*, No. 05-14-01520-CV (Tex. App.—Dallas Feb. 18, 2015, no pet.) (mem. op.).

B. Standing

1. Determined at Time Suit is Filed

"Standing and subject matter jurisdiction are determined at the time suit is filed, and amendment of the original petition cannot confer standing on the same basis asserted in the original petition when it has been determined that

that basis for standing does not exist." Accordingly, in holding the trial court did not err in granting respondent's plea to the jurisdiction, the court explained: "If the plaintiff lacks standing at the time suit is filed, the case must be dismissed, even if the plaintiff later acquires an interest sufficient to support standing." *In re N.I.V.S. and M.C.V.S.*, No. 04-14-00108-CV (Tex. App.—San Antonio Mar. 11, 2015, no pet.) (mem. op).

2. Standing to File an Original Suit as Basis for Intervention

TFC § 102.003(a)(10) provides that an original suit may be filed at any time by "a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162."

Appellants alleged in their amended petition in intervention that they had standing to bring an original suit pursuant to TFC § 102.003(a)(10) after being named managing conservators in the parents' affidavits of relinquishment. Accordingly, they argued that intervention is permitted for a person who could have brought the original suit.

At the hearing on intervention, appellants attempted to establish their standing as a result of their being named managing conservators in the child's parents' affidavits of relinquishment; however, the trial court declined to consider the affidavits, reasoning: "It's not relevant. . . . It may be in another proceeding, but [not] on the standing issue."

The court of appeals explained that appellants did not assert standing by filing an original suit under TFC § 102.003(a)(10). Instead, they asserted standing by invoking TFC § 102.003(a)(10) as a basis for their request to intervene in the Department initiated suit. Although § 102.003 sets forth the statutory standing bases for filing an original suit rather than intervening, the appellate court "[could not] conclude that a person who satisfies the statutory standing requirements to file an original suit is nonetheless foreclosed from intervening."

The appellate court held that it was error for the trial court not to consider whether the appellants had standing to intervene under TFC § 102.003(a)(10) when standing to intervene under that section was raised by their pleadings and their arguments at the hearing on intervention. *In re A.T.*, No. 14-14-00071-CV (Tex. App.—Houston [14th Dist.] July 15, 2014, no pet.) (mem. op.).

NOTE: Individuals seeking to intervene under TFC § 102.004(b) are required "to ask the trial court for leave in order to intervene . . . in a suit affecting the parent-child relationship."

3. TFC § 102.005 — No Best Interest Determination

In a Department-initiated termination proceeding, father's parental rights were terminated, mother's parental rights were not terminated, and the Department was named the child's permanent managing conservator. The child's paternal grandmother subsequently filed suit seeking termination of mother's parental rights and adoption. The Department sought to have grandmother's suit dismissed for lack of standing and because granting her party status would not be in the child's best interest. After grandmother failed to appear at the hearing on the Department's motion to dismiss, the trial court dismissed her suit for lack of standing. On appeal, grandmother argued that she showed sufficient substantial past contact with the child to warrant standing under TFC § 102.005(5).

Section 102.005 sets forth the standing requirements to file a suit for adoption or for termination and adoption, and provides in relevant part: "An original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by: (5) another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so."

In an affidavit attached to her petition, grandmother averred that the child lived with her from December 2012 through November 2013, from March 2008 through July 2010, and about 75% of the time from 2006 through 2008. The court noted that the Department presented no evidence at the hearing on its motion to dismiss, nor did it present any argument regarding "substantial past contact." However, the Department argued that grandmother had a prior suit seeking possessory conservatorship dismissed for lack of standing. The child's attorney ad litem argued that: (1) the child had been removed from a prior placement with grandmother because she allowed the child contact with the parents before termination of father's parental rights; and (2) the child was thriving in his current placement.

In reviewing whether the grandmother's petition alleged facts sufficient to show standing under TFC § 102.005, the appellate court rejected the Department's argument that

dismissing grandmother's petition for lack of standing was in the child's best interest. It held: "Nothing in the language of section 102.005 incorporates a best interest determination into the statutory requirements for standing." The court consequently reversed the trial court's dismissal of grandmother's suit and remanded grandmother's termination and adoption suit to the trial court. *In re D.A.*, No. 02-14-00265-CV (Tex. App.—Fort Worth Feb. 5, 2015, no pet.) (mem. op.).

II. PRE-TRIAL ISSUES

A. Adversary Hearing

1. Evidence Required

At the adversary hearing, father moved to dismiss the Department's petition because it lacked the requisite affidavit. The trial court stated that it had reviewed affidavits of the child's parents in another case and believed there were issues of drug abuse involved, but the court admitted no exhibits and heard no testimony. Father moved for a directed verdict, asserting that there was no evidence in support of the Department's petition. The trial court denied father's motion and issued a "Temporary Order Following Adversary Hearing" mandating that the child would remain in the care of the Department.

Father sought mandamus relief, asking the appellate court to vacate the temporary order and order that the child be returned to him. Father argued that the trial court abused its discretion because the Department failed to produce any evidence under TFC § 262.201 of: (1) danger to the child, (2) an urgent need for protection requiring the immediate removal of the child, (3) reasonable efforts to enable the child to return to father's home, and (4) a substantial risk of continuing danger to the child if returned to father's home.

The appellate court found that despite the temporary order stating that the findings were based on "the sworn affidavit accompanying the petition and based upon the facts contained therein and the evidence presented to [the] [c]ourt at the hearing", it was undisputed that the Department's petition did not have an accompanying affidavit and the Department failed to produce any evidence or testimony at the hearing.

Based on the lack of a sworn affidavit and the lack of evidence at the adversary hearing, the court held that "the trial court could have come to only one reasonable conclusion—that the Department failed to satisfy the requirements of Section 262.201(b) and that possession of the child should have been returned to his father as required under Section 262.201." The court conditionally granted father's mandamus and directed the trial court to vacate its "Temporary Order Following Adversary Hearing", and ordered the return of the child to father. *In re Hughes*, 446 S.W.3d 859 (Tex. App.—Texarkana 2014, orig. proceeding).

2. Local Rules Do Not Negate Requirement of Evidence

In their petition for mandamus relief, the parents argued that the trial court abused its discretion by signing the temporary orders granting the Department temporary managing conservatorship of the child without conducting a full adversary hearing as required by TFC § 262.201.

In November 2014, the Department filed its original petition and the trial court signed an ex parte order granting the Department temporary managing conservatorship of the child. Two weeks later, the trial court signed an order setting the case for an adversary hearing on January 5, 2015 at 8:30 a.m.—as agreed to by the parties. In addition, the order warned the parents that to proceed with the setting they must first: "(1) announce ready in accordance with the Local Rules and attached procedures; (2) timely appear for the Monday Family Law Docket at 8:30 a.m. in accordance with the Local Rules and attached procedures; and (3) wait for the hearing to be assigned to a judge from the docket." Finally, the order informed the relators that if they "fail[ed] to comply with the specific procedures for announcing and appearing for the hearing" the trial court could enter appropriate orders, including granting temporary managing conservatorship to the Department.

The record was undisputed that counsel for the parents failed to announce as required. In addition, the parents' counsel failed to appear for the Monday Family Law Docket on January 5, 2015. On the afternoon of January 5, the parties received an e-mail message from an employee of the court informing the parties that the court "ha[d] removed this setting from its calendar due to the failure of the parties to announce." However, that same day, the trial court signed temporary orders finding that "[the parents' attorney] failed to announce as required by the instructions and [parent's attorney] failed to appear at the Family Law Docket" and granting temporary managing conservatorship to the Department.

The trial court's January 5 temporary orders also contained requisite findings under TFC § 262.201(b) to support the order granting the Department temporary managing

conservatorship and stated that the court had received sufficient evidence of those elements. The appellate court noted that despite this finding, "the Department did not dispute that no evidentiary hearing was conducted and that it presented no evidence or testimony to the trial court in support of the temporary orders" and "[a]s such, there was no evidence on which the trial court could have based its findings." Instead, the appellate court found that the trial court "signed the temporary orders, at least in part, based on its finding that [parents' attorney] failed to comply with the requirements of the court's local rules" and that "[a] court's local rules . . . cannot trump the mandatory requirements of a statute." The court held that "[a]bsent a record of an evidentiary hearing, we cannot determine that the trial court had a basis on which to make the findings required under § 262.201(b)." The court concluded that "the trial court abused its discretion in signing the temporary orders without an evidentiary hearing and without evidence to support those orders." *In re A.V. and G.G.*, No. 03-15-00030-CV (Tex. App.—Austin Feb. 27, 2015, orig. proceeding).

B. Contesting Indigency Affidavit

The trial court granted mother court-appointed counsel but denied one for father. At the jury trial, the parental rights were terminated. Father and mother filed an affidavit of indigency more than six months before the underlying jury trial began. There was nothing in the clerk's record to indicate that the Department or the court clerk filed a written contest of the indigency finding.

The appellate court applied TRCP 145(d), holding that a parent is indigent in a parental termination case as a matter of law when an affidavit of indigence is filed with the court unless either the Department or the court clerk files a written document contesting indigency. Accordingly, the case was remanded back to the trial court to appoint father an attorney and for a new trial. *J.E. v. Tex. Dep't of Family and Protective Servs.*, No. 03-14-00164-CV (Tex. App.—Austin Sept. 10, 2014, no pet.) (mem. op.); *but see In re G.S.*, No. 14-14-00477-CV (Tex. App.—Houston [14th Dist.] Sept. 23, 2014, no pet.) (mem. op.) (Department's oral contest to parent's indigency status was sufficient to remove court-appointed counsel).

C. Service by Posting — Due Diligence

After the Department filed an original petition for protection of a child, for conservatorship, and for termination in suit affecting the parent-child relationship, it filed a motion for substituted service of citation by posting or other means stating that it had been unable to serve father by personal delivery, by registered mail, or by certified mail. Attached to the motion was an affidavit by the caseworker, who affirmed she "exercised due diligence in attempting to locate the whereabouts of [father], Respondent, whose residence is unknown to affiant, or who is a transient person, and have been unable to locate him." The trial court subsequently ordered that "service is authorized on [father] by posting a true copy of citation at the courthouse door in Bexar County." The return of the citation in the record reflects that the sheriff executed the citation by posting it "on the courthouse door in the City of San Antonio, County of Bexar, in the State of Texas, for a period of seven days."

On appeal, father argued that the trial court erred in terminating his parental rights because the Department "did not prove that [he] had been served with required notice of the case." In support of his argument, father relied upon *In re E.R.*, 385 S.W.3d 552 (Tex. 2012), which found the evidence in that case established a lack of diligence.

However, the court of appeals found the facts in this case distinguishable from *E.R.* It stated that the record demonstrated that the Department exercised due diligence in attempting to ascertain the residence or whereabouts of father. The Department's witnesses testified that no contact had ever been made with father. A caseworker testified that a search had been conducted to locate family members who may have been related to father. The Department attempted to reach possible family members who came up during that search and spoke with a possible mother, but that person hung up the phone when asked if she had any knowledge of father's whereabouts. Additionally, the caseworker testified that the Department followed up with all the addresses found but was unable to locate father. Another caseworker testified that the child's mother did not provide the Department with any information that would help locate father. The caseworker also testified that she reviewed the child's mother's history and was able to locate an old address and phone number for father; however, she was unable to reach him. Additionally, she testified that she sent father a certified letter to the address listed for him, but received no response. The appellate court concluded that there was evidence the Department could not locate father to serve him personally and that it attempted to serve him by certified mail but was unable to do so. As such, the court held that "the record in this case shows the Department acted with due diligence in attempting to locate [father]." *In re A.M.M.*, No. 04-14-00248-CV (Tex. App.—San Antonio Oct. 29, 2014, no pet.) (mem. op.).

D. Appointment of Counsel

1. Critical Stage of Proceeding

Following the removal of the child in November 2012, the trial court entered temporary orders which stated that it "ma[de] no finding with regard to the indigency of [mother] because . . . insufficient information is available to make such a determination at this time." Over the course of the case, the trial court held "a few" hearings, and mother appeared without counsel at those hearings.

On December 2, 2013, mother filed an affidavit of indigence. Eight days later, the trial court began a termination trial in which mother was not represented by counsel. Following direct examination of the first witness, the trial court remarked "Well, I've got a problem with the fact that [mother] has filed an indigency form . . . as of several days ago. So we need to ask [her] a few questions." Nevertheless, it was not until after three witnesses testified, including the mother, that the trial court informed the parties that trial was "in recess" and appointed mother an attorney. The court then stated: "I'm going to recess this hearing, and we will commence it after he's had a couple of weeks, or let's do it after the first of the year, so he has an opportunity to get up to speed on your case." The court then confirmed that the trial was in "recess" and that "we're not starting over."

When trial continued on January 21, 2014, the Department did not present any additional witnesses. Mother's appointed counsel asked the trial court for additional time for mother to complete her service plan and presented testimony from mother, the guardian ad litem, and the caseworker relevant to this request. The trial court denied this request for additional time and terminated mother's parental rights.

On appeal, mother complained that the trial court erred in "trying the termination case against her on the merits before considering an affidavit of indigence that she had filed a week earlier" in violation of "her statutory right to appointment of counsel and her constitutional due process rights."

The appellate court noted that TFC § 107.013(a)(1) provides that in a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of an indigent parent who responds in opposition to the termination. The court also cited precedent that "A parent's filing of an affidavit of indigency 'trigger[s] the process for mandatory appointment of an attorney ad litem.'"

In addressing the timing of the appointment of mother's counsel, the appellate court presented the question of whether "delaying that appointment until after the commencement of the termination trial" constitutes reversible error. In addressing this issue, the court looked to TFC § 107.0131, "which delineates the powers and duties of an attorney ad litem for a parent", and TFC § 107.0133, which subjects the attorney to disciplinary action for failure to perform those duties.

In light of those statutory requirements, the appellate court reasoned that "[c]onsidering the mandatory nature of the appointment of counsel upon a finding of indigency, and the appointed attorney's specific obligations in connection with representing an indigent parent, a trial court should address a parent's affidavit of indigence as soon as possible—before the next critical stage of the proceedings, whether it be a hearing, a mediation, a pretrial conference, or, in particular, a trial on the merits, and allow a reasonable time for appointment of counsel to make necessary preparations."

Accordingly, the court explained that "[w]hen an indigent parent seeks representation before a critical stage of the proceedings, and the trial court nonetheless proceeds with that stage, the delay may render the ultimate appointment a toothless exercise and irreparably impair the parent's ability to defend the case or regain custody of the child."

In its analysis, the court considered that: (1) mother filed her affidavit a week before the trial setting; and (2) the one year dismissal deadline in the case was two months after the trial setting and "no party had yet asked for the dismissal date to be reset". Ultimately, the court concluded that "[t]he commencement of trial on December 10 was a critical stage of the termination proceedings, at which the indigent mother was not represented by counsel" and therefore held "that the trial court erred in failing to first consider [mother]'s affidavit of indigency and appoint an attorney ad litem to represent her before proceeding with the termination trial." The court reversed the judgment and remanded the case for new trial. *In re V.L.B.*, 445 S.W.3d 802 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also In re K.M.L.*, 443 S.W.3d 101 (Tex. 2014) (Justice Lehrmann questioned "whether the trial court erred in failing to appoint counsel to represent [Father] or admonish him of his right to counsel" when father did not receive notices of hearings, did not attend any hearings, but showed up at final hearings as a result of a Department-issued subpoena. Justice Lehrmann

concurred that father's case be remanded for a new trial "[b]ecause [Father] was given no meaningful opportunity to invoke, much less to intelligently waive, his right to appointed representation in these critically important proceedings".).

2. Failure to Appoint Counsel

The Department filed a petition and an adversary hearing was held. The adversary hearing order deferred consideration of court-appointed counsel for the parents because neither had "appeared in opposition of the suit" or established indigency. The parents continued to appear pro se at hearings throughout the pendency of the suit. On the day of the final hearing, mother was not present because she was incarcerated. Father testified that mother was incarcerated due to a charge of theft by check, whereas the caseworker testified that mother was in jail due to non-payment of "court fines." Father also provided testimony about the couple's financial difficulties, including a lack of a car, that he could not bail mother out of jail until he was next paid, and that they had lived with relatives during the case. The record also "consistently reflects both [father and mother] were unemployed."

On appeal, mother argued that the court "denied her statutory and constitutional protections by not appointing counsel for her at trial." The Department first argued that there was nothing in the record to "demonstrate[ ] the trial court was on notice of the mother's indigency prior to the beginning of the final hearing." The court disagreed, noting that: (1) the trial court's temporary order deferring consideration of court appointed counsel for mother; and (2) the court has previously looked to matters introduced at trial in considering evidence of indigence. Specifically, the court noted that father's testimony "was replete with references to the couple's financial difficulties".

The Department also argued that mother "never responded in opposition to termination of her parental rights". The court again disagreed, citing prior authority that there are "no 'magic words' required to respond in opposition to termination". The court looked exclusively to father's testimony, and stated that "the evidence before the court was unmistakable that the mother, like the father, opposed termination of their parental rights. His testimony made her desires clear, and we think on this record her opposition to termination never was in question." The court sustained mother's issue and the case was remanded for a new trial for mother. *In re J.B., J.B., S.B., and A.R.B.*, No. 07-14-00187-CV (Tex. App.—Amarillo, Nov. 6, 2014, no pet.) (mem. op.).

E. Notice of Final Hearing

More than two months after suit was filed, the Department served father by publication without appointing an attorney ad litem. Over the next six months, Father received no notice of the proceedings, nor did he have any involvement with the child. However, he was contacted by the child's grandmother, he was put in touch with grandmother's attorney, and he filed pro se pleadings acknowledging paternity, requesting that his rights not be terminated, and providing his sister's address and phone number, where he was residing, along with his mother's contact information. Despite filing a response in opposition, father was not provided notice of any hearings in the case, nor was there evidence that he received notice of the trial.

The Department served father with a subpoena to attend the final trial and father arrived at the trial by police escort. For the first few hours of the trial, father sat in the hall outside the courtroom and missed pre-trial motions, jury selection, and part of the Department's opening statement. Grandmother's attorney alerted the trial court that father was in the hallway and father came into the courtroom. The court told father—after father gave a short opening statement—that he possibly could have been entitled to appointed counsel, but that it was "a little late for that now." Following a four-day jury trial, father's parental rights were terminated.

The court of appeals held that father waived his complaint about notice of trial by appearing at trial and did not address the lack of notice of the permanency hearings. Further, the court of appeals held that father waived his right to counsel under TFC § 107.013 because he generally appeared following service by publication and did not request an attorney or file an affidavit of indigence until after trial. The Supreme Court granted father's petition for review. Father's petition asked the court to consider whether he waived his right to notice of the termination hearing by appearing at trial after being subpoenaed.

The court noted that the record did not show that father was served with actual notice of the trial setting as required under TRCP 245. Despite his original answer containing his sister's address, as his place of residence, no return of citation was included in the clerk's record. The court explained that father testified that he knew about the termination suit and had previously met with the grandmother's attorney. However, father appeared at trial under subpoena. When asked if he was given notice of the trial, father responded, "I have never gotten anything", and that "he didn't get anything in the mail." The court then reasoned, "[f]ailure to give a parent notice of pending

proceedings 'violates the most rudimentary demands of due process of law.'" As such the court concluded that "[g]iven the constitutional implications of parental rights termination cases . . . and [father's] statements on the record that he did not receive notice of trial, and absent any evidence to the contrary, we must conclude that [father] did not receive notice of trial."

The Department argued that father waived notice by appearing at trial and not moving for a continuance. The court acknowledged that the due process right to notice prior to judgment is subject to waiver, but stated, "such waiver must be voluntary, knowing, and intelligently waived." The court further explained that the "due process requirement of notice must be provided "at a meaningful time and in a meaningful manner." The court considered that father attended and participated in all four days of trial and did not request a continuance based on his lack of notice. The court further considered that father was told by the trial judge on the first day of trial that it was too late for him to be appointed an attorney. The court concluded, "[b]ased on the record before us, we cannot conclude that [father] waived his due process right to notice of trial by sitting, under subpoena, through trial without any help from counsel and failing to formally move for continuance." *In re K.M.L.*, 443 S.W.3d 101 (Tex. 2014).

F. Incarcerated Father's Jury Request

Father filed a request for a jury trial which "was made more than a month prior to the trial setting and shortly after counsel was appointed for [him]". This request was denied by the associate judge. Prior to the bench trial, father filed a request for de novo review of the associate judge's denial of his request for a jury trial.

Father filed a second request for jury trial on the same day as the bench trial—"held several months before the mandatory dismissal deadline"—however, he did not pay a jury fee or file an oath of inability to pay with the district clerk. At the de novo hearing, the district court upheld the associate judge's ruling.

On appeal, father contended that the trial court abused its discretion in denying his request for a jury trial. The court of appeals agreed. The court found that because father's "request was made more than thirty days before the trial setting, [his] request for a jury trial was presumed to have been made in a reasonable time" under TRCP 216. The court also noted that the Department did not rebut that presumption "by showing that the granting of a jury trial would operate to injure the [Department], disrupt the court's docket, or impede the ordinary handling of the court's business." The court explained that "[t]he bench trial was held several months before the mandatory dismissal date" and "lasted less than one hour."

The Department argued that the trial court did not abuse its discretion when it denied father's jury request because he did not pay a jury fee or file an affidavit of indigence in accordance with TRCP 216 and 217. The court of appeals agreed that the record did not reflect that father deposited a jury fee or filed an oath of inability to pay, and that the trial court cited TRCP 217 as a basis for its ruling. However, because father was appointed an attorney in the trial court as required by TFC § 107.013, the court explained that father's indigency status "was not contested". Accordingly, the court "decline[d] to conclude that [father]'s jury trial request was untimely based on the failure to deposit the jury fee or to file an oath of inability under rule 217."

After determining that the issue of best interest was a disputed issue of fact, thus resulting in harmful error, the court reversed and remanded the case. *G.W. v. Tex. Dep't of Family and Protective Servs.*, No. 03-14-00580-CV (Tex. App.—Austin Feb. 11, 2015, no pet.) (mem. op.).

III. TRIAL PRACTICE

A. Counsel's Failure to Appear at Trial

Neither incarcerated father nor his appointed attorney was present at trial; however, the trial judge proceeded with the trial. At the beginning of the trial, the court asked the clerk whether the clerk had attempted "to secure [father's attorney]'s participation by phone?" The clerk responded, "Yes. . . . He didn't answer. I got his voice mail and I left him a message." The trial court noted that his "understanding [was] dad is in TDC at Dominguez. He was at the [adversary hearing] of 8/23/13." The trial court explained that there was "no extraordinary circumstances to delay any further resolution for the young child" and commenced the trial. After hearing the Department's sole witness testify, the trial court terminated father's parental rights.

The Department argued that father had not shown his appointed attorney's decision to avoid appearing at the termination hearing was not a strategic decision or that his defense was prejudiced. The court disagreed. Citing to case law, the court held "that the adversarial process employed here was so unreliable that a presumption of prejudice is warranted." The court concluded that because father was denied counsel at trial, which was a critical stage of litigation, father had shown that his defense was prejudiced. The appellate court reversed the

trial court's order of termination and remanded the case for further proceedings. *In re J.M.O.*, ___ S.W.3d ___, No. 04-14-00427-CV (Tex. App.—San Antonio Dec. 10, 2014, no pet.); *but see In re C.J., Jr.*, No. 04-14-00663-CV (Tex. App.—San Antonio Mar. 11, 2015, no pet.) (mem. op.) (mother claimed that "her retained attorney rendered ineffective assistance when he wholly failed to appear for the trial". However, a "parent who hires his or her own attorney in lieu of the attorney appointed by the court cannot raise an ineffective assistance of counsel challenge".).

B. TFC § 263.401

1. What Constitutes Commencement?

TFC § 263.401(a) provides that: "Unless the court has commenced the trial on the merits or granted an extension under Subsection (b), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court shall dismiss the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child."

On appeal, father alleged that the trial court abused its discretion because it "refused to grant his motion to dismiss the petition to terminate his parental rights previously filed by" the Department. The case was extended under TFC § 263.401. On the date of the final trial, two-and-a-half weeks before the new dismissal date, the Department sought, and was granted, a continuance. The trial was reset and was scheduled to be held two days before the new dismissal deadline. On the day of trial, the Department advised the trial court that it anticipated it needed "[a]t least half a day" for the trial. The trial court responded: "All right. Then I am going to call it for today, but I am going to recess the hearing from today to a date certain that I'll ask all of y'all to go in the -- in the coordinator's office and get that date set at this time." The court then "continue[d the case] pending the final hearing."

The case was continued for one month. However, about two weeks before the case was called for final hearing, father "filed a motion to dismiss for failure to try this matter within the statutory time period." On the day of trial, the trial court orally overruled father's motion to dismiss and commenced the trial. The court of appeals stated that the issue on appeal is "whether, under the facts of this case, the trial court commenced the trial on the merits" when it continued the case pending the final hearing.

In its analysis, the appellate court noted that on the first date the trial was called, "the parties never answered that they were ready or not ready for trial." In reviewing the trial court's actions, the court determined that "No substantive action was taken regarding the case. No preliminary matters or motions were heard." The court noted that there were no cases "directly on point" on this issue; therefore, the court looked to cases from the Texas Supreme Court and the Texas Court of Criminal Appeals for guidance. In doing so, the court explained:

> [W]e are of the opinion that *section 263.401* of the Texas Family Code requires more than a putative call of the case and an immediate recess in order to comply with the statute. We would suggest that at a minimum the parties should be called upon to make their respective announcements and the trial court should ascertain whether there are any preliminary matters to be taken up. To allow the trial court to use the method set forth in the record to extend the case beyond the mandated dismissal date would completely dismember the statute and make it worthless. Accordingly, we sustain [Father's] issue and find that the trial court abused its discretion in denying [Father's] motion to dismiss.

In re D.S., 455 S.W.3d 750 (Tex. App.—Amarillo 2015, no pet.) (emphasis in original).

2. Commencement and Mistrial as to One Party

On appeal, mother claimed the trial court erred because it failed to dismiss the underlying cause when it "declared a mistrial in the underlying cause". However, the Department argued that "the trial court declared a mistrial only with regard to the father of the children". In overruling mother's challenge, the court explained: "The record establishes that the mistrial was declared only with regard to the father's parental rights; therefore, trial was timely commenced with regard to [mother's] parental rights." *In re L.R.R., et al.*, No. 04-14-00457-CV (Tex. App.—San Antonio Sept. 24, 2014, no pet.) (mem. op.).

3. Commencement and Partial New Trial

Relator grandmother filed two intervention petitions seeking conservatorship in related Department-initiated SAPCRs. After a jury trial, parents' parental rights were terminated and grandmother was appointed managing

conservator of the children. The trial court orally "accept[ed] and adopt[ed]" the jury's verdict. The Department filed motions for new trial on the issue of conservatorship in both cases, three months after the jury rendered its verdict. A week later, grandmother moved to strike the Department's motion and filed motions to dismiss the Department from both suits. The next day, the trial court denied grandmother's motions to dismiss. Eleven days later, the trial court entered orders terminating parents' rights, appointing grandmother sole managing conservator, and continuing the Department as the children's possessory conservator until the children were relinquished to grandmother. However, four days later, the trial court "entered orders granting new trials in each case as to managing conservatorship but not as to termination of parental rights; and reinstated the Department as temporary managing conservator of the children. After grandmother's first mandamus attempt was denied, she filed new motions to dismiss in the trial court "arguing that granting the Department's new trials on conservatorship allowed the Department to avoid the statutory deadlines" under TFC § 263.401. The trial court denied grandmother's motions to dismiss and set the cases for trial on the issue of conservatorship. Grandmother filed another mandamus.

The court of appeals focused "on the effect of the new trials on the statutory deadlines as to the specific facts of this case." In its analysis, the appellate court explained that TFC § 263.401(a) "requires the dismissal of a SAPCR *filed by the Department* requesting the termination of parental rights or requesting that the Department be named managing conservator". The court then considered that grandmother's two interventions could have been brought in a separate action because she "asserted that she had standing to intervene, and pleaded for conservatorship of the children". The court then explained that "[t]he trial court's grant of the partial new trial did not disturb the termination of parental rights [because a] partial new trial may be granted when such part is clearly separable without unfairness to the parties." The court reiterated well-established legal principals when it continued: "Granting a new trial has the legal effect of vacating the original judgment and returning the case to the trial docket as though there had been no previous trial or hearing. . . . When a motion for new trial is granted, the original judgment is set aside and the parties may proceed without prejudice from previous proceedings. . . . Thus, when the trial court grants a motion for new trial, the court essentially wipes the slate clean and starts over."

Applying these well-established principles to the facts of this case, the court explained:

> Relator sought appointment as sole managing conservator of the children, not the termination of Mother's parental rights. No party moved to strike her petition in intervention. Relator's claims are not necessarily contingent upon the Department's request for termination of parental rights. Therefore, the trial court could properly grant a partial new trial on conservatorship.

The court then determined that grandmother's claim was not subject to TFC § 263.402, which provides: "A motion to dismiss is timely if the motion is made before the trial on the merits commences." The court reasoned: "The partial granting of the new trial had the effect of setting the conservatorship issue on the docket as though it had never been tried." The court continued: "[Grandmother] contends that, because the new trial was granted on the conservatorship issue, her motions to dismiss the Department were timely filed under section 263.402, the trial court was required to dismiss the Department from the suits, and the Department may not use a new trial to circumvent the statutory deadlines set forth in section 263.401." In rejecting grandmother's argument and ultimately denying her mandamus, the court explained: "[Grandmother's] arguments assume that section 263.401's deadlines are applicable to her intervention. We disagree with such an assumption. Mother's rights have been terminated in the Department's suits against her. At this point, [grandmother's] conservatorship claims are *against the Department*. This is not a 'suit affecting the parent-child relationship *filed by the department* that requests termination of the parent-child relationship or requests that the department be named conservator of the child' under section 263.401. Consequently, the section 263.401 deadlines are not applicable in this case." *In re E.C.*, 431 S.W.3d 812 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (emphasis in original).

LEGISLATIVE UPDATE: 84(R) SB 206 amended TFC § 263.401 by adding subsection (b-1), which reads:

> If, after commencement of the initial trial on the merits within the time required by Subsection (a) or (b), the court grants a motion for a new trial or mistrial, or the case is remanded to the court by an appellate court following an appeal of the court's final order, the court shall retain the suit on the court's docket and render an order in which the court: (1) schedules a new date on which the suit will be dismissed if the new trial has not commenced, which must be a date not later than the 180th day after the date on which: (A) the motion for a new trial or mistrial is granted; or (B) the appellate court remanded the case; (2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and (3) sets the new trial on the merits for a date not later than the date specified under Subdivision (1).

Act of April 13, 2015, 84th Leg., R.S., S.B. 206, §§ 11, 37, 38 (effective September 1, 2015) (to be codified as amendment to Tex. Fam. Code Ann. § 263.401).

C. Evidence

1. Trial Following Failed Monitored Return

Over the Department's objections, the trial court entered an order requiring a monitored return of the children to the father, finding there was "good cause" to do so. However, during the monitored return, father and mother got into an altercation and the Department took custody of the children again and sought termination of father's rights.

Relying on case law wherein a monitored return was the result of a mediated settlement agreement stating the return was in the children's best interest, father argued that the trial court, by stating there was "good cause" to return the children to his care, made a "judicial admission" that the return was in the children's best interest, and that the appellate court's "best interest analysis should be limited to the facts that occurred from the date that the monitor[ed] return started to the date of the re-removal or the date of trial."

In distinguishing this case, the appellate court explained that "the monitored return order in this case did not include any language to the effect that placement with [father] was in the children's best interest, there was evidence that the Department was opposed to the return, and there was no jury instruction or other judicial admission related to the children's best interest."

Accordingly, the court held that "[t]o hold that the majority of a parent's actions during the pendency of a termination proceeding could not be considered if a trial court enters a monitored return order would discourage the Department and the courts from attempting family reunifications in close cases such as this one. . . . We hold that it was proper for the jury to hear and consider evidence related to the children's best interest that arose before the July 2013 monitored return." *J.C.C. v. Tex. Dep't of Family and Protective Servs.*, No. 03-13-00845-CV (Tex. App.—Austin June 13, 2014, no pet.) (mem. op.).

2. Authentication of Exhibit

Mother argued that the trial court erred in overruling her objection to the admission of one of the Department's exhibits. The challenged exhibit was a printout of pages from a website called "Naughty Reviews". The pages contained pictures of mother that identified her as "Natalia", a "Female Escort in Austin Texas". The contact information included a phone number with an area code from Pennsylvania, an email address, and costs of services.

Mother contended that the exhibit was not properly authenticated pursuant to TRE 901(a), which states: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

Specifically, mother argued that some information on the website, such as her height, was not accurate. Mother testified that she was not aware of the website before trial, she had nothing to do with it, she had never used the phone number that was listed, and someone must have created the profile on the website to humiliate her. She did not dispute that the pages were posted on the website, the photographs on the website were of her, or the email address on the website was her email. Additionally, a Department caseworker testified that the phone number on the website matched the contact number that the Department had been provided for mother for several months, and that mother admitted to using the name "Natalia" on a Facebook account that she created. The appellate court determined that "[g]iven this evidence, the trial court could have concluded that there was sufficient evidence to support a finding that the pages from the website were what the Department purported them to be and, therefore, the trial court did not abuse its discretion by overruling mother's

objection to the evidence based on lack of authentication. *R.Z. v. Tex. Dep't of Family and Protective Servs.*, No. 03-14-00412-CV (Tex. App.—Austin Oct. 29, 2014, no pet.) (mem. op.).

IV. TERMINATION GROUNDS

A. TFC § 161.001(D) and (E)

1. Unexplained Injuries

The Department received a referral alleging physical abuse of the two month old child. The child had been admitted to the hospital because she suffered a broken left arm while in mother's care. Further testing revealed that the child had also suffered a fracture to the end of her thigh bone approximately two weeks before the broken arm. Testing also showed possible rib injuries, referred to as "cupping." The child was hospitalized for three to four days and required a cast on both her arm and leg before being discharged.

The undisputed evidence at trial established that mother was the child's sole caregiver and that child was "never out of her care". In addition, only mother and the child's five-year old sister were present during the time frame the child's arm injury occurred. The caseworker testified that mother never identified anyone other than her five-year-old who could have caused the child's injuries.

Mother provided "inconsistent" descriptions of the events surrounding the child's arm injury and theories about the leg injury. Regarding the arm injury, mother first claimed to have "no idea" how the injury happened. She later stated that the child's five-year old sister had tried to pick the child up by the arm. She also told a doctor that the sister had grabbed the child when he started choking on a bottle. Mother's theories about the leg injury included: (1) a Thanksgiving trip to the grandmother's house—which she raised for the first time at trial; (2) that she heard the child make "a noise" while in the back seat of the car with the sister; (3) that the sister tried to take the child out of a bassinette "and played with her like a doll"; and (4) that the sister was "jealous" of the child, indicating the sister may have "purposely hurt" the child.

The Department provided expert testimony to show that the child's injuries were "intentionally inflicted and they are consistent with physical abuse having occurred on more than one occasion." The medical records also showed two fractures inflicted at different times. The expert testimony further established that a five-year-old could not have caused the injuries. In addition, subsequent testing ruled out a "genetic bone disorder".

In addition, mother also denied "ever hearing the [c]hild cry or scream as a result of her broken arm, despite the medical testimony that any child would have screamed after such an injury". Mother also claimed that the child was "the type of baby who 'did not cry'". However, medical records reflected that the child "later cried when her injured arm was being examined".

On appeal, mother challenged the legal and factual sufficiency of the evidence supporting termination of her parental rights under TFC §§ 161.001(1)(D) and (E). TFC § 161.001(1)(D) provides that a court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child. TFC § 161.001(1)(E) provides for termination if a parent engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangered the physical or emotional well-being of the child.

The appellate court found that the trial court could have credited the expert medical testimony that a five-year-old was not capable of causing the child's injuries and that the injuries resulted from abuse. The trial court was also not required to believe mother's testimony that she was unaware of the injury until shown the x-ray at the hospital.

Ultimately, the court of appeals concluded that: "In light of the evidence in this case that the [c]hild sustained an arm fracture and a leg fracture at different times while in [mother]'s care, the injuries were not accidental, but instead were abusive injuries caused by extreme force, and the [c]hild would have screamed in pain so that her caregiver should have been aware of the arm fracture, the trial court could have reasonably inferred that [mother] knowingly allowed the [c]hild to remain in an environment that endangered her physical well-being and that she engaged in conduct that endangered her physical well-being."

In upholding termination under (D) and (E), the appellate court held that "[i]t was within the trial court's province to judge [mother]'s demeanor, to disbelieve her testimony that she did not know how the [c]hild was injured, and to infer that she knew of the [c]hild's injuries and how they occurred, supporting its findings under subsections D and E." *In re J.D.*, 436 S.W.3d 105 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also In re H.A.G.*, No. 04-14-00396-CV (Tex. App.—San Antonio Nov. 21, 2014, no

pet.) (mem. op.) ((D) and (E) findings upheld where infant had three arm fractures "in various stages of healing" and skull fracture, which expert medical testimony established were "likely not" caused by mother's claim that child rolled off sofa or bed); *In re J.D.B.*, 435 S.W.3d 452 (Tex. App.—Dallas 2014, no pet.) (The child had twenty-six fractures "in different stages of healing" which were described by medical expert as "on the severe end of child abuse, during the time when he was under [the parents'] care and that those fractures were caused by non-accidental trauma." Finding under (D) upheld, despite parents' lack of explanation for child's injuries and denial of knowledge of how injuries occurred).

2. Evidence Legally Insufficient

In seeking termination of mother's parental rights under TFC § 161.001(1)(D) and (E), the Department called its caseworker as its only witness. The caseworker testified that she did not believe mother had demonstrated an ability to provide a safe and stable housing environment for the children; she did not believe this would change. The caseworker also testified that termination of mother's parental rights was in the children's best interest. She did not, however, relate any facts that formed the basis of her opinion.

The court found that the Department presented no evidence to support its allegation that mother allowed her youngest child to become malnourished, and that she left the children alone unsupervised before they were removed. The Department also presented no evidence that the children's living conditions posed a real threat of injury or harm. The Department argued that the trial court took judicial notice of the file and its contents. The court held that the trial court could properly take judicial notice that the Department filed an affidavit along with its original petition, but it could not take judicial notice of the truth of the allegations the Department made in the affidavit. Thus, no reasonable factfinder could have formed a firm belief or conviction that the Department's allegation was true and supported termination as to (D).

As for termination under (E), the court found that the record did not show the Department presented any evidence regarding its allegations that mother demonstrated a voluntary, deliberate, and conscious course of conduct that endangered the children's physical and emotional well-being. The Department did not present any evidence to show how mother's mental health or failure to attend visitations affected her conduct towards the children or her ability to parent, nor did the Department present evidence that the children were regularly left alone because mother was jailed. The trial court noted that mother's failure to work her service plan could not be used as a ground for termination because the statutory nine months had not passed since the date of removal. There was also no evidence that mother's failure to complete the service plan demonstrated a voluntary, deliberate, and conscious course of conduct that endangered the children's physical and emotional well-being. Because the Department did not provide any evidence and the trial court could not take judicial notice of the truth of the allegations the Department made in its affidavit, the court held that no reasonable factfinder could have formed a firm belief or conviction of the truth of the Department's allegation was true and supported termination under (E). *In re D.N., R.N. and C.N.*, No. 12-13-00373-CV (Tex. App.—Tyler July 9, 2014, no pet.) (mem. op.).

B. TFC § 161.001(1)(E) — Single Act or Omission

Mother drove her twins and the grandmother to a bank. Mother admitted that grandmother had a substance abuse problem and once had been charged with driving while intoxicated with one of the children in the car. Mother had a prior case with the Department in which the Department had emphasized to her that the grandmother should never be left alone with the children. Mother stated at trial that she was exasperated with the grandmother because "she had me going all over the place." When mother complained about having to go to her own appointments, the grandmother ordered mother out of the car. The grandmother would not lend mother her cell phone to call someone for a ride, so mother removed the children from the car while they were still in their car seats, set them down in the bank, then left the bank in grandmother's vehicle. Grandmother carried the children out of the bank and left them in their car seats alone outside the door to the bank. When the grandmother and mother returned, they were informed by the bank's vice-president that the police had already been called. Angrily, mother hit one of the children and tossed the children—still in their car seats—into the car without securing them. With the doors wide open, mother drove in reverse in the parking lot, and then stopped suddenly, forcing the car doors to close. Mother then drove away before the police arrived.

On appeal, mother argued "evidence of a single act or omission cannot support an endangerment finding" under subsection (E). The court of appeals reiterated that "[a] single act or omission that directly affects a child can justify an endangerment finding." In upholding termination under (E), the court explained that the jury reasonably could have concluded that mother not only left her children with an inappropriate caregiver, she failed to

secure that inappropriate caregiver's consent to watch the children and she failed to ensure that a responsible person would be watching the children. The jury also could have reasonably found that when mother returned, she further endangered them by failing to secure their car seats and driving recklessly to avoid law enforcement. *In re K.S., K.S. and G.S.*, No. 09-14-00222-CV (Tex. App.—Beaumont Sept. 25, 2014, pet. denied) (mem. op.).

C. TFC § 161.001(1)(F)

Pro se father's parental rights were terminated in a private case. One ground supporting termination was TFC § 161.001(1)(F)—that father had failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition.

According to mother, father was required by court order to pay $150.00 per month in child support. She claimed, however, that he had not paid anything. Mother alleged that father sold cocaine, which he denied.

Based on the testimony, the trial court found that Father had failed to support the child as specified in (F). The appellate court began its analysis by noting that "one year means twelve consecutive months, and the ability to pay support must exist in each month during the twelve-month period."

While the court mentioned a dispute regarding whether nonsupport had been established for the twelve-month time period, it wrote "we note a glaring defect in the proof relative to [father's] ability to pay." Mother, it wrote, had the burden to prove that father "had the ability to pay *each month* during the relevant time period." The court found that mother failed to offer "*any*" evidence regarding father's ability to pay during the statutory time period. The evidence was determined to be legally insufficient. *In re N.G.J.*, No. 06-14-00083-CV (Tex. App.—Texarkana Mar. 26, 2015, no pet. h.) (mem. op.) (emphasis in original).

D. TFC § 161.001(1)(K)

1. Voluntary Execution of Relinquishment

Mother appealed the termination of her parental rights because she claimed she did not voluntarily execute her affidavit of relinquishment. Mother signed the relinquishment affidavit after participating in mediation and contended on appeal "that the [mediated settlement agreement] requirement that she execute the affidavit of relinquishment made it involuntary" and also that she was unduly influenced by statements made by the Department at mediation.

In her motion for new trial mother claimed that she had "signed the affidavit of relinquishment under duress and because of undue influence." In her motion, mother alleged that "[o]nly after [she] was led to believe that the father had signed an affidavit of relinquishment, that her mother-in-law supported the termination[,] and that her children wanted her to allow them to be adopted [] did she agree to sign the affidavit."

At the motion for new trial hearing, mother testified that "the undue influence that occurred was . . . aggressive behavior by the mediator and a misrepresentation as to what [the paternal grandmother] wanted to have happen or thought was in the best interest of the children." However, when asked if that "caused your mind to change so much that you didn't take the action that you would have otherwise taken?", mother candidly replied: "No." Mother's testimony continued with the following statements:

- "It broke my heart, and I didn't—no mother wants to hear that their kids don't want them, you know";
- "they knew that I haven't talked to my boys, so I mean they—it—it—it killed me. I mean it—ever—I mean I went—it just—it was the worst news that I ever heard";
- "they knew that they couldn't get me to sign them papers, or they knew to send somebody in before me to sign them papers, they knew. Why did it—[her ex-husband] have to be present but [the other fathers] didn't have to be present"
- After she signed the MSA, she believed that she "had to sign" the affidavit of voluntary relinquishment; and
- "once [she] put [her] initials on here and once [she saw her ex's] initials on here, [she] thought there was nothing else that [she] could do".

The appellate court recited that an "involuntarily executed affidavit is a complete defense to a termination decree based solely on such an affidavit." The court explained that the party opposing termination based on a proper affidavit has the burden of proving that the affidavit "was executed as a result of fraud, duress, or coercion." The court noted that mother "testified that the statement that the boys wanted to be adopted and the presence of the

presumed father's signature on the documents were what influenced her decision." The court continued: "She raised no evidence showing that the boys did not want to be adopted or that the presumed father's signature was improper or invalid." In overruling mother's issue, the court explained: "Facing the apparent desires of her sons and the presumed father at the same time as deciding whether to terminate her rights and duties as a parent peaceably by agreement and a run-of-the-mill prove-up hearing or to gear up for a full-blown adversarial trial understandably produced strong emotions in Mother, but the trial court could have rightfully determined that none of those influences were undue, no duress was shown, and to the extent that there was overreaching or a misrepresentation by TDFPS or the mediator, Mother by her own testimony did not rely on it in making her decision to sign the affidavit of relinquishment." The court accordingly held that mother "did not prove fraud, duress, or coercion by a preponderance of the evidence, and she therefore did not prove that her affidavit of relinquishment was involuntarily executed regardless of the MSA." *In re C.E., C.E., and M.E.*, No. 02-14-00054-CV (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.); *see also In re A.C., Z.C., J.C., S.C., and A.C.*, No. 12-14-00122-CV (Tex. App—Tyler Oct. 22, 2014, no pet.) (mem. op.) (in challenging a validly executed relinquishment affidavit, burden shifts to parent "to prove by preponderance that affidavit was executed due to fraud, duress, or coercion").

NOTE: In discussing a claim of undue influence, the Fort Worth court explained: "The heart of a claim of undue influence is the overcoming of a person's free will and replacing it with the will of someone else, causing the person to do something that she otherwise would not have done. Influence is not 'undue' just because it is persuasive and effective. [T]he law does not condemn all persuasion, entreaty, importunity, and intercession."

2. Incapacity Fixed at Time of Adjudication of Incapacity

Mother suffered from bipolar disorder and intellectual disabilities. Grandmother and mother decided that the child should live with grandmother while mother completed high school. The Department became involved after the child sustained injuries in grandmother's home. During the case, mother executed her third relinquishment affidavit in which she named the Department as managing conservator of the child. About six weeks later, at the request of grandmother, the County Court of San Jacinto County signed a guardianship order naming Grandmother as Mother's guardian of the person and estate. Following a four-day jury trial, the jury found termination grounds for mother under multiple grounds, including (K).

On appeal, mother and grandmother challenged the sufficiency of the evidence to support all predicate grounds for termination of Mother's rights. The court of appeals affirmed the jury's finding of (K); however, the Supreme Court granted mother's and grandmother's petitions for review.

In the Supreme Court, mother argued that "because she lacked mental capacity at the time the affidavit was executed, the affidavit needed to have been executed through her guardian to have legal effect." The Court rejected this argument because "the adjudication that she lacked capacity occurred after she executed the affidavit, not before." The court explained: "[a]n adjudication of incapacity in guardianship proceeding fixes the individual's status as an incapacitated person *at that time*" and that "this determination is merely a rebuttable presumption that the legal incapacity will be that person's condition at any given time thereafter in the absence of the facts showing reason has been restored." The court continued: "there is no legal authority for the proposition that a guardianship determination has retroactive effect such as to conclusively establish [Mother's] incapacity to [have] knowingly and intelligently execute[d] the affidavit of voluntary relinquishment".

Accordingly, the court found that "the guardianship determination has no binding legal impact on the earlier execution of the affidavit," and determined that "we cannot hold that her guardian (which did not yet exist at the time) was required to execute the affidavit." *In re K.M.L.*, 443 S.W.3d 101 (Tex. 2014) (emphasis in original).

E. TFC § 161.001(1)(L)

TFC § 161.001(1)(L)(iv) allows termination of parental rights where a parent has "been convicted [. . .] for conduct that caused the death or serious injury of a child and that would constitute a violation of . . . [Penal Code] Section 21.11 (indecency with a child)."

In a private suit, father's parental rights were terminated to the child under TFC § 161.001(1)(L)(iv). Father pled guilty to the offense of indecency with a child against the child's older sister and received a three-year sentence as part of a plea bargain. Father argued "there is no evidence of serious injury of a child to satisfy termination under . . .

(L) . . . and that serious injury to a child cannot be inferred from his commission of the offense of indecency with a child." He further argued that "serious injury to a child is not implicit in the offense of indecency with a child." Despite relying on case law holding that "where death or serious injury is not an element of the offense, the conviction or deferred adjudication is not by itself sufficient evidence to support termination under (L)(iv)", father wholly ignored evidence that mother testified that the child's older sister suffered "physical trauma" and "emotional and psychological harm" from the molestation, and was "emotionally unstable" and at times suicidal. He further disregarded the Supreme Court's statement in *In re L.S.R.*, 92 S.W.3d 529, 530 (Tex. 2002), wherein it "disavow[ed] any suggestion that molestation [of a child], or indecency with a child, generally, does not cause serious injury." The court also referenced *In re A.R.R.*, 61 S.W.3d 691 (Tex. App.—Fort Worth 2001, pet. denied), wherein a caseworker testified that the type of abuse the parent perpetrated against the child, which was sexual assault/ "inappropriate touch[ing]", "causes a child to sustain serious injury to her emotional well-being, and that such an injury could present a 'lifelong problem.'"

The appellate court accordingly held that the evidence in this case is legally sufficient to find that the child's older sister suffered serious injury as a result of father's indecency conduct, and the termination of father's parental rights was affirmed. *In re F.G.M.*, No. 10-14-00066-CV (Tex. App.—Waco Nov. 26, 2014, no pet.) (mem. op.).

LEGISLATIVE UPDATE: 84(R) SB 206 amended TFC § 161.001(b)(1)(L) to expand the scope of the subsection from the enumerated Penal Code section violations, to also include "law[s] of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections."

Act of April 13, 2015, 84th Leg., R.S., S.B. 206, §§ 11, 37, 38 (effective September 1, 2015) (to be codified as amendment to TFC § 161.001(b)(1)(L)).

F. TFC § 161.001(1)(N)

1. Reasonable Efforts—Second Service Plan Not Required

TFC § 161.001(1)(N) provides that termination may occur if the parent has constructively abandoned the child who has been in the temporary managing conservatorship of the Department for not less than six months, and: (i) the Department has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment.

Mother appealed the termination of her parental rights, challenging, *inter alia*, the sufficiency of the evidence to support the trial court's finding that the Department made reasonable efforts to return the child under TFC § 161.001(1)(N)(i).

Service plans were put into place in 2009. In her modification trial testimony, mother acknowledged that she did not initially "work the services" required in her service plan. She explained that she was incarcerated in a state jail for a year and she agreed to an order appointing the Department as permanent managing conservator of the children. Mother then testified that she did so because she knew she could not complete the required services by the court date, "so [she] decided to give the Department [permanent managing conservatorship] so that [she] could have enough time to get out and work on [her] services and start getting [her] kids back."

The evidence demonstrated that mother completed some of the tasks of her service plan. Mother explained that she postponed working on the plan because she was preoccupied with the service plan for her new baby, born to her while in state jail. However, mother did not complete any services during that year.

The appellate court noted that mother's own testimony demonstrated that she understood that compliance with her service plan was necessary for the return of the children. The court explained: "Her testimony, and that of the caseworker describing elements of the plans, supports the trial court's implicit finding that the handling of the plans constituted a reasonable effort on the part of the Department to return the children to [mother]."

Mother argued that "the Department 'did not give [her] any other services to work' to aid her reunification with the children after the . . . order granting the Department permanent managing conservatorship." The court noted that mother failed to cite any "authority suggesting that the Department was required to do so in order to demonstrate its reasonable efforts to return the children to her." The court also considered the caseworker's testimony that "each time [mother] contacted the Department about visitation with her children under the terms of the . . . order, the Department did its best to accommodate her requests", and that the "record also contains testimony

referring to home studies the Department conducted in efforts to place one of the children with relatives of his father." Accordingly, the court held that "[t]he trial court could have seen these efforts also as supporting this element of (N)." *In re M.R., J. and M.R.*; *In re D.J.B.*, Nos. 07-13-00440-CV and 07-13-00441-CV (Tex. App.—Amarillo June 9, 2014, no pet.) (mem. op.).

2. Reasonable Efforts Despite Plan of Termination and Lack of New Service Plan

In its initial suit, the trial court denied the Department's petition for termination and appointed the Department as the child's permanent managing conservator and the parents as possessory conservators. The Department later filed a petition requesting modification of the final order and termination of parental rights. The case was tried before a jury and the jury terminated father's parental rights.

Before the jury, the Department's caseworker testified that father was given a service plan during the original case and confirmed that a new service plan was not created after the trial court denied termination. The service plan did not state a permanency goal for the child. Father testified that he knew he was still required to complete the tasks assigned in the service plan in order to see the child. The Department's caseworker testified that father failed to comply with his service plan. Father testified that since the trial denying termination, he did not receive any letters about permanency conferences, and that he felt the Department had not made reasonable efforts to work with him.

On appeal, father argued that "the Department never intended to return [the child] to his care and failed to make reasonable efforts." He also argued that because the Department failed to file a new service plan after the trial denying termination, there is no evidence that the Department attempted to return the child to him. Father's argument continued to allege that after the trial court denied termination, the prior service plan was no longer in effect because the trial court's order denying termination stated that "all relief requested in this case and not expressly granted is denied."

In response, the court explained: "the question of whether the Department engaged in reasonable efforts to reunite [the child] with [father] does not turn on whether the old service plan was still in effect or whether a new service plan was filed. Instead, the question of reasonable efforts focuses on the Department's conduct." Relying on well-established law, the court reiterated that the "preparation and administration of a service plan constitutes evidence that the Department made reasonable efforts."

The court continued: "Moreover, the absence of a stated goal on [the child]'s service plan is not a *per se* failure to engage in reasonable efforts at reunification. We note that the Department's goal after the [initial] trial was unrelated adoption and has never changed. But even when the goal is termination, at least one court has held that the preparation and implementation of a service plan constitutes reasonable efforts at reunification. . . . Accordingly, the Department's goal in this case—regardless of whether it was written in the service plan—does not mean that it failed to engage in reasonable efforts at reunification."

In its analysis, the court considered the following evidence in finding the Department made reasonable efforts to return the child that "went beyond the preparation and filing of a service plan": (1) father had "little desire to have a relationship with [the child] and no desire for custody"; (2) the Department offered services before and after the trial denying termination "that were designed to facilitate the [child's] reunification with [father]; (3) "the Department attempted to provide [father] notice of meetings and hearings concerning [the child]"; and (4) the Department "conducted a home study at [father's sisters]' request". *In re S.R.*, No. 12-14-00238-CV (Tex. App.—Tyler Jan. 23, 2015, pet. denied) (mem. op.).

3. Failure to Regularly Visit — Parent's Desire to Visit Irrelevant

On appeal, mother challenged the sufficiency of the trial court's finding that she did not regularly visit or maintain significant contact with the children.

The children did not live with mother at any time between their 2009 removal and the October 2013 final hearing. Except for a short period, the children were in foster care. After her release from state jail, mother moved to Fort Worth where her mother and sisters lived. At the time of the final hearing, she was living with her father near St. Louis, Missouri, where she had lived since late 2012.

During the 33 months since the Department was named permanent managing conservator, the children only saw mother five times. Mother requested a visit in July 2012 but did not attend because she was hospitalized. She next requested a visit in January 2013, but was not allowed to attend because she failed a drug test administered before the visit. Mother requested another visit in July 2013 but

did not attend the visit because she had not yet passed a drug screen test. The Department's caseworker testified that "[e]very visit except for yesterday's visit has been the same day as a placement review hearing."

Mother argued that she visited the children "as often as she could." In upholding termination under (N), the court explained that "[e]ven if true, the argument would not defeat the ground for termination" because the Department was required to prove that mother "had not regularly visited or maintained significant contact with her children, not that she lacked desire to visit them." *In re M.R., J. and M.R.*; *In re D.J.B.*, Nos. 07-13-00440-CV and 07-13-00441-CV (Tex. App.—Amarillo June 9, 2014, no pet.) (mem. op.).

4. Inability to Provide Safe Environment

When the Department filed its petition in 2013, father was incarcerated. His paternity was confirmed six months before trial and he was released approximately two months before trial.

In analyzing whether the evidence was sufficient to support the finding that father "demonstrated an inability to provide the child with a safe environment", the appellate court considered the caseworker's testimony that father did not inform her of any plans to show he could provide the child with a safe and stable environment, rather he described his plan "to work and to live with his sister until he got himself together." Although father told the caseworker, and testified, that he was employed, he did not provide her or the trial court proof of his income. Despite claiming he wanted to be in the child's life, he did not send anything to the child after his paternity was established, and made no inquiries about how to contact the child. Father testified he was willing to pay for daycare if awarded custody, but he had not investigated or made any arrangements for daycare, and acknowledged that he did not know anything about the child.

In March 2014, father provided the child's aunt as a possible placement, a home study was performed, and her home was approved. However, the home study was not completed until mid-April 2014, and the Department's position was that it would not be beneficial to change the child's placement so close to trial, which was set in less than six weeks. While acknowledging that an incarcerated parent may provide a safe environment for a child through family members, the court concluded that although aunt's home was approved after a home study, she had never seen the child, and the Department determined that changing the child's placement shortly before trial would be too disruptive. In upholding father's termination under (N), the court held the evidence that placement of the child with the aunt would be too disruptive, combined with the lack of evidence of father's present ability to care for a young child, father's lack of proof of income or stable housing, and his lack of plans for the child's care while he worked, was sufficient to support a finding that father lacked the ability to provide a safe environment for the child. *In re V.D.A.*, No. 14-14-00561-CV (Tex. App.—Houston [14th Dist.] Dec. 23, 2014, no pet.) (mem. op.).

G. TFC § 161.001(1)(O)

1. Failure to Meet Goals of Service Plan

TFC § 161.001(1)(O) provides for the termination of parental rights on the basis that the parent has "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child."

The tasks and services required by mother's court ordered service plan included: (1) completion of anger management and parenting classes, a psychological assessment and drug assessment; (2) attendance at NA or AA meetings; (3) demonstration of financially ability to provide for the child and demonstrate she had obtained a "steady job by providing current paystubs"; (4) maintaining contact with the case worker; (5) cooperating with the Department and all service providers and follow all recommendations; and (6) participating in individual counseling sessions. The plan set forth a number of goals, including demonstrating the ability to: (1) parent and protect the child; (2) provide for the child's basic necessities, including food, clothing, shelter and medical care; (3) use appropriate family and friends for support; and (4) protect the child from harm.

The caseworker testified that the mother had had three therapists. Two of them discharged mother because of her missed appointments. Mother started with the third therapist, but then quit because she did not believe she was going to be reunited with her son. Mother claimed that she was unaware that she was required to attend AA or NA classes. The Department decided that mother needed to retake the parenting and anger management classes because she had been unable to display what she had learned.

In finding the evidence supporting (O) legally and factually sufficient, the court explained:

> In this case, the trial court heard evidence that [mother] had completed several of the plan requirements. However, the court also heard evidence that the Department and service providers believed [mother] needed to retake some of her classes and attend additional counseling, but she refused. Several witnesses testified [mother] had not learned from her classes or was not applying what she had learned. [Mother] also refused to provide the court with her current address, and she is unemployed. She has not attended any NA or AA meetings.
>
> In addition to not completing all of her tasks and services, it is apparent [mother] has not met her goals of demonstrating the ability to (1) parent and protect [the child]; (2) provide basic necessities such as food, clothing, shelter, and medical care; (3) use appropriate family and friends to obtain necessary support; and (4) protect the child from harm.

In re D.R.F., No. 04-14-00920-CV (Tex. App.—San Antonio Apr. 15, 2015, no pet. h.) (mem. op.).

2. Removal from Hospital

Mother's parental rights were terminated pursuant to TFC § 161.001(1)(O). On appeal, she challenged the determination that the child had been removed from her due to abuse or neglect. The evidence at trial showed that the child was removed a few days after birth because of concerns that mother smoked marijuana while she was pregnant and had an extensive history of maintaining relationships which involved severe domestic violence. At the time of removal, mother had another open case with the Department involving a different child who had also been removed from her care. A social worker who had worked with mother in 2012 testified that mother did not believe she had mental health issues, and tended to minimize her history of domestic violence and dependence on others. The social worker also testified that at the time of the child's birth, mother had not participated in services ordered for her reunification with the other child, in the Department's care.

In relying on *In re E.C.R.*, 402 S.W.3d 239 (Tex. 2013), the court reiterated that abuse or neglect under (O) includes risk and that the "evidence presented in this case showed that [the child] was removed due to safety concerns and the substantial risk and continuing danger that would have resulted if [the child] had been allowed to remain with [mother]." *G.N.E.-A. v. Tex. Dep't of Family and Protective Servs.*, No. 03-14-00168-CV (Tex. App.—Austin July 29, 2014, no pet.) (mem. op.).

3. Removal Affidavit Admissible as Exhibit Under (O)

The Department offered into evidence the removal affidavit that was attached to the original petition. The trial court overruled mother's hearsay objection. In that affidavit, the investigations caseworker detailed her interviews with the parents and her observations of the child's neglect.

The affidavit stated that mother admitted to using marijuana, Vicodin and Xanax before and during her pregnancy. It also stated that mother admitted she could be addicted to Xanax, but refused any referrals to address the problem. She admitted to criminal history, and that her contact with her other three children is court-ordered to be supervised because of her history of marijuana and prescription drug use. The caseworker also reviewed mother's divorce, which contained a finding that "the Mother had a history or pattern of child neglect" of the children of that marriage. The affidavit stated that father admitted to past and current drug use and was seen to be suffering from the effects from withdrawal. Father also admitted to a criminal history, including drug possession.

The caseworker made the conclusion in the affidavit that the parents were "incapable of providing a safe and stable home for [the Child] and it is believed that this child would be in immediate danger of his physical health and safety should he be allowed to remain in the home."

The court first held that any error in the admission of the affidavit was waived because the same information was contained in other documents that were admitted without objection. However, citing *E.C.R.*, the court also pronounced that the affidavit was relevant to prove that the child was removed for abuse and neglect under TFC § 161.001(1)(O), stating that "the Supreme Court of Texas has approved the consideration of an affidavit such as the one in this case to evaluate the sufficiency of the evidence supporting subsection (O)." *In re A.J.E.M.-B.*, No. 14-14-00424-CV (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.) (mem. op.).

H. TFC § 161.002 — Failure to File Admission or Counter-claim

In the Department's Petition, father was identified as "father or alleged father" of the child. After he was served

by publication, but before he was personally served, father wrote a letter to the Department in which he referred to "my child" and asked for progress reports. This document was not filed with the court. However, father refused to submit to court-ordered DNA testing. At trial, mother testified that father was on the child's birth certificate. Father's court appointed attorney requested that if the court terminated father's rights, that it do so as an alleged father. The court ultimately terminated pursuant to TFC § 161.002(b)(1) for what it called father's "failure to come forward".

A month after trial, but before the final order was signed, the Department received a certified copy of father's acknowledgment of paternity from the Pennsylvania Department of Public Welfare, and filed it with the court. Father filed a motion for new trial, claiming that he acknowledged paternity when he signed the Pennsylvania document. The motion was denied.

On appeal, father challenged the sufficiency of the evidence to terminate his rights for failure to file an admission or counterclaim of paternity after being served with citation. The court of appeals explained that sufficiency of the evidence claims are only considered based on the evidence actually adduced at trial. Additionally, the court acknowledged that there are no formalities necessary to admit paternity. However, in this case, the evidence was sufficient to support termination under TFC § 161.002 for failure to admit paternity because father did not file any documents in the trial court and did not testify at trial. In rejecting father's claim, the court held that "[father] did not respond to the lawsuit and made no appearance in the trial court to make the trial court aware that he was admitting paternity." *In re K.R.L.*, No. 01-14-00213-CV (Tex. App.—Houston [1st Dist.] Aug. 5, 2014, no pet.) (mem. op.); *see also In re J.L.A.*, No. 04-13-00857-CV (Tex. App.—San Antonio May 7, 2014, no pet.) (mem. op.) ("[B]y appearing at trial and admitting he is the child's father, an alleged father triggers his right to require the Department to prove one of the grounds for termination under section 161.001(1) and that termination is in the best interest of the child.").

I. TFC § 161.003 — Inability to Care

1. Specific Diagnosis Not Required

After a jury trial, mother's parental rights were terminated pursuant to TFC § 161.003. TFC § 161.003 provides that a trial court may terminate a parent's rights if the court finds by clear and convincing evidence that (1) the parent has a mental or emotional illness or mental deficiency that renders the parent unable to provide for the physical, emotional, and mental needs of the child; (2) the illness or deficiency will continue to render the parent unable to provide for the child's needs until the 18th birthday of the child; (3) the Department has been the managing conservator of the child for at least six months; (4) the Department has made reasonable efforts to return the child to the parent; and (5) termination is in the best interest of the child.

On appeal, mother argued that the evidence was "insufficient to show she suffers from a mental illness that makes her unable to care for [the child]". Specifically, mother noted "that the doctors do not seem to have diagnosed exactly what disorder or disorders she suffers from and assert[ed] that because the experts only talked about 'best guesses' and testified that [she] could make progress in addressing her mental problems, their testimony cannot support findings" that she has a mental or emotional illness that renders her unable to properly care for the child's needs and that the illness will in all reasonable probability, continue to render her unable to care for the child's needs until the child's eighteenth birthday. The appellate court stated that mother "essentially seems to argue that because no expert directly stated, 'Due to mental illness X, [mother] is an unfit parent and will never recover,' the evidence is insufficient to support the jury's verdict." The appellate court disagreed.

In its analysis, the court considered testimony from the caseworker that she: (1) believed mother "had mental illnesses that made her unable to care for [the child], basing that conclusion on the various professionals' reports and diagnoses and on her own observations of [mother and the child]"; and (2) believed mother's mental illness "was likely to persist until [the child] was eighteen, saying, 'I believe that [mother] has had this mental health issue for several years, and she continues to have it, and she's not recognizing it. And so I believe she would continue to not address it, and deny these mental health issues, and it would not be appropriate for [the child] to be in her care.'" The court also considered the child's testimony that "she loved her mother but did not believe that she could be healthy living with her if [mother] did not see to her own mental health."

In addition, the court explained that numerous mental health experts evaluated mother and: (1) "the majority of those experts believe that [she] suffers from some form of mental illness, and three of them believed she has schizoaffective disorder, bipolar type"; (2) other experts could not specify her illnesses because mother "did not answer their questions honestly or fully"; and (3) most experts testified that, no matter what her exact illness is, "[mother]'s lack of empathy and inability to recognize and

address her own issues has been detrimental to [the child]'s emotional well-being and renders mother unable to be an adequate parent." Also, several experts testified that schizoaffective disorder, bipolar type, "is difficult to treat under the best of circumstances and that [mother]'s unwillingness or inability to recognize her own mental issues will make treatment more difficult and slow any progress."

The court explained that "[t]he fact that some experts did not believe [mother]'s mental condition was as serious as others believed it to be does not invalidate the evidence supporting the jury's findings." The court reasoned that: (1) multiple experts provided testimony that mother "suffered from some form of serious mental illness"; (2) multiple witnesses testified about "[mother]'s unusual or inappropriate behavior and the distress her behavior caused [the child]"; and (3) mother "utterly denied that she had mental issues and was tangential and rambling in her testimony". The court held the evidence was sufficient to support termination of mother's parental rights and overruled mother's issue. *C.S.F. v. Tex. Dep't of Family and Protective Servs.*, No. 03-14-00597-CV (Tex. App.—Austin Mar. 13, 2015, no pet.) (mem. op.).

2. Reasonable Efforts Despite Plan of Termination

Mother's parental rights to the child were terminated under TFC § 161.003. Among her challenges to the court's findings under TFC § 161.003, mother alleged that the Department did not make reasonable efforts to return the child.

In its analysis, the appellate court reiterated that preparation and administration of a service plan is generally considered reasonable efforts and explained that "efforts to provide a parent with training, classes, assistance with medical or mental needs, and information to address those needs also qualify as 'reasonable efforts,' even if the parent fails to make significant improvement."

Despite the fact that the plan for the child "was always termination" and attempts at reunification were "never actively pursued", the court considered evidence that mother attended some counseling, which was unsuccessful due to her nonparticipation, the caseworker attempted each month to schedule visits between mother and the child, and mother "cursed" the caseworker, and repeatedly told her to "leave [her] alone."

In upholding termination under TFC § 161.003, the appellate court found that even though "family reunification was not actively pursued, a service plan was created and counseling services were offered to [mother] throughout the entirety of the case" and the Department's efforts demonstrate its reasonable efforts to return the child. *In re J.L.H.*, No. 12-14-00216-CV (Tex. App.—Tyler Dec. 3, 2014, no pet.) (mem. op.).

V. BEST INTEREST

A. Insufficient Evidence to Support Best Interest Finding

1. Conclusory Testimony

The Department received a referral in September 2013 for neglectful supervision by mother and father of one of their children after police approached their vehicle and discovered approximately eight grams of heroin in the vehicle. Mother did not appear at the termination hearing, and the only witness who testified was the Department supervisor.

At trial, the supervisor testified that she had no recent contact with mother, but after viewing mother's Facebook page, she believed mother was "in a relationship with a new individual who smokes marijuana and has guns." She also testified that mother had missed "a couple of visits with the children in July and August and did not believe that mother had maintained significant contact with them because of several missed visits through the pendency of the case. Further, the supervisor testified that mother had "done 'nothing' to demonstrate she could provide the children with a safe and stable home", despite the Department's reasonable efforts to work with her. According to the supervisor, mother had completed "some of the requirements of her service plan", but did not complete anger management classes or participate in a psychological evaluation, and she had started, but not completed individual counseling. The trial court also heard testimony that mother had failed to appear for drug tests and a hair follicle test. The supervisor believed that mother's behavior during the September 2013 incident endangered the child's well-being, but was not asked whether her behavior endangered the other three children. She testified as to mother's prior criminal history which included "theft 50 to 500 and robbery second degree felony". There was no testimony regarding "the year of the arrest, the details of the offenses, or whether the arrest resulted in a conviction."

In reversing the portion of the judgment terminating mother's parental rights, the appellate court determined that the Department "did not meet its burden to establish by clear and convincing evidence that termination of [mother's] parental rights was in the children's best

interest." In reaching this determination, the court noted that there was "no evidence adduced regarding any physical or mental vulnerabilities of any of the four children." The court further stated that there was "[n]o evidence of the magnitude, frequency, and circumstances of the harm, if any, to any of the four children", and that there was "no evidence in the record that any of the children have been the victim of repeated harm" or whether "any of the children have expressed any fear of living in or returning to their home." Additionally, the court considered that there was "no evidence of a history of abusive or assaultive conduct by the children's family or others who have access to the children's home." The court reasoned, "[o]ther than [the supervisor's] testimony, no other witness testified and no evidence was admitted." The court noted that "the record contained no evidence about or even a mention of the other three children except their names and birthdates." The court then determined that "[the supervisor's] agreement that it was in the children's best interest to terminate [mother's] parental rights and it was in their interest to 'move on' was conclusory." Accordingly, the appellate court reversed the trial court's judgment terminating the mother's parental rights. *In re B.R., A.R., X.R., and J.R.*, 456 S.W.3d 612 (Tex. App.—San Antonio 2015, no pet.); *see also In re A.J.L., A.R.L., A.A.R., and B.N.G.*, No. 04-14-00013-CV (Tex. App.—San Antonio Sept. 24, 2014, no pet.) (mem. op.) (other than the "conclusory testimony" by the caseworker that the children seemed "detached" during their visits with mother and that mother was unable to participate in family counseling because of her incarceration, no other evidence was offered on whether mother's relationship with the children was inappropriate).

2. No Evidence of Parenting Ability and Programs Despite (O) Ground Termination

In 2013, the Department removed the subject child and his siblings from the home in which they lived with their mother and the child's stepfather. The child's father had moved to another state in 2008, when the child was six years old, and lived there with his wife and two of his other children when the case began. After a bench trial, father's parental rights were terminated under (O) and best interest. On appeal, father challenged the sufficiency of the evidence supporting the trial court's best interest finding.

Father's court-ordered service plan ordered him to complete a parenting course, maintain contact with his caseworker, and pay child support. Father conceded that he did not complete the parenting classes. Despite father's concession, the court reversed and rendered the best interest finding and found that father's failure to comply with his service plan was not probative of the child's best interest and reasoned that if "termination is based on a parent's failure to complete a parenting course when the child is removed because of *that* parent's abuse or neglect, the failure to complete the course might be significantly probative of the child's best interest." However, in this case, the court concluded that father's failure to complete court-ordered parenting classes was not probative of best interest because the Department "presented no evidence about [father's] parenting skills that would make his failure to complete a parenting course probative of [the child's] best interest" in light of the fact that the Department presented no evidence that father knew the child was exposed to domestic violence or drug use in the mother's home. *In re D.B.T.*, No. 04-14-00919-CV (Tex. App.—San Antonio Apr. 29, 2015, no pet. h.) (mem. op.) (emphasis in original).

B. Desires of the Child

The children did not testify at trial. The initial psychological assessment conducted on the older child eight months after the children entered foster care indicated that she liked living in her current foster home and enjoyed the stability, but thought she would be reunited with mother in a year. There was evidence this belief came from statements mother made during visits. Mother testified that the younger child cried at the conclusion of visits, but stated the child had become more distant after entering foster care. The younger child's psychological assessment conducted eight months after he entered care reflected that he did not like being in foster care, but was glad he was going to spend the summer in the foster home because he knew he would have fun. Sometime between the psychological assessment and trial, the younger child was moved to a new foster home. His CASA volunteer testified that the child expressed happiness in the home and did not mention his mother.

In seemingly resolving this in the Department's favor, the court concluded: "while both children missed Mother and at times expressed a desire to return to her, they also recognized and appreciated the stability and structure they received from their foster homes." *In re A.W. and J.W.*, 444 S.W.3d 690 (Tex. App.—Dallas 2014, pet. denied).

C. Emotional and Physical Needs of the Children

The Department received a referral that mother was living at a shelter, was running away from an abusive husband, had eight children, and had mental health issues that were not being treated. The Department was unable to find her

at the time. There was a second referral two days later. Mother had left her eight children, ranging in age from nine years to five days old, in a van outside a children's hospital for more than an hour while mother was being treated for bleeding at a nearby hospital. At different times, mother claimed that three different people had agreed to watch the children during the medical appointment. Mother had alleged that the three oldest children were not in school because of diarrhea, but the children's hospital denied this claim.

During the pendency of the case, mother did not consistently attend visits with the children, which proved to be traumatic for them, while the visits that occurred were chaotic. During one visit, mother gave two of the children cellphones. In a phone call, a child told mother the location of her foster home and her school. Mother proceeded to disrupt the foster home, requiring the Department to relocate this child. The Department then warned mother not to give the children cellphones; however, she gave a child a second cellphone. During another visit, mother lied to the children about her pregnancy with a ninth child, which caused one child to be depressed about the deception. In yet another visit, mother called 911 because her infant was crying. The baby calmed down soon after a staff member took the child from her. After being warned that one child was going to be told in therapy about his father's death, mother showed that child pictures of his father in a casket. In addition, mother's conduct toward a paternal grandmother caused that grandmother to return the child to the Department's care. There was also an allegation that "someone" was telling some of the children that they were going home, causing two of the children to refuse to unpack at their foster home.

Mother's parental rights were terminated, and on appeal, she contested the sufficiency of the evidence to support the finding that termination was in the children's best interest.

Under the *Holley* factors of emotional and physical needs of the children and parenting abilities, the court emphasized that "the need for stability and permanence is an important consideration for a child's present and future physical and emotional needs."

The court first considered the evidence of instability prior to removal, including domestic violence involving mother, frequent moves, removing the children from a shelter, and leaving them alone in a van at a hospital. The court also noted that during the pendency of the case, mother: (1) missed visits; (2) impermissibly gave a child cellphones to locate and disrupt the child's placement; (3) disrupted a child's placement with her paternal grandmother; (4) lied about a ninth pregnancy, resulting in a child becoming depressed upon learning the truth; (5) misled the children about returning home; (6) informed a child that his father was deceased by showing the child a picture of father in a casket; (7) had "chaotic" visits with the children; (8) failed to complete all of her services; (9) was "hostile and aggressive" throughout the pendency of the case; and (10) missed several days of trial. Thus, the court stated that the jury heard "evidence of [mother's] inability to provide for the emotional stability and protection of the children." Citing established case law, the court reasoned that "conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being" and that "the jury could infer from [mother]'s past conduct endangering the children's welfare that similar conduct would recur if the children were returned to her care." The court found that based on the evidence, this factor weighed in favor of termination of mother's parental rights. *In re D.W., J.L., V.T., R.W., K.E.W., K.A.W., B.W., and A.W.*, 445 S.W.3d 913 (Tex. App.—Dallas 2014, pet. denied); *see also In re A.C. and As. C.*, No. 04-14-00031-CV (Tex. App.—San Antonio May 21, 2014, no pet.) (mem. op.) (In rejecting mother's complaint that Department presented no evidence of children's needs, and thus, no evidence that she is unable to meet them, appellate court held: "We do not believe any direct evidence is required for the trial court to find that children's physical and emotional needs include stable housing and a caretaker who can provide some minimal degree of financial security.").

D. Parenting Abilities

Although affirming the trial court's finding that termination is in the children's best interest, the court of appeals found the fourth *Holley* factor pertaining to the parenting abilities of the individuals seeking custody "neutral". The trial court heard the following evidence regarding the mother's parental abilities: (1) mother's "parental ability [was] questionable" because "the children were often in the possession of [the foster parents] during the pendency of the case"; and (2) mother's "home was cluttered and the children were dirty" but were "for the most part[,] . . . okay". The trial court also heard evidence that the "foster family was loving, provided the children with structure, and applied rules consistently." However, the court determined that "the Department did not present evidence of the parental abilities of the foster family." *In re A.L. and D.L.*, No. 06-14-00050-CV (Tex. App.—Texarkana Oct. 18, 2014, no pet.) (mem. op.).

E. Programs Available — Timing of Completion of Services

In a best interest analysis, a trial court could consider that parents "did much toward completion of their service plan"; however, in affirming the trial court's best interest finding, the court could also properly consider that parents did not complete those services "within a reasonable time given parents' long-term drug use and involvement with the Department". *In re G.C.D.*, No. 04-14-00769-CV (Tex. App.—San Antonio Apr. 29, 2015, no pet. h.) (mem. op.).

F. Acts or Omissions of the Parent

On appeal, mother argued that the evidence was 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. The trial court heard evidence that the child was initially placed in foster care after mother was arrested for shoplifting after placing items in the child's stroller and walking past the store's check-out area without paying. Additionally, there was no family member to act as caregiver for the child. Mother pled guilty to theft and spent three days in jail. More than six months later, during the pendency of the case, mother was again arrested for theft. She again pled guilty and spent one week in jail.

In its best interest analysis under "the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one", the appellate court noted that mother's service plan "stressed that the parents would need to make a number of changes to regain custody." Specifically, one such change in the service plan was that the "Parent will stop participating in criminal acts and accept responsibility for prior criminal activity." The court concluded that "[m]other's second arrest indicates she was not able to effectuate this critical change. By choosing to steal again, she failed to make reunification with [the child] her priority." The court found this factor to weigh "most heavily in favor of termination." *In re S.Y.*, 435 S.W.3d 923 (Tex. App.—Dallas 2014, no pet.).

G. Failure to Attend Trial

The determination that termination of mother's parental rights was in the best interests of the child was supported by mother's failure to appear at the final hearing. The appellate court reasoned that mother "did not personally appear at trial to oppose the appointment of the Department and to give evidence to regain custody of her child, despite receiving notice through her appointed counsel. She offered no explanation for her absence in her motion for new trial. From this, a reasonable factfinder could conclude that the proceeding was not important to her." *In re K.N.D.*, No. 01-12-00584-CV (Tex. App.—Houston [1st Dist.] Aug. 14, 2014, no pet.) (mem. op.).

VI. DENIAL OF TERMINATION AND CONSERVATORSHIP

A. Conservatorship Issue Not Submitted to Jury

The jury trial in this case resulted in a jury's verdict "finding that [mother's] parental rights [to the child] should not be terminated." The jury was not asked a question regarding conservatorship. The court then asked when the order would be prepared and the Department "moved to be named" PMC of the child. At that point, the trial court "requested briefing" and stated:

> And even though we didn't submit a question, which is interesting to me, about PMC—you'll need to think about that, why no one asked the jury if you don't answer yes to these questions, should we then appoint the department as PMC, should we appoint mom as possessory conservator…. I've had other charges where we asked layers of questions. For whatever reason, everyone elected not to do that in this case. And I think there are, I'm sure, sound reasons and sometimes strategic reasons why you choose to do what you do, but now you're asking me to do something that the jury was not asked to do.

After briefs were submitted, the trial court held a hearing on the issue of "whether the Department could be named PMC after not having submitted the issue to the jury."

At the hearing, the Department was asked why it did not submit a jury question regarding conservatorship and it responded: "[W]e just thought that the Court had the authority to do it if—by looking at the statutes." The trial court "noted that [mother] had also opted not to ask such questions, and [her] attorney answered that [mother] had told her, 'I either want my child with no rights terminated or I don't have my child and I'm out of the picture.'" Mother's attorney informed the trial court that "she had proceeded 'thinking that it was going to be an all or nothing, that the [D]epartment would be dismissed if mother's rights were intact or she would be completely out of the picture.'" The trial court determined "that the Department's request for PMC 'was in the pleadings in the alternative' and, thus, that the issue was fairly before the court." After the hearing, the trial court signed a final

order appointing the Department permanent managing conservator of the child and mother possessory conservator with supervised visitation.

On appeal, mother argued "that the Department should not have been allowed to ask to be named PMC because (1) it waived the issue by not seeking to ask the jury any questions related to conservatorship; (2) it 'repeatedly informed' the jury that, should the jury decide not to terminate [mother's] rights, the child would go home to her; and (3) it only pled for conservatorship under section 153.005 of the family code, not sections 153.131 and 263.404, and thus waived the right to seek conservatorship."

In response, the Department argued "that the court had statutory authority under section 161.205 of the family code to appoint the Department as sole managing conservator, that the jury's verdict was given full effect by the court's conservatorship decision, and that the Department's pleadings gave [mother] fair notice that it would seek managing conservatorship in the event that her parental rights were not terminated."

In agreeing with the Department, the appellate court determined that the Department's pleadings, "referring to the court's duty to name a managing conservator and asking that the Department be so appointed, was sufficient to give [mother] notice of its intent to seek PMC in the event that the jury decided not to terminate her rights." The court continued: "The fact that the Department did not reference sections 153.131[—parental presumption—] or 263.404 [—final order denying termination and naming Department PMC—] did not waive the Department's ability to seek to be named PMC."

The appellate court reasoned: "section 161.205 provides that if a trial court does not order the termination of parent's rights, it shall either deny the Department's petition or 'render any order in the best interest of the child.' . . . And, section 153.002 states that the child's best interest 'shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.'" Accordingly, the court held "that the trial court had statutory authority under the applicable family code provisions, when read as a consistent and logical whole, to determine that [mother] was not at the time of trial an appropriate PMC and to name the Department as PMC instead." The court continued: "To hold otherwise, particularly when, as the trial court noted, [mother] herself opted not to seek the jury's answer about conservatorship, would put [the child's] best interest subservient to technicalities of the rules governing pleadings and waiver. This would violate section 153.002, which is the overarching consideration in all matters related to conservatorship and possession." The appellate court upheld the trial court's conservatorship order. *T.L. v. Tex. Dep't of Family and Protective Servs.*, No. 03-14-00361-CV (Tex. App.—Austin Nov. 26, 2014, no pet.) (mem. op).

VII. PRIOR DENIAL OF TERMINATION

A. TFC § 161.004: Material and Substantial Change

In 2010, a final hearing was held in which the Department sought termination of father's parental rights. The trial court denied the termination, instead appointing the Department permanent managing conservator and father and mother as possessory conservators.

The Department filed a petition to terminate father's parental rights in 2010. The petition alleged there had been a material and substantial change in circumstances since the 2010 order denying termination. After a January 2014 trial, father's parental rights were terminated, based in part on conduct occurring prior to the 2010 order denying termination.

On appeal, father contended that because the trial court's order did not make a finding of a material change in circumstances, the trial court could only terminate his parental rights on acts occurring after the January 2010 order.

The appellate court noted that the trial court's written notice of termination contains all the required TFC § 161.004 findings, except for the finding of a material and substantial change in circumstances since the 2010 order. To cure the issue, the appellate court abated the appeal to determine whether the trial court had made such a finding. Upon learning that the trial court made the requisite finding, and because father failed to brief the sufficiency of the evidence supporting the trial court's finding, the order of termination was affirmed. *In re J.R.I.*, No. 04-14-00102-CV (Tex. App.—San Antonio Sept. 3, 2014, no pet.) (mem. op.).

VIII. INDIAN CHILD WELFARE ACT (ICWA)

A. Actual Notice Sufficient

Mother and child are both from Oklahoma City, Oklahoma. Mother and child were traveling through Texas when a report of neglectful supervision was reported

at a Texas hospital, which led to the removal of the child from mother's custody. The Department filed an emergency petition for protection of the child and the trial court signed an emergency order naming the Department as temporary sole managing conservator of the child. A representative from the Cherokee Nation advised the trial court that it was intervening in the case on the child's behalf.

Following the termination of her parental rights, mother argued on appeal that the proceedings should be invalidated because the notice afforded to Cherokee Nation did not comply with 25 U.S.C.A. § 1912(a), which requires that in any involuntary proceeding in a state court involving an Indian child, "the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." The clerk's record did not contain any of this required documentation. 25 U.S.C.A. § 1914 provides that an order of termination may be invalidated for failing to comply with Section 1912.

The question before the appellate court was whether the trial court's order should be invalidated for failing to strictly comply with Section 1912(a)'s notice requirements when Cherokee Nation had actual notice of, and involvement in, the proceedings. The appellate court noted that there was no showing that the Department strictly complied with Section 1912(a)'s requirements; however, it also found that Cherokee Nation became involved "very early" in the case. Cherokee Nation had a representative attend court hearings and provided transportation to mother to Texas for visits and services, and conducted home visits to mother's apartment in Oklahoma City.

As this was a case of first impression in Texas, the appellate court looked to the Bureau of Indian Affairs Guidelines, which state that notice is necessary and that certain information in the notice is required "so the persons who receive notice will be able to exercise their rights in a timely manner." The court noted that the Guidelines do not address whether the policy interests of the ICWA can be realized upon a tribe's actual notice of, and involvement in, a proceeding without having received the notice specified in Section 1912(a).

The appellate court also looked to courts from other jurisdictions who have refused to invalidate termination orders for failure to satisfy Section 1912(a)'s requirements when, as in this case, the interested tribe had actual notice of the proceedings and agreed that "[w]hen actual notice of an action has been given [irregularity] in the content of the notice or the manner in which it was given does not render the notice inadequate."

The appellate court found that in the instant case, Cherokee Nation had actual notice of the proceedings, intervened, and participated throughout the pendency of the case. The court further found that there was no evidence that the failure to strictly comply with Section 1912(a)'s notice requirements negatively affected Cherokee Nation's interest in the child and in retaining the child in its society. Therefore, the court held that the trial court's order need not be invalidated due to the Department's failure to comply with Section 1912(a). *In re K.S.*, 448 S.W.3d 521 (Tex. App.—Tyler 2014, pet. denied).

B. ICWA Does Not Preempt TFC Termination Findings

Mother argued on appeal that the ICWA preempts the Texas Family Code termination ground and best interest findings in a parental termination case. She argued that the trial court erred by making findings under TFC § 161.001 because it is impossible to simultaneously comply with the Family Code and the Federal ICWA. The Department argued that termination grounds under TFC § 161.001 are not mutually exclusive, and thus, are not preempted by the ICWA.

The court stated that it reads state law provisions in harmony with federal law unless the state law provisions stand as an obstacle to the accomplishment and execution of the congressional objectives in the ICWA.

The appellate court found that Congress did not expressly state that by enacting the ICWA it was preempting state law concerning child custody proceedings or that it intended for the ICWA to occupy the area of child custody proceedings completely. Accordingly, the court stated it "must presume that Congress did not intend to preempt the Texas Family Code when it enacted the ICWA."

In addressing the issue of preemption, the court compared the Family Code provisions relating to the termination of the parent-child relationship with the pertinent ICWA provisions to determine whether the Family Code serves as an obstacle to the accomplishment and execution of the objectives Congress sought to accomplish. The appellate court explained that "[t]he ICWA and the Texas Family Code address similar interests when a child is removed from his or her home because they both seek to protect the

best interests of the child and to preserve family stability." The court stated that "[t]he ICWA seeks to achieve this goal by requiring 'active efforts' to prevent the breakup of the Indian family and proof beyond a reasonable doubt that 'the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child'"; wherein, "the family code seeks to achieve this goal by requiring 'reasonable efforts' to make it possible to return the child to the home and requiring clear and convincing evidence that (1) the parent has engaged in conduct described in section 161.001(1) . . . of the family code and that (2) termination of the parent-child relationship is in the child's best interest."

The court further explained that "Generally, the concurrent application of the family code to proceedings involving Indian children provides additional protection to parents of Indian children because it requires the party seeking termination to prove state and federal grounds before the parent-child relationship may be terminated."

Based on precedent from the Houston First Court of Appeals, mother argued that it is impossible to comply with both statutes because the Family Code's best interest requirement is based on an "Anglo standard" while the ICWA is concerned with the "best interests of Indian children".

The appellate court concluded that, based upon its reading of the ICWA and TFC §§ 161.001 and 262.001, "the family code does not serve as an obstacle to the realization of the ICWA's purpose. Therefore, we disagree that the family code cannot be read in harmony with the ICWA."

The appellate court also concluded that the "family code is not preempted each time an Indian child is involved in a child custody proceeding in Texas, namely a suit involving the termination of the parent-child relationship. . . . Thus, when the ICWA applies, both the ICWA and the Texas Family Code grounds for termination must be satisfied." Accordingly, the court held that it was not error for the trial court to make findings under both the ICWA and the Family Code. *In re K.S.*, 448 S.W.3d 521 (Tex. App.—Tyler 2014, pet. denied).

C. Burden of Proof Remains Clear and Convincing Evidence for TFC Findings in ICWA Case

Mother challenged the sufficiency of the evidence supporting the jury's findings, which terminated her parental rights under TFC § 161.001(1)(D), (E), and (O) and 25 U.S.C.A. § 1912(d) and (f) of the ICWA. The jury charge presented to the jury imposed a beyond a reasonable doubt burden of proof as to both the Family Code findings and the ICWA gounds.

In its analysis, the court of appeals held that because the Family Code and the ICWA require different burdens of proof to terminate the parent-child relationship, different standards of review apply to each—beyond a reasonable doubt for the ICWA and clear and convincing evidence for TFC § 161.001.

The appellate court concluded that although the court's jury charge imposed the beyond a reasonable doubt burden on the Family Code grounds for termination, the court would conduct a sufficiency review of the evidence and apply the state burden of proof—clear and convincing evidence—to the Family Code termination findings. *In re K.S.*, 448 S.W.3d 521 (Tex. App.—Tyler 2014, pet. denied).

D. Burden of Proof — 25 U.S.C.A. § 1912(d)

A termination order may be invalidated for the failure to comply with 25 U.S.C.A. § 1912. Subsection (f) provides that termination of parental rights requires "evidence beyond a reasonable doubt." However, subsection (d) provides that a party seeking to terminate parental rights "shall satisfy" the court that active efforts have been made and "proved unsuccessful" to prevent the breakup of the Indian family. The burden of proof required to "satisfy the court" that active efforts were made and "proved unsuccessful" is not specified by the ICWA.

After looking to other states for guidance, the court of appeals concluded that because the ICWA proceeding in this case concerns the termination of parental rights, the burden of proof required under subsections (d) and (f) is evidence "beyond a reasonable doubt." *In re K.S.*, 448 S.W.3d 521 (Tex. App.—Tyler 2014, pet. denied).

E. Failure to Provide Remedial Services

Under 25 U.S.C.A. § 1912(d), the party seeking termination of parental rights must prove that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. On appeal, the Department conceded that the record did not contain legally sufficient evidence that it provided mother with remedial services. Accordingly, the court reversed and rendered the trial court's judgment terminating the mother's parental rights. *In re G.D.P.*, No.

09-14-00066-CV (Tex. App.—Beaumont July 10, 2014, no pet.) (mem. op.).

F. Broad Form Submission of ICWA Ground

Mother contended on appeal that in a jury trial in which the ICWA was involved, the trial court erred by permitting "a broad-form submission jury charge . . . rather than multiple alternative submissions containing state grounds for termination and grounds for termination under the ICWA."

At trial, mother's attorney argued that the broad form question in the charge was not sufficient due to the "special provisions of the Indian Child Welfare Act" and argued that separate findings on the ICWA grounds were necessary. The question to which mother objected presented the jury with a choice of "Yes" or "No" to the question: "Should the parent-child relationship between [mother] and the child, [---], be terminated?"

Mother argued that it was not feasible to submit this question because the ICWA requires a higher burden of proof than the Family Code. The appellate court disagreed, noting that once the jury received the instructions on the law that applied to the grounds for termination under the Family Code and the ICWA, the controlling question under both statutes remained the same: "Should the parent-child relationship between [mother] and the child, [---] be terminated?"

The court found that the trial court's charge included the statutory language for termination of parental rights under the Family Code and the ICWA, and imposed the beyond a reasonable doubt standard on both state and federal grounds. The court held that the trial court did not abuse its discretion in submitting the question to the jury in broad form. *In re K.S.*, 448 S.W.3d 521 (Tex. App.—Tyler 2014, pet. denied).

IX. POST-TRIAL

A. Findings of Fact and Conclusions of Law Not Required

Following the trial court's termination of his parental rights, father filed a request for findings of fact and conclusions of law and then a notice of past due findings of fact and conclusions of law. On appeal, father argued that the trial court erred by not filing the requested findings of fact and conclusions of law.

The court of appeals disagreed citing TRAP 28.1(c), which states that in an accelerated appeal, "the trial court need not file findings of fact and conclusions of law but may do so within 30 days after the order is signed". Relying on its own precedent, the appellate court explained that "even before rule 28 was amended to apply to termination cases, we held that a failure to file findings and conclusions was harmless when a termination order sets out the termination grounds and the record allows the appellant the opportunity to fully brief the sufficiency of the evidence to support those grounds for our review." The court concluded that "[b]ecause the rules provide for the trial court's discretion with regard to filing findings of fact and conclusions of law in an accelerated appeal like this . . . even if the trial court abused its discretion, [f]ather suffered no harm, we overrule [f]ather's first issue." *In re M.P.*, No. 02-14-00032-CV (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.).