Termination and Post-Trial Procedure Case Law Update

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I. PRE-TRIAL ISSUES

A. Standing

1. Actual Care, Control, and Possession

A stepfather and a biological father brought a suit to modify conservatorship following the mother's death. The stepfather was appointed sole managing conservator and the biological father was appointed possessory conservator of the child. The biological father appealed, arguing that the stepfather did not have standing under TFC 102.003(a)(9). TFC 102.003(a)(9) provides that, "a person, other than a foster parent, who has had actual care, control, and possession of a child for at least six months, ending not more than 90 days preceding the date of the filing of the petition", has standing to file a SAPCR. The biological father argued that the stepfather only had possession of the child for three months because the child was removed by the Department following the mother's death and then returned to stepfather for another four months before he filed the petition. The biological father contended that the four months following the mother's death should not be included because he was entitled to custody.

The San Antonio Court disagreed, holding that, "in computing the six-month period under section 102.003(a)(9), the time need not be 'continuous and uninterrupted.' Rather, the court shall consider the child's principal place of residence during the relevant time period." The appellate court found that the purpose of TFC 102.003(a)(9) is to "create standing for those who have developed and maintained a relationship with a child over time." In this case, the stepfather's periods of possession added up to "a total of at least eight months". *In re Guardianship of C.E.M.-K.*, No. 04-10-00385-CV (Tex. App.—San Antonio Feb. 16, 2011, pet. filed) (mem. op.).

2. Care, Control, and Possession Need Not Be Exclusive

Tammy and Kathy were involved in a seven-year relationship. Before their separation in 2008, they had been caring for an infant, S.J.F., at the request of his biological father. In 2009, both women sought adoption of S.J.F. when the Department became involved with the biological mother after she gave birth to another child who was born drug-positive. Tammy petitioned for adoption solely in her name, and it was alleged that Tammy agreed to add Kathy as an adoptive parent at a later date. The adoption was granted solely to Tammy. After the adoption, although Tammy and Kathy lived separately, Kathy asserts that the women enjoyed a committed relationship, pointing to Tammy's testimony that the two women spent most evenings and nights together. Kathy testified that she assumed primary responsibility for S.J.F. when she and Tammy were together, that she selected his daycare, and attended his medical appointments due to Tammy's heavy workload.

In April 2010, they permanently separated. Kathy filed an original suit on May 21, 2010, alleging that Tammy began denying her access to S.J.F. almost immediately after their break-up. Tammy filed a motion to dismiss, challenging Kathy's standing to file an original suit affecting the parent-child relationship. In denying Tammy's motion, the associate judge found: (1) Kathy has developed significant relationship with the child; (2) Kathy has invested significant time training and caring for the child; (3) Kathy and Tammy have both had the care, control, and possession of the child for a period of six months not ending more than ninety days prior to the filing of Kathy's original suit; and (4) it is in the child's best interest for Kathy to proceed with her suit. Tammy filed for a *de novo* hearing. The trial court orally adopted the associate judge's findings after four days of testimony. Tammy sought mandamus relief.

In denying Tammy's petition for a writ of mandamus *en banc*, the First Court replied to Tammy's argument that "relies upon cases suggesting that for purposes of the standing determination, a parent and a non-parent cannot both exercise actual care, control, and possession of a child at the same time without the consent of a parent" by holding that nothing in TFC 102.003(a)(9) requires that care, custody, and control be exclusive. The Houston Court found that, taking Kathy's evidence as true and indulging every reasonable inference and doubt in her favor, the evidence showed that although Kathy's care, control, and possession was not exclusive, she provided the child with a place to sleep, food, clothing, toys, and medicine. Both women cared for the child most nights, and Kathy participated in the most important decision involving the child's welfare, such as choosing his daycare and attending medical appointments. *In re Fountain*, No. 01-11-00198-CV (Tex App.—Houston [1st Dist.] May 2, 2011, orig. proceeding) (mem. op. on reh'g); *compare to In re K.K.C.*, 292 S.W.3d 788, 793 (Tex. App.—Beaumont 2010, orig. proceeding) (rejecting standing of person who cohabited with parent and participated in supporting the child, yet "had no legal right of control over the child and no authority to make decisions on behalf of the child").

3. Post-Termination Limitations on Grandparent Standing

On May 28, 2008, the trial court entered an order terminating mother's and father's parental rights and appointing the Department permanent managing conservator of the children. On June 4, 2008, the maternal great-grandparents filed an "Original Petition in Suit Affecting

the Parent-Child Relationship" in which they requested their appointment as the children's temporary joint managing conservators. On September 19, 2008, the court entered an order dismissing their petition without prejudice, finding that the great-grandparents lacked standing to sue because they failed to establish that the children's present circumstances would impair their physical health or emotional development under TFC 102.004(a)(1). The great-grandparents then filed an "Amended Petition for Adoption of Children" on November 21, 2008, alleging they had standing under TFC 102.005 because they had "substantial past contact" with the children. The trial court dismissed their amended petition, finding that the great-grandparents lacked "standing under [TFC] 102.005 because [they] as great[-]grandparents are excluded from filing for standing under [TFC] 102.006(c)", which provides that where the parent-child relationship has been terminated in a government-initiated termination proceeding; in such cases, a "grandparent" may file—but only within a ninety-day window from the date of the termination order.

On appeal, the great-grandparents argued that "grandparents" as used in TFC 102.006(c) includes "great-grandparents". The Department argued that the great-grandparents do not have standing because: (1) TFC 102.006(c) exempts "grandparents", not "great-grandparents from the limitations on standing; and (2) the great-grandparents failed to file their petition for adoption within ninety days from the date of the termination order.

The Corpus Christi Court only considered the issue of whether the great-grandparents filed their petition for adoption within the ninety-day window under 102.006(c). The appeals court found that the termination order was entered on May 28, 2008, and the great-grandparents filed their original petition seeking their appointment as joint managing conservators. This suit was dismissed without prejudice to re-filing. On November 21, 2008, the great-grandparents filed an amended petition in which they sought to adopt, rather than appointment as joint managing conservators. The Corpus Christi Court held that because the amended petition sought different relief than the June 2008 petition, the amended petition, despite its title, was an "original petition". Because it fell outside the ninety-day window provided under TFC 102.006(c), it was filed untimely. *In re M.G. and P.G.*, No. 13-09-00305-CV (Tex. App.—Corpus Christi July 15, 2010, no pet.) (mem op.).

4. Standing for Grandparent Intervention

B.D. and A.D., real parties in interest and prospective adoptive parents, filed a petition on September 3, 2009 seeking to terminate the parent-child relationship between the mother and her unborn child. When the child was born on September 7, 2009, the mother signed an affidavit of relinquishment and surrendered him to the prospective adoptive parents. They also requested their appointment as the child's permanent managing conservator so they could adopt. On September 21, 2009, the mother executed a revocation of her affidavit of relinquishment and filed a motion for writ of attachment seeking the child's return. The prospective adoptive parents amended their petition in October 2009 to allege that the mother abandoned the child under TFC 161.001(1)(A). In April 2010, the trial court entered temporary orders appointing the prospective adoptive parents as managing conservators and the mother as possessory conservator of the child.

In July 2010, the maternal grandparents, S.B. and T.B., filed a petition in intervention in the pending suit requesting termination, or in the alternative, appointment as managing conservators. The intervenors attached consents by both biological parents to the intervention in accordance with TFC 102.004(a)(2). TFC 102.004(a)(2) provides that a grandparent who does not have standing under 102.003 may file an original suit requesting managing conservatorship upon showing: (1) the child's present circumstance would significantly impair the child's physical health and emotional development; or (2) both parents, the surviving parent, or managing conservator or custodian either filed the petition or consented to the suit. The prospective adoptive parents answered, alleging that the grandparents did not have standing to intervene in the pending suit. The trial court agreed and struck the grandparents' intervention, stating that TFC 102.004(a)(2) confers standing to bring an original suit, not an intervention in an existing suit.

The grandparents filed a petition for writ of mandamus, requesting that the trial court's order striking their intervention be vacated. On appeal, the prospective adoptive parents argued that the grandparents cannot intervene in their suit seeking termination and managing conservatorship because it is not an "original suit" under 102.004(a). The Fort Worth Court disagreed, finding that: (1) "the existence of subsection (b), allowing a grandparent to intervene if he or she can make a showing that the appointment of one or both parents would significantly impair the child's physical health and emotional development, does not prohibit a grandparent who has standing under subsection (a) from intervening in an existing suit under that subsection"; and (2) "the Legislature could not have intended that the burden to intervene in an existing suit be higher than the burden to initiate an original suit under 102.004(a)". Accordingly, the court held that because intervenors had the right to bring an original suit requesting managing conservatorship because they had the

consent of both parents, they also had the right to intervene in the prospective adoptive parents' suit.

The court granted conditional mandamus requiring the trial court to vacate its order striking the grandparent's intervention, also noting that a mandamus remedy was appropriate because the grandparents would have been unable to maintain their suit for managing conservatorship if the parents' parental rights were terminated. *In re S.B., T.B., and L.M.*, No. 02-11-00081-CV (Tex. App.—Fort Worth Mar. 11, 2011, orig. proceeding) (mem. op.).

5. Parent's Standing After Termination Order

Father sought to appeal an order permitting adoption of the child after his parental rights had been terminated. The Ninth Court held that because the termination decree was valid, father had no legal interest in the child and thus lacked standing to appeal the adoption order. "Once the trial court terminates a parent's right to a child, the parent no longer has standing as a party in a subsequent custody or adoption proceeding." *In re I.E.Z.*, No. 09-09-00499-CV (Tex. App.—Beaumont Aug. 19, 2010, no pet.) (mem. op.).

6. Standing to Bring Suit for Modification

After the children's mother died, the Department filed a SACPR concerning them. Appellant was not a relative of the children and was not named as a party by the Department. Nevertheless, after a hearing, the trial court found that appellant had enjoyed substantial past contact with the children and granted appellant leave to intervene in the suit. The trial court ultimately entered an agreed order, which appellant signed as an intervenor, naming the children's uncle as their managing conservator and granting appellant telephone access to the children. One year later, the appellant filed suit seeking to be appointed as the children's conservator in place of the uncle. The uncle asserted that appellant lacked standing, rendering the trial court without subject-matter jurisdiction. The trial court agreed and dismissed appellant's suit for lack of standing under TFC 156.002. The appeal followed.

The court first addressed uncle's contention that the substance of appellant's petition was an original suit, and as such, could not be construed as a suit for modification under TFC chapter 156. The caption of the pleading had the original cause number lined-out and a new cause number added. Based on the substance of appellant's pleading, and the fact that uncle filed no special exceptions, the appellate court rejected uncle's claim, finding that appellant's pleading constituted a petition to modify under TFC chapter 156.

Under TFC 156.002(a), a modification suit may be brought by "a party affected by an order." In addressing whether appellant was a party, the appellate court looked to its sister courts which have held that to be a "party", a person must be a party to the order the person seeks to modify. After considering the definition of "party", and the holdings of its sister courts, the appellate court determined that the plain meaning of the word "party" requires that the person have been a party to the order he or she seeks to modify. Before signing the order, the trial court found that appellant had substantial past contact with the children and granted her leave to intervene. Once a person intervenes in a suit, he or she becomes a party for all purposes and continues to be one unless the trial court strikes the intervention. The trial court's order states that appellant made an appearance, that she is a party to the order, and that she agreed to the order as evidenced by her signature. Consequently, appellant was a party.

The uncle argued that appellant was not "affected" by the order because she did not receive any conservatorship rights under it. Relying on previous precedent which rejected this contention, the appellate court found uncle's argument without merit. Although "affected" is not defined in the statute, the term is not ambiguous as its plain and ordinary meaning is "to produce an effect… upon." Thus, the appellate court had to decide whether the trial court's order produced an effect upon appellant. Because the order granted appellant telephone access to the children, and required her to give notice if her contact information changed, the appellate court found that, "Without question, the Order produced an effect upon [appellant]." Thus, under the plain meaning of the statute, appellant had standing as she was a "party affected" by the order. *In re S.A.M., P.R.M., and S.A.M.*, 321 S.W.3d 785 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

7. Motion to Strike Intervention

The child was removed at birth in October 2008 when the child tested positive for marijuana and the mother tested positive for marijuana and Valium. The child was placed with the Seales, whom the Department believed to be the child's paternal grandparents. The Seales continued to care for the child even after a paternity test showed otherwise. In July 2009, the Browns, who are the maternal great-aunt and uncle of the child, discovered that the child was being "raised" by the Seales. The Browns filed a petition to intervene in February 2010, requesting to be appointed managing conservators of the child. The Department filed a motion to strike the Brown's intervention which was denied on March 30, 2010. Thereafter, the Seales filed their own petition to intervene one month before trial.

The trial began at the end of April 2010, at which time the Browns made an oral motion to strike the Seales' petition in intervention; they alleged they had only been served with notice of the petition the day of trial and the Seales had failed to request leave to file their intervention. The trial court denied the Seales' request for intervention based on their failure to file a motion for leave, although it allowed them to testify if called as witnesses by the parties in the case. At trial, the Browns invoked the Rule and the Seales were excluded from the courtroom. The trial court terminated the mother's parental rights and appointed the Browns and the Department as the child's joint managing conservators.

On appeal, the Seales contend that the trial court erred in denying the Department's motion to strike the Brown's intervention and in striking their plea in intervention. The Amarillo Court held that "Under TRCP 60, leave of court is not a precondition for intervention; however, a party opposed to the intervention may challenge it by a motion to strike." The appeals court rejected the Seale's complaint that the Browns failed to file a motion to strike their petitioner in intervention, finding that although the Browns, in making their oral objection to the Seale's intervention, did not use the word "strike", their challenge to the Seale's intervention made it clear to the court that they were requesting that relief.

The Amarillo Court held that the trial court abused its discretion in striking the Seale's petition in intervention because: (1) the Seales had standing to intervene based on their substantial past contact with the child because they had raised the child for the entirety of her eighteen-month life; (2) the Seale's would not have complicated the case because they did not bring any new claims - the only claim they asserted was conservatorship which was narrow and already at issue and the Seale's interest in the case could not have been surprising to the court or the parties; and (3) the Seale's inclusion in the case "was essential to the protection of their interests" and the Seale's were not able to call their own witnesses or cross-examine witnesses. Thus, "the trial court eviscerated their ability to present their position effectively".

The Amarillo Court further held that the trial court's striking of the Seale's petition in intervention was harmful error because it prevented the Seales from properly preserving, advocating, and presenting their case on appeal, despite their clear justiciable interest. The case was reversed and remanded for new trial. *Seale v. Tex. Dep't of Family and Protective Servs.*, No. 01-10-00440-CV (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.).

B. Indispensable Party

The Department filed a termination suit which resulted in an agreed order appointing the Department permanent managing conservator of C.M. and N.M. and kept them in their current foster care placement. The foster parents were appointed joint sole managing conservators of J.M.F., Jr., and the Department was dismissed as a party in reference to J.M.F., Jr. Thereafter, the foster parents and the Department filed a first amended joint petition to modify the parent-child relationship regarding all three children. Later, the Department and the foster parents filed a third amended joint petition to modify and to terminate the parent-child relationship between C.M., N.M., and J.M.F., Jr. and the mother, and between J.M.F., Jr. and his father, J.M.F., Sr. After a jury trial, the trial court found by clear and convincing evidence that both the mother and J.M.F., Sr. engaged in acts or conduct that satisfied one or more of the statutory grounds for termination and that termination was in the best interest of the children and ordered that their parental rights be terminated. Mother filed a motion for appointment of appellate counsel and a notice of appeal and was appointed appellate counsel.

On appeal, mother argues, *inter alia*, that the order of termination is void because J.M., C.M.'s and N.M.'s father, was an indispensable party was not served and therefore not properly joined.

The Department argued: (1) that mother does not have standing to challenge the service on J.M. and, even if she does, J.M. was properly served; (2) even if mother could have challenged the father's allegedly improper service, defects in joinder must be raised at the trial court by a sworn plea alleging the defect, which mother failed to do; and (3) having failed to file a sworn plea alleging the defect and having failed to object at trial, the mother waived this complaint.

The Tyler Court held that because mother did not raise the defect in joinder by a sworn plea in the trial court, any resulting lack of joinder did not deprive the trial court of jurisdiction, the order of termination is valid, and it was not fundamental error for the trial court to proceed to judgment. *In re E.M., C.M., N.M., and J.M.F., Jr.*, No. 12-09-00092-CV (Tex. App.—Tyler Aug. 25, 2010, pet. denied) (mem. op.).

C. Exchange of Benches Doctrine

Mother and father appealed the termination of their parental rights under TFC 161.001(1)(D), (E), and best interest, challenging the sufficiency of the evidence. Mother also asserts that the trial judge in the 324th District Court improperly presided over the trial and the hearing on the motion for new trial. She contends that the 325th Judicial District Court had continuing exclusive jurisdiction of the case by virtue of an order establishing the parent-child relationship entered in November 2005. The record reflects

that there were scheduling conflicts which required the judge of the 324th Judicial District Court to preside over the trial. The 324th District Court Judge explained at the hearing on the motion for new trial, that "the 324th is not assuming jurisdiction of this case."

In rejecting mother's claim, the Fort Worth Court held: "Texas law grants broad power to district courts to act for each other." "The Texas Constitution allows district judges to 'hold courts for each other when they deem it expedient.'" *In re T.S., B.S., B.S., and T.S.*, No. 02-10-00089-CV (Tex App.—Fort Worth Nov. 10, 2010, no pet.) (mem. op.); *see also Celestine v. Dep't of Family and Protective Servs.*, 321 S.W.3d 222 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding District Courts have broad discretion to exchange benches and enter orders on other cases in the same county, even without a formal order memorializing the exchange or transfer).

D. Discovery

1. Designating Experts and Unfair Surprise

The Department timely designated three expert witnesses in this case; however, the Department did not provide the experts' bibliographies or resumes. Mother objected on the basis that she had requested all of the information outlined in TRCP 194.2(f). The Department provided the names and contact information of the expert witnesses. It further provided therapy notes. Two of the witnesses provided therapy to mother, the other provided therapy to the child, D.G. Mother acknowledged that the trial court could find that the therapy notes complied with the request for the subject matter of the expert testimony.

Pursuant to TRCP 193.6(a), a party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce into evidence the material or information that was not timely disclosed, or offer the testimony of a witness who was not timely identified unless there was good cause for the failure to timely make, amend, or supplement the discovery request or if the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or prejudice other parties. The Waco Court held that because the trial court allowed the witnesses to testify, the court impliedly found that the mother would not be unfairly surprised or prejudiced by the Department's failure to provide a resume or bibliography. *In re S.R. and D.G.*, No. 10-10-00063-CV (Tex. App.—Waco Dec. 8, 2010, pet. denied) (mem. op.).

2. Proper Disclosures and Harmful Error

Wife appeals the trial court's judgment in a divorce decree contending, *inter alia*, that the trial court erred in striking three of wife's fact witnesses on the basis that her disclosure responses did not conform to TRCP 194.2(e). TRCP 194.2 (e) provides that a party may request disclosure of "the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified persons connection with the case." The wife argued that the requirement that the responses must contain a "brief statement of each identified person's connection with the case" was satisfied by making such notations as "Petitioner's father" and "Petitioner's sister". Father contended that wife did not comply with TRCP 194.2(e) because she did not "give any detailed information as to any information [her witnesses] would be testifying to," and did not provide "a description of the knowledge of [the witness]," or did not "disclose, generally what [the witnesses were] going to testify to."

The Fourteenth Court disagreed with husband's interpretation, noting that the comment section of TRCP 192.3(c), which discusses the scope of discovery relative to persons with knowledge of relevant facts, states that "the provision [providing that a person may obtain discovery of "a brief statement of each identified persons connection with the case"] does not contemplate a narrative statement of the facts a person knows, but at most a few words describing the person's identity as relevant to the lawsuit." The appellate court held that husband's interpretation of the requirements of TCRP were "unnecessarily onerous," and that given the facts of the case, the relationship of the parties, and the nature of the trial, wife's responses were sufficient to adequately identify those witnesses' connection to the case or identity as relevant to the suit.

After determining that the trial court erred in excluding wife's witnesses, the appeals court concluded that wife's three witnesses were unique and not cumulative and added substantial weight to the issue of conservatorship. The court affirmed the division of the marital estate but remanded the part of the decree regarding conservatorship for a new trial with instruction to allow wife's three witnesses to testify. *Van Heerden v. Van Heerden*, 321 S.W.3d 869 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

E. Denial of Dismissal Deadline Extension

Father argued that the trial court had abused its discretion in granting an extension under TFC 263.401(b), because no "extraordinary circumstances existed to extend [this case] beyond the [original] dismissal date[.]" The Eleventh Court of Appeals rejected father's argument, explaining that "under Section 263.401(b), the reason for the extension need not be extraordinary, but the circumstances necessitating that the child remain in the care of the Department must be extraordinary." *In re A.L.J.*, No. 11-10-00351-CV (Tex. App.—Eastland Jan. 27, 2011, pet. denied) (mem. op.).

F. Denial of Motion for Continuance

Although Mother had notice of the date of the termination hearing, she failed to appear at the hearing. Mother contacted the court and her counsel's office, stating that she did not have a ride to court, but upon a return call to the contact number, mother's sister stated that mother had "just left" the residence. The Department caseworker informed the court that if the Department had known in advance that mother needed transportation, it would have provided mother a ride, as it had done in the past. Mother's trial counsel moved for a continuance or for a recess to await mother's arrival. The trial judge denied counsel's request, but expressly stated that it would re-open the evidence if mother made it to court that day. Mother never arrived. Her counsel was present and represented her at trial; counsel cross-examined witnesses and was not prevented from calling any witnesses that counsel desired to present.

On appeal, mother complained that her due process rights were violated by the trial court's refusal to grant a continuance or recess so that she could be present at the hearing. The Ninth Court, after noting that counsel was present and participated at the trial, held that no deprivation of due process was shown. Under the circumstances, the trial court was not required to grant a continuance because it could have reasonably rejected mother's explanation and concluded that her absence from court was not involuntary. *In re G.E., A.E., and L.E.*, No. 09-10-00188-CV (Tex. App.—Beaumont Jan. 20, 2011, no pet.) (mem. op.).

G. Disqualification of Judge

1. Disqualification Cannot Be Waived

Even though Father did not make trial judge aware of potential disqualifying circumstances, this failure did not waive his complaint that the judge was disqualified. Father could raise the issue of the trial judge's disqualification under TRCP 18b(1)(a) for the first time on appeal. "[U]nlike statutory recusal, disqualification cannot be waived, and may be raised at any time." *In re D.C., Jr.*, No. 07-09-00320-CV (Tex. App.—Amarillo Sept. 23, 2010, no pet.) (mem. op.).

2. Same "Matter in Controversy"

Trial judge was disqualified from presiding over termination proceeding because one of the judge's associates at his former law firm had represented mother in her divorce when the judge was still with the firm. The divorce had involved the issue of conservatorship of the subject child. TRCP 18.1(b)(1)(a) requires judges to disqualify themselves in all proceedings in which they have served as a lawyer in the "matter in controversy," or when a lawyer with whom they have previously practiced law served during such association as a lawyer concerning the matter. Because the termination proceeding again raised, between the same parties, issues of the child's best interest and other aspects of the relationship that were in controversy during the divorce, the termination proceeding involved the same "matter in controversy" as the divorce. Although the divorce and termination proceedings had different standards and burdens of proof, this did not mean that they could not involve the same "matter in controversy" for purposes of disqualification. *In re D.C., Jr.*, No. 07-09-00320-CV (Tex. App.—Amarillo Sept. 23, 2010, no pet.) (mem. op.).

3. Judge's Lack of Knowledge Immaterial

A judge's actual knowledge of disqualifying events under TRCP 18.1(b)(1)(a) is irrelevant. A judge's lack of awareness that a former associate served as a lawyer concerning the matter does not preclude disqualification under TRCP 18.1(b)(1)(a). *In re D.C., Jr.*, No. 07-09-00320-CV (Tex. App.—Amarillo Sept. 23, 2010, no pet.) (mem. op.).

H. Failure to Request A Jury

Mother argued that, despite her failure to request a jury trial, she was entitled to a jury trial and could not waive her right to a jury trial absent her express "assent". The court stated: "Her argument is flawed. A parent in a termination suit need not specifically assent to a jury waiver; waiver of a jury is implied if there has been no jury demand." Mother's issue was overruled. *In re T.C., T.B., Jr., T.B., and T.B.*, No. 11-10-00056-CV (Tex. App.—Eastland Apr. 14, 2011, no pet. h.) (mem. op.); *accord White v. Shannon*, No. 14-09-00826-CV (Tex. App.—Houston [14th Dist.] Oct. 26, 2010, no pet.) (mem. op.).

I. Guardian *Ad Litem* Not a Party

A guardian *ad litem* appointed for a child is not a party to the suit but may conduct an investigation to the extent (s)he considers necessary to determine the best interest of the child. *Hanselman v. Tex. Dep't of Family and Protective Servs.*, No. 03-09-00485-CV (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.).

J. Incarcerated Parent

1. No Right to Physical Presence at Trial

The Department filed a petition to terminate father's parental rights to three children. Because father was incarcerated in federal prison in Kentucky, the trial court granted a *writ of habeas corpus ad testificandum* so that he could testify by telephone. Father's counsel did not object the first day of trial that he was not able to be physically present; father testified by telephone. Father's parental

rights were terminated. In the last of his six issues on appeal, he complains that his constitutional rights under the Texas and U.S. Constitutions were violated because he was not physically present at trial. He argues that he was prejudiced because the factfinder "was not able [to] see him or his demeanor and judge his credibility."

In rejecting his argument, the Beaumont Court found that he did not object on the first day of trial, and, when he was not able to appear telephonically the second day of trial due to a lockdown at the prison, his attorney did not object to him not being able to be physically present. Rather, he only objected to father's inability to testify by telephone. The court held that, even if father's issue had been preserved, the trial court lacked the authority to compel his attendance from a federal facility in another state and the federal government refused to honor the trial court's *writ of habeas corpus ad testificandum*. Further, in considering the need for an prisoner's physical presence at trial, a court may evaluate: (1) the cost and inconvenience of transporting the prisoner to the courtroom; (2) the security risk the prisoner presents to the court and public; (3) whether the prisoner's claims are substantial; (4) whether the matter can be reasonably delayed until the prisoner's release; (5) whether the prisoner will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone or some other means; (6) whether the prisoner's presence is important in judging his demeanor and credibility; (7) whether the trial is to the court or to the jury; and (8) the prisoner's probability of success on the merits. When trial counsel objected to the father's unavailability by telephone the second day of trial, he did not offer any evidence in support of these factors, nor did he explain why his client's presence was necessary. Trial counsel also failed to argue that his client's inability to testify by telephone at trial left counsel unable to adequately represent him. *In re C.P.V.Y., B.Y., and C.C.P.I.*, 315 S.W.3d 260 (Tex. App.—Beaumont June 24, 2010, no pet.).

2. Meaningful Participation at Trial

Incarcerated father claimed that his telephonic appearance at trial was not meaningful because of malfunctioning telephone equipment, the occasional loss of the telephone connection, and interruptions of the proceeding as the trial court verified the father's presence on the telephone line. At the outset, the Amarillo Court noted that this issue was not preserved through an appropriate and timely objection at trial, had not been presented in his statement of points for appeal, and was not adequately briefed. Considering the merits of the claim, the appellate court noted that an inmate has no absolute right to appear in person for a civil trial; as the court permitted him to participate at trial by telephone and through counsel, the denial of the bench warrant did not amount to an abuse of discretion.

The court reached the same conclusion when evaluating whether the father's telephonic participation at trial constituted a "meaningful appearance." The court observed that the judge made accommodations for the father by having witnesses speak more loudly or repeat testimony when the connection was lost. Because father's testimony did not appear to have been hindered by use of a telephone, the court determined that conducting the hearing by telephone was also not an abuse of discretion. *In re D.S., N.S.*, 333 S.W.3d 379 (Tex. App.—Amarillo 2011, no pet.).

K. Default

1. Default and Service of Process under the UCCJEA

Appellee, "Nick", brought a petition against his estranged wife, "Angie", under the *Hague Convention on the Civil Aspects of International Child Abduction*, "Hague Convention" alleging that, his son, Evangelos, habitually resided in Greece for all five years of his life before she wrongfully removed him from Greece. After Angie failed to attend the hearing, the court entered a default judgment against her ordering her to return Evangelos to Nick and to pay $68,300.00 in attorney's fees. Angie appealed, arguing, in part, that the default judgment is void due to defects in the service and return, and the trial court erred in not granting a new trial based upon the service defects.

On the same date that Nick filed his petition, the Fort Bend District Clerk's Office issued a writ of attachment. After a private process server made three unsuccessful attempts to serve Angie, Nick secured an order for alternative service under TRCP 106. On February 11, 2009, service by alternative service was affected by delivering the citation, pleadings, and orders at 5115 Barlow Bend, Katy, Texas, with anyone over sixteen years of age or by taping it to the front door. The precept to serve Angie was filed on February 12, 2009, the same date as the hearing. Neither Angie nor counsel for her was present at the hearing. The Court noted that the file contained the return of precept served on Angie the previous day after the court authorized alternative service. On that same date, the court signed a default order to return the child to Nick.

Angie specially appeared before the court on March 16, 2009, contesting personal and subject matter jurisdiction and simultaneously filed an unsworn motion for new trial attacking service. The trial court denied her motion for new trial and Angie appealed. Angie asserted: (1) the citation did not include the name of the petitioner; (2) the return was not properly verified; (3) the return was not filed with the district clerk for ten days before rendition of the

default judgment; (4) the return does not reflect that Angie was served with the writ of attachment; (5) the process server did not endorse the return or attach the endorsement to the return; and (6) the return does not specify the person who served the process.

Following well-established case law, the court held: (1) a default judgment cannot withstand direct attack by a defendant who demonstrates that it was not served in strict compliance with the TRCP; (2) in a direct attack, the court will not presume the validity of the issuance, service, and return of citation; (3) if the record does not affirmatively show strict compliance with the TRCP, the judgment is void. In this case, because the return was not filed in the district clerk's office ten days before the hearing, this alone renders the judgment void. The First Court also held that because there was not strict compliance with Texas law regarding proof of service, the notice requirements under the UCCJEA, which apply to proceedings under the Hague Convention, were also violated. The case was reversed and remanded. *Livanos v. Livanos*, 333 S.W.3d 868 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

2. Timely Objection Defeats a No-Answer Default

A putative father was served with process in a child support case filed in May 2009 by the Attorney General's Office. The putative father filed a written objection, stating that he could not file an answer because the copy of the petition with which he was served had a missing page. The objection identified the parties to the case and provided the putative father's address. Nevertheless, the associate judge signed a default order establishing paternity. The father appealed. The Dallas Court held that although the answer was not in the "standard form", his "objection identified the parties to the case and [his] current address", and constituted "an appearance in the matter and was sufficient to defeat a no-answer default". The case was reversed and remanded. *In re I.L.S.*, No. 05-09-01375-CV (Tex. App.—Dallas Mar. 2, 2011, no pet.) (mem. op.).

II. TRIAL PRACTICE

A. Severance

In 2008, the Department filed a suit which resulted in father being appointed permanent managing conservator of his children and mother being appointed possessory conservator with no right of access to or visitation with the children due to her drug use. Less than two months after the entry of the order, mother murdered one of the children, K.L.L., while she was babysitting at the request of father. The Department filed for termination of both parents' parental rights, which was granted following a jury trial.

Father appealed, claiming that the trial court erred by denying his request for severance and also complaining that his trial counsel was ineffective. Father asserted that before jury selection, he objected that mother was wearing an inmate's orange jumpsuit and moved for severance, which was denied. He re-urged this complaint in his motion for new trial. On appeal, father argues that conducting the trial with the mother prejudiced his rights because the jury would see her acts as his acts. The Beaumont Court noted that TRCP 41 grants the trial court broad discretion to sever causes. The trial court may grant severance if: (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining that they involve the same facts and issues.

In rejecting father's argument, the court held that because the Department alleged that father endangered the children by entrusting them to mother, and the mother's actions were "clearly relevant" to the allegations against father, the trial court could properly determine that the allegations against the two parents involved the same facts and issues. Further, the trial was conducted almost eighteen months after the children's removal and severing the causes might not have been possible given the dismissal date. The court also discussed that a trial court has the discretion to grant severance under TRCP 174 "in furtherance of convenience or to avoid prejudice." The court found that the record does not reflect that the jury heard evidence that it would not have heard had the court ordered separate trials because the jury still would have heard evidence of mother's conviction for capital murder and mother would have been a witness. *In re J.L. and J.L.*, No. 09-10-00170-CV (Tex. App.—Beaumont Feb. 24, 2011, no pet.) (mem. op.).

B. Reasonable Efforts to Place with a Relative Prior to Termination Not Required

A complaint that the Department violated TFC 262.114 is not a basis for reversal on appeal. The Department has no duty to place a child with a relative before the parent's rights can be terminated, and the fact that placement plans are not final or that placement will be with non-relatives does not bar termination. *In re H.S.B. and E.N.B.*, No. 02-10-00324-CV (Tex. App.—Fort Worth Apr. 14, 2011, no pet.) (mem. op.) (per curiam).

C. Confrontation Clause Not Applicable to Termination Proceedings

Mother argued that the trial court's failure to grant a continuance to allow her to be present at the termination hearing abridged her right to confront witnesses under the confrontation clause. The Ninth Court rejected mother's argument, holding that "[t]he right to confront witnesses

applies to criminal proceedings; the Sixth Amendment does not reference civil cases." *In re G.E., A.E., and L.E.*, No. 09-10-00188-CV (Tex. App.—Beaumont Jan. 20, 2011, no pet.) (mem. op.).

D. Remedy for *Batson* Error

Following the implicit sustaining of a *Batson* challenge in a termination case, the trial court declared a mistrial and set the trial to "start again" the next morning with a new jury panel. On appeal from the termination verdict returned by a jury selected from the new jury panel, mother complained that the trial court erred in declaring a mistrial as a remedy for the *Batson* violation. Mother argued that the court should have, instead, placed the stricken jurors on the jury. The Second Court disagreed, stating that it could not conclude that the trial court abused its discretion by declaring a mistrial rather than seating the excluded panel members on the jury, and cited to cases leaving the remedy for a *Batson* violation to the discretion of the trial court. *In re K.V.C., Q.V.C., and V.C.*, No. 02-10-00242-CV (Tex. App.—Fort Worth Mar. 24, 2011, no pet.) (mem. op.).

E. Motion in Limine and Objections

At trial, mother filed a motion in limine seeking to prohibit the parties from offering evidence related to "any other matter outside of this cause related to the termination and or modification of [mother's] parental rights in this or any other jurisdiction." The trial court did not initially rule on the motion. Immediately before trial, mother re-urged the motion, which the trial court denied. During trial, mother was called as the Department's first witness. Mother responded affirmatively when asked whether her parental rights had been terminated to her four other children. Her counsel raised no objection to the question.

The Fort Worth Court reiterated that a trial court's ruling on a motion in limine is not a final ruling on the evidence and preserves no error for appellate review. To preserve a complaint for appeal involving the subject of a motion in limine, the complaining party must also object when the evidence is offered at trial. Because mother failed to object to the Department's questions, she failed to preserve her complaint about the admission of the evidence. *In re J.W.O.*, No. 02-10-00065-CV (Tex. App.—Fort Worth Dec. 2, 2010, no pet.) (mem. op.).

F. Limiting Instructions

On appeal, mother argued that the trial court erred by refusing to submit an instruction in the charge prohibiting the jury from considering "any evidence of any action taken against [mother] in any other state." At the conclusion of the trial, the trial court granted mother's request for a directed verdict on the alleged ground that her parental rights to her other children had been terminated. *See* TFC 161.001(1)(M). Mother's counsel requested verbally and in writing that the jury be instructed not to consider the evidence about the prior terminations because prior termination had been removed as a ground. The trial court denied this request, finding that the jury could consider the evidence for best interest purposes.

A party is entitled to a limiting instruction when evidence is admissible for one purpose but not another. When a trial court refuses to submit a requested instruction, the question on appeal is whether the request was reasonably necessary to enable to jury to reach a proper verdict. First, in this case, the complained-of evidence was admitted for all purposes because mother failed to object to it. Second, even after the directed verdict, the evidence remained relevant as to the jury's determination of the child's best interest. Accordingly, mother's proposed jury instruction was not reasonably necessary to enable the jury to reach a proper verdict. *In re J.W.O.*, No. 02-10-00065-CV (Tex. App.—Fort Worth Dec. 2, 2010, no pet.) (mem. op.).

G. Objecting to a Jury Charge

Mother argued that the trial court erred by allowing certain questions to be submitted to the jury in the charge. In rejecting her complaint, the appellate court noted that she failed to complain to the trial court about the alleged jury-charge errors. A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. Further, the constitutional dimension of the parent-child relationship does not automatically override the procedural requirements for error preservation; the Texas Supreme Court has specifically held that rules governing error preservation must be followed in termination cases as in other cases in which a complaint is based on constitutional error. "Because Mother did not object to the submission of [the] questions to the jury, [the] complaints have not been preserved for our review." *In re M.P. and J.P.*, No. 02-10-00064-CV (Tex. App.—Fort Worth Dec. 23, 2010, no pet.) (mem. op.).

H. Broad-Form Jury Charge Submission

The Department became involved with father and mother after a report was received from the hospital that their child tested positive for marijuana at birth. When the child exhibited difficulty crawling at nine months, the child was taken to the emergency room where it was determined that the child had two healing rib fractures and a wrist fracture that were inconsistent with the parents' explanation of their cause. Evidence of physical abuse, inadequate nutri-

tion, and marijuana use resulted in the termination of their parental rights at trial.

The parents appealed, contending that the use of a broad-form jury charge violated their due process rights because it allowed the jury to recommend termination of their parental rights without reaching a unanimous verdict as to any particular termination ground. They did not challenge the sufficiency of the evidence. The parents argued that the Texas Supreme Court's decision in *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647 (Tex. 1990) (allowing for the submission of a broad-form jury charge in parental termination cases), should be reconsidered in light of *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 388-90 (Tex. 2000) because: (1) *Casteel* was based upon the fact that when one invalid theory of recovery is included in a broad-form submission, a reviewing court cannot conclude that the jury's answer was not based on one of the improperly submitted theories; and (2) the Austin Court has previously held that *Casteel* casts doubt on the holding in *E.B.* The Austin Court overruled their issue, holding that, "Because it remains true that the supreme court has not held that ten jurors must agree on a particular ground for termination, we again conclude that judgments based on broad-form submission of valid grounds for termination are acceptable." The Austin Court further held that, "We resolve this concern by pointing to the language in *E.B.* emphasizing the 'controlling question' is whether a parent's parental rights should be terminated, not the specific ground upon which they should be terminated." *Click v. Tex. Dep't. of Family and Protective Servs.*, No. 03-10-00123-CV (Tex. App.—Austin Oct. 8, 2010, no pet.) (mem. op.); *see also In re S.L.*, No. 12-10-00173-CV (Tex. App.—Tyler Feb. 23, 2011, no pet.) (mem. op.) (holding that because the jury charge almost identically tracked the statutory language to the charge given in *E.B.*, the Tyler Court is bound to follow *E.B.* unless it is overruled).

NOTE: Based upon its interpretation of *Casteel*, the Waco Court of Appeals is the only court that does not consider broad-form jury charges proper in parental termination cases.

I. Mediated Settlement Agreement

The Department filed to terminate mother's parental rights to S.A.D.S. based on prior terminations of parental rights involving mother and her other children, and allegations that mother previously used illegal drugs, was often homeless, and occasionally resided with a sex offender. Although mother completed her service plan, she failed to demonstrate the ability to provide S.A.D.S. with a stable living environment. Eventually, the trial court ordered that the case be referred to mediation. At mediation, the Department and mother entered into a mediated settlement agreement whereby S.A.D.S.'s maternal grandfather would be appointed sole managing conservator and mother would be appointed possessory conservator. The agreement read "MEDIATED SETTLEMENT AGREEMENT" across the top of the first page, and it was signed by mother, a Department representative, and the attorneys who attended the mediation, including the child's attorney *ad litem*. The agreement was filed with the trial court. The agreement provided, "The Parties, by their signatures to this agreement, hereby waive their right to have the issues resolved herein tried to the court or to a jury, save and except for any motion for entry of the order of enforcement of this agreement." The mediated settlement agreement covered possession, conservatorship, and child support.

Following the execution of the mediated settlement agreement, the trial court held a hearing for the purpose of entering an order based on the agreement. At the hearing, the Department asked the trial court to sign an order that included a finding that appointing mother as managing conservator would not be in child's best interest because it would significantly impair the child's physical health or emotional development. This provision was not anywhere in the mediated settlement agreement. The Department alleged that the trial court was required to make the finding under TFC 153.131, which the Department argued is required any time a trial court appoints a non-parent as managing conservator. The trial court entered an order containing the finding under section 153.131. The mother appealed, contending that the 153.131 finding should not have been in the order since it was not agreed to as part of the mediated settlement agreement. The Fort Worth Court agreed with mother, holding that under that rules of statutory construction, the more specific provisions for mediated settlement agreements provided in TFC 153.007 should prevail over the more general provisions in section 153.131. The Fort Worth Court also reasoned that failure to include the section 153.131 language in the final order did not render it void. The judgment of the trial court was modified to exclude the significant impairment language. *In re S.A.D.S.*, No. 02-09-302-CV (Tex. App.—Fort Worth Aug. 12, 2010, no pet.) (mem. op.).

J. *De Novo* Hearing and Dismissal Deadline

Mother brought a mandamus, arguing that the Department's case should be dismissed for violation of the 263.401 dismissal deadline. An associate judge commenced and heard the case two months prior to the dismissal deadline. When the referring court granted her request for a *de novo* hearing and set the matter for hearing after the expiration of the dismissal deadline, mother contended that dismissal was necessary because the trial court had failed to commence the trial prior to the dismissal date.

In denying mother's request for mandamus relief, the appellate court rejected her argument that the trial court's granting of *de novo* hearing should be characterized as a motion for new trial, meaning that the case was reinstated on the docket as if no trial had occurred. A *de novo* hearing, unlike a motion for new trial, is limited to the issues specified in the request. Further, in conducting the hearing, the referring court may consider the record of the hearing before the associate judge. Consequently, the granting of a *de novo* hearing under TFC 201.015 does not, like the granting of a motion for new trial, reinstate the case on the court's docket as if no trial had occurred. "[B]ecause trial on the merits commenced prior to the statutory dismissal date in this case, the trial court did not clearly abuse its discretion in denying [mother's] motion to dismiss." *In re Russell*, 324 S.W.3d 885 (Tex. App.—Austin 2010, orig. proceeding).

III. EVIDENTIARY ISSUES

A. Hearsay

1. Child Hearsay Statements

Father complained that the trial court erred in allowing the child's therapist to testify that the child told her she saw "white powder" during a discussion about whether the child knew that her parents used drugs. The therapist testified that during play therapy, the child was about four and one-half years old, when she pretended that "she was being arrested for drugs that she did, that she did use drugs and she had found them on the-on the sidewalk. They made her feel weird and that-then a baby had used the drugs and it killed the baby." In coming back to the topic, the therapist told the child, "we are being serious now. I have to know, did you ever use drugs?" The child said she had not but that "her parents did use drugs and she recalled seeing some white powder". When the therapist asked the child how her parents acted when they used drugs, the child said they "would act weird" and that it caused her to "always get a headache, so she would go into her room."

Before allowing the testimony, the trial court held a hearing outside the jury's presence. During that hearing, the trial court heard testimony from the therapist about the context in which the child made the statement. The therapist testified that she believed the child provided truthful information and that it would "[a]bsolutely not" be in the child's best interest to have to testify in open court about seeing her parents use drugs.

The court explained that "the family code allows the admission of a child's hearsay statement describing alleged abuse against the child if there are sufficient indications of the statement's reliability and the child testifies or is available to testify or the court finds that the statement should be used in lieu of the child's testimony to protect the child's welfare." *See* TFC 104.006. It continued: "'Abuse' is defined as, inter alia, a genuine threat of substantial harm from physical injury or a person's 'current use' of a controlled substance so as to physically, mentally, or emotionally injure a child." *See* TFC 261.001(1)(C), (I).

The court found that the therapist's testimony about the child's statement was admissible. It reasoned: "the therapist testified that she stressed the importance of [the child] telling whether she had used or seen her parents use drugs and that she believed [the child] was truthful in her responses, and there is no indication in the record of evidence to negate the child's awareness that her therapist needed accurate information and that being truthful was in her best interest." *Calderon v. Tex. Dep't of Family and Protective Servs.*, No. 03-09-00257-CV (Tex. App.—Austin June 11, 2010, no. pet.) (mem. op.).

2. Statements Made in the Context of Therapy

An exception to hearsay is TRE 803(4), which allows a hearsay statement made "for purposes of medical diagnosis or treatment" to be admissible if: (1) the declarant knew that the statement was made for the purpose of receiving treatment; and (2) the substance of the statement was pertinent to the treatment or, in other words, the kind of information reasonably relied on by a medical professional for treatment or diagnosis. After a discussion of how the evidence was admissible under TFC 104.006 based on the same facts in number 1 above, the Court found that the evidence was also admissible under TRE 803(4) because the statement was made in the context of therapy. *Calderon v. Tex. Dep't of Family and Protective Servs.*, No. 03-09-00257-CV (Tex. App.—Austin June 11, 2010, no. pet.) (mem. op.).

3. Blanket Hearsay Objection Insufficient

At trial, father did not make any specific objection to a home study report regarding the uncle with whom the children were placed, but made a general objection "to [the] exhibit on the basis of it being hearsay". The record shows that the report was prepared by a licensed professional counselor and was filed with the district clerk. The judge admitted the report over father's general objection. On appeal, father argued that the trial court erred in admitting the home study report because it "contained extensive hearsay" and the "histories and allegations within the report by other parties [that] were hearsay". In affirming the trial court, the Eastland Court held that "a blanket objection that does not identify which parts of the document contain hearsay is not sufficiently specific to preserve error with respect to those parts". Further, "at least part of the

report was admissible as an exception to the hearsay rule under either TEX. R. EVID. 803(6) or (8)." The judgment terminating father's parental rights was affirmed. *In re M.N., G.R. IV, and G.R.,* No. 11-10-00129-CV (Tex. App.—Eastland Mar. 17, 2011, no pet.) (mem. op.).

4. Business Records Exception

The foundation for the business records exception to hearsay has four requirements: (1) the records were made and kept in the course of a regularly conducted business activity; (2) it was the regular practice of the business activity to make the records; (3) the records were made at or near the time of the event that they record; and (4) the records were made by a person with knowledge who was acting in the regular course of business.

The Department offered into evidence records from Wilson Drug detailing mother's prescription drug history at the pharmacy. The owner and pharmacist of Wilson Drug testified by telephone and stated that she is the custodian of business records for the pharmacy. She testified that she transmitted the records and that the records were kept in the regular course of business for the pharmacy. Some of the prescriptions were written by a physician, and some prescriptions were phoned in and written on a prescription note by the pharmacist. Mother argued that the Department did not establish the proper predicate to admit the records because some of the prescriptions were not personally written by the pharmacist. The court stated: "Rule 803(6) does not require that the witness laying the predicate for admission of a document be the creator of the document or even an employee of the same company as the creator. The witness does not even have to have personal knowledge of the information recorded in the document but need only have knowledge of how the records were prepared." (Citations omitted). The court overruled mother's issue. *In re S.R. and D.G.,* No. 10-10-00063-CV (Tex. App.—Waco Dec. 8, 2010, pet. denied) (mem. op.).

B. Consideration of Testimony from Prior Hearings

1. Testimony Can Be Used if Admitted into Evidence

In a supplemental opinion on rehearing, the Fourteenth Court of Appeals acknowledged that it could only consider the evidence presented at the termination trial, and not any testimony from prior hearings in the case, because the prior testimony had not been introduced into evidence at termination trial. "Testimony from a prior hearing can be used at trial only if the testimony is admitted into evidence." *In re M.C.G.*, 329 S.W.3d 674 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (supp. op. on reh'g).

2. Reliance on Prior Testimony in De Novo *Hearing Before Referring Court*

In a private child support matter, mother timely appealed the associate judge's recommendation setting father's monthly child support obligation at $410 and confirming an arrearage of $3,500. Without objection from father, the referring court reviewed the record of the trial before the associate judge. On appeal, father argued that the referring court erred in doing so.

To preserve a complaint for appellate review, a party must make a timely request, objection, or motion with sufficient specificity to apprise the trial court of the complaint and obtain an adverse ruling thereon. Failure to do so waives the complaint on appeal. Because father failed to object to the referring court's intent to review the transcript from before the associate judge, he waived the issue on appeal. The appellate court did, however, note that the referring court has the express discretion to consider the record from the hearing before the associate judge under TFC 201.015(C). *In re N.T.*, 335 S.W.3d 660 (Tex. App.—El Paso 2011, no pet.).

C. No Competency Standard in Termination Cases

Mother argues on appeal that the trial court should have *sua sponte* ordered a competency evaluation for her because of evidence that her bipolar disorder was untreated. She also argues that the trial court's failure to order the competency evaluation was fundamental error and violated her right to due process. The court explained that the Family Code does not prescribe a competency standard that parents must meet before participating in a hearing or trial. Mother's issue was overruled. *In re M.C.*, No. 2-09-300-CV (Tex. App.—Fort Worth May 27, 2010, no pet.) (mem. op.).

D. Expert Witnesses

1. Retained Experts

Mother and maternal grandparents challenged the admission of the testimony of eight experts on appeal. They contend that only one, Dr. Matthew Cox, was a retained expert. The trial court implicitly found Dr. Cox to be a non-retained expert because it referred to all of the Department's witnesses in its written ruling as "non-retained". The importance in the distinction between retained and non-retained experts is in the differing disclosure requirements for each required by the rules of civil procedure.

The appellate court noted that the rules of civil procedure appear to view the term "retained expert" broadly. Dr.

Cox testified that he is employed by the State of Texas as an assistant professor and pediatrician at the University of Texas Southwestern Medical School and Children's Medical Center in Dallas. He related that the State provides funding to create centers of consultation for CPS at the four medical schools operated by the University of Texas to furnish experts to CPS for evaluating children with concerns of abuse or neglect. On cross-examination, Dr. Cox explained that his duties include providing medical expertise and court appearances for the Department, and that his salary funded by the State includes reviewing records and appearing in court. The appellate court determined that the trial court abused its discretion in determining that Dr. Cox was not a retained expert. "Though Cox may not be a 'retained expert' in the traditional sense, we conclude from his testimony that he is a retained expert for purposes of the discovery rules because he is 'employed by [and] otherwise subject to the control of' the State on behalf of the Department." *In re M.H., S.H., and G.H.*, 319 S.W.3d 137 (Tex. App.—Waco 2010, no pet.).

2. Reliability of Expert's Testimony in Non-scientific Fields

Mother argued the Department did not establish the reliability of a therapist's testimony as an expert witness. Citing well-established case law, the court stated: "When measuring the reliability of an expert's opinion in non-scientific fields, […] courts should consider whether: (1) the field of expertise is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and (3) the expert's testimony properly relies upon the principles involved in that field." (Citation omitted). The therapist testified that psychology is an accepted field of practice, that she studied various theories and methods of psychology, and that she uses those theories and principles in her practice. Mother's issue was overruled. *In re S.R. and D.G.*, No. 10-10-00063-CV (Tex. App.—Waco Dec. 8, 2010, pet. denied) (mem. op.).

IV. CHILD CUSTODY

A. Parental Presumption

1. Evidence of Past Misconduct Alone Does Not Rebut Parental Presumption

Child's great-aunt and great-uncle sought to be appointed sole managing conservators of the child after mother, who had a history of drug use and criminal behavior, was arrested in 2007. Great-aunt and great-uncle were granted joint conservatorship of the child along with mother, but were given the exclusive right to designate the child's primary residence. On appeal, mother challenged the legal and factual sufficiency of the evidence supporting the trial court's finding that her appointment as sole managing conservator or joint managing conservator with the right to determine the child's primary residence would not be in the child's best interest because it would significantly impair the child's physical health or emotional development.

The Second Court of Appeals agreed with mother and reversed the order, holding that evidence of mother's past criminal conduct, drug use, and bad associations did not overcome the parental presumption of TFC 153.131(a). The appellate court noted that there was no evidence that mother had used drugs since being placed on community supervision following her 2007 arrest; mother had also complied with her community supervision requirements and had passed multiple drug tests. There was also no evidence that mother had any continuing association with persons that used illegal drugs. The court stated that concerns that mother would resume such associations were "mere speculation and surmise," which were insufficient to support the trial court's finding. "'When determining fitness of a parent, the material time to consider is the present. If the parent is a suitable person to have custody, the fact that there was a time in the past when the parent would not have been the proper person to have such custody is not controlling.' Evidence of past misconduct may not by itself be sufficient to show present unfitness." (Citations omitted). *In re K.R.B.*, No. 02-10-00021-CV (Tex. App.—Fort Worth Oct. 7, 2010, no pet.) (mem. op.).

2. No Parental Presumption in a Suit to Modify Conservatorship

This appeal arises from a child-custody dispute. Under an agreed conservatorship order signed in October 1999, father was appointed sole managing conservator and mother was appointed possessory conservator with supervised visitation rights. In 2001, father remarried and the child was "brought up almost exclusively" by father and stepmother. In 2006, father died of a heart attack while on a camping trip with the stepmother and the child. On the day of father's funeral, appellant demanded that stepmother surrender the child to her. Mother was escorted from the funeral home by police officers.

Stepmother filed suit seeking to be appointed as her stepson's managing conservator, either solely or jointly with mother. Mother counterclaimed, seeking modification of the earlier custody order and asking to be named the child's sole managing conservator. After months of trial, the trial court appointed stepmother as the child's sole managing conservator and appointed mother as possessory conservator. In its findings of facts, the trial court found that appointment of mother as a managing conservator would significantly impair the child's physical health and emotional development.

Mother argued that stepmother's suit was an original conservatorship proceeding subject to TFC chapter 153, and therefore, stepmother failed to overcome the parental presumption contained in TFC 153.131(a). Stepmother argues that her suit sought to modify a prior conservatorship determination and was not an original conservatorship proceeding. Thus, her suit was a modification suit under TFC chapter 156 to which no parental presumption applies.

The court explained that "[t]he controlling provisions for *original* custody suits are found in TFC chapter 153, which contains a 'parental presumption' codifying the common-law notion that a child's best interest is usually served by awarding custody to a parent." (Emphasis in original). Modification suits are governed by TFC chapter 156. The court explained, "a modification suit introduces *additional* policy concerns not present in an original custody action, 'such as stability for the child and the need to prevent constant litigation in child custody cases.' Those concerns apparently prompted the Legislature to remove any statutory presumption that would favor a parent over a non-parent in a custody-modification proceeding". (Emphasis in original) (citations omitted). The court continued:

> By including the parental presumption in original suits affecting the parent-child relationship but not in suits for modification of conservatorship, the Legislature balanced the rights of the parent and the best interest of the child. On one hand, "the interest of parents in the care, custody, and control of their children" has been described as "perhaps the oldest of the fundamental liberty interests" recognized by the United States Supreme Court. On the other hand, it is the public policy of this State to resolve conservatorship disputes in a manner that provides a safe, *stable*, and non-violent environment for the child. The Legislature has determined that when these two interests compete … the child's interest in stability prevails over the parent's right to primary possession. Thus, when statutory requirements are met, the parent's right to primary possession must yield to the child's right to a safe, stable home. (Emphasis in original) (citations omitted).

After an analysis of the evidence, the court overruled mother's issue, finding stepmother presented evidence to rebut the parental presumption under TFC chapter 153 and evidence supporting modification of the previous custody order under TFC chapter 156. *In re R.T.K.*, 324 S.W.3d 896 (Tex. App.—Houston [14th Dist.] 2010, pet. filed); *accord In re N.L.V., D.N.V., and G.R.V.*, No. 04-09-00640-CV (Tex. App—San Antonio May 4, 2011, no pet. h.) (mem. op.) (Court held that because the action was a modification, rather than an original suit, the parental presumption of TFC 153.131 does not apply).

3. Evidence Demonstrating Significant Impairment of the Child

At the time of the R.R.W.'s birth May 2005, Jennifer and Joshua were in a relationship. Joshua was named as the child's father on the birth certificate. In June 2006, Jennifer and Joshua were married. In April 2007, a paternity test revealed that Ryan was the father of R.R.W. Joshua filed a petition for divorce requesting that he be appointed joint managing conservator of the child. Jennifer filed and was granted a partial motion for summary judgment which denied Joshua's claim for joint managing conservatorship. The case proceeded to jury trial. The trial court entered a decree of divorce incorporating the summary judgment denying Joshua's claims to R.R.W. Joshua appealed, complaining that the trial court erred in denying his request to be appointed joint managing conservator of the child.

The Houston Fourteenth Court disagreed with Joshua, holding: "as a non-parent, Joshua had to present evidence of specific actions or omissions by Jennifer or Ryan to demonstrate that the appointment of either or both parents as managing conservators would result in significant impairment to R.R.W.'s physical or emotional development." "Acts or omissions that would show significant impairment of the child include physical abuse, severe neglect, abandonment, drug or alcohol abuse, or very immoral behavior on the part of the parent." In overruling his issue, the Houston Fourteenth Court held that Joshua failed to show that any evidence raised a fact issue regarding whether appointment of Jennifer or Ryan as a joint managing conservator would result in serious physical or emotion harm to R.R.W. *White v. Shannon*, No. 14-09-00826-CV (Tex. App.—Houston [14th Dist.] Oct. 26, 2010, no pet.) (mem. op.); *see also In re K.R.B.*, No. 02-10-00021-CV (Tex. App.—Fort Worth Oct. 7, 2010, no pet.) (mem. op.).

B. Modification of Conservatorship

"In determining whether a material and substantial change has occurred, the trial court is not confined to rigid or definite guidelines. The court is looking for evidence of change since the prior order, but the law does not require any particular method for proving change of circumstances." Proof of a material and substantial change of circumstances in order to support a modification of conservatorship pursuant to TFC 156.101(a)(1)(A) "can be established by circumstantial evidence, such as if the court relied on facts or events occurring after the date of the prior order." A reviewing court assesses the record for

evidence regarding a material and substantial change in circumstances between the date of the prior order and the date of the hearing to modify conservatorship. Evidence of father's inappropriate conduct during visits with child, loss of his visitation rights, lack of communication with child, and of child's bonding with foster family supported determination that there had been a material and substantial change in circumstances since the prior order. *In re C.L.*, 322 S.W.3d 889 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

V. TERMINATION GROUNDS

A. 161.001(1)(D)

1. Removal of Newborn Child

Mother testified that, before giving birth to J.C.R., she had another child, C.G., who had died. C.G. was two years old when he was murdered. A year before his death, the Department removed C.G. from mother's care and placed him with a maternal aunt because he had a spiral facture of the tibia; mother said she did not know how the fracture occurred. Mother had unsupervised visits with C.G. On the day of his death, mother was living with J.C.R.'s father and she was pregnant with J.C.R.; mother's eight-year-old brother was also visiting at the time. Mother went to a therapy session, finished her appointment, and called home at about 2:00 p.m. J.C.R.'s father told mother that C.G. had thrown up. According to mother, when she returned home C.G. was playing, then everyone took a nap. When C.G. woke up from his nap, mother said that he wanted water, and when she gave him some, he spilled it. Mother testified that C.G. then collapsed in her arms, his eyes rolled back in his head, and his feet turned blue. Mother and J.C.R.'s father took C.G. to the maternal aunt's house. Mother testified she did not know why she did not take C.G. directly to the hospital. C.G. died later that day.

J.C.R. was born the day after C.G. died. The Department immediately removed J.C.R. from mother's care. The Department's termination case "was based on the environmental and conduct endangerment involving C.G." "The bulk of the evidence at trial, however, concerned the events leading up to and surrounding C.G.'s death." The evidence regarding C.G.'s condition when he arrived at the hospital indicates that C.G. had suffered severe life-threatening injuries that had been inflicted upon him. As with his spiral fracture to the tibia, mother was unable to explain how C.G. was injured. Mother also refused to place the blame on J.C.R.'s father, despite his confession to injuring C.G. Mother's therapist testified that if mother was unable to identify the risk factors that resulted in injury and death to C.G., then mother would be unable to make the changes necessary to protect J.C.R. in the future. Termination under (D) and (E) was affirmed. *In re J.C.R.*, No. 04-09-00500-CV (Tex. App.—San Antonio June 16, 2010, no pet.) (mem. op.).

2. Evidence of Endangerment Following Monitored Return

The Department became involved with the family when their one-year old child, J.T.H., was hit by a car. At the time of the incident, the mother was living in a trailer with her mother and her mother's boyfriend. On the day of the incident, the mother put J.T.H. in a playpen and went outside. The mother's boyfriend took the child out of the playpen, and the child followed the mother outside. When the mother came back inside, she asked where the child was, but no one knew. It was later determined that the child was hit by a car and "care-flighted" to the hospital. The Department filed suit for termination of mother's and father's parental rights. The investigator testified that during her investigation, she found that the home was unsafe for the children because there was no air-conditioning, an electrical cord was strung over the house, the carpet was ripped up, and dogs were chained in the front yard.

In June 2009, the Department filed a motion for a monitored return of the children to the parents, who had worked most of their court-ordered services, but still had not reached their goals for reunification. The monitored return was granted and the children were returned to the parents. The day after the children were returned, the caseworker went to the family's home and observed the children hanging out of their bedroom window with an almost three-foot drop. The caseworker recommended that the family install a screen on the window. The mother, who appeared oblivious to the danger, asked the father to fix the window so the children could not open it. He nailed it shut, making the room extremely uncomfortable during the heat of the summer. There was no air-conditioning where the children played and slept and the house was very hot. The caseworker believed that the parents failed to bond with the children and did not demonstrate basic parenting skills. Based upon these concerns, the Department decided to re-remove the children and proceed with termination. After a bench trial, both parent's parental rights were terminated under predicate grounds (D) and (O).

Both mother and father appealed. The Eastland Court affirmed father's termination because he did not challenge (O) or best interest. However, the mother challenged termination under (D) and best interest. Regarding (D), mother contended that the home the Department approved for the "monitor and return" was the same home it argued at trial was an unsafe environment, therefore the evidence was insufficient to support termination under (D). The Eastland Court disagreed. The court considered evidence regarding both the original removal and the removal after

the monitored return in holding that the evidence was legally and factually sufficient to support the trial court's finding that the mother knowingly allowed J.T.H. to remain in conditions or surroundings which endangered the child's physical or emotional well-being. The termination was affirmed. *In re J.R.H. and J.T.H.*, No. 11-09-00321-CV (Tex. App.—Eastland Dec. 2, 2010, no pet.) (mem. op.).

B. TFC 161.001(1)(E)

1. Repeatedly Leaving Children

"Leaving a child over and over again"—repeatedly placing the child in the care of other people for months or years, causing the child to never know when or if the parent will return—subjects the child to uncertainty and instability that endangers the child's physical and emotional well-being and supports a finding under TFC 161.001(1)(E). *In re I.J.A., P.J.A., and J.J.A.*, No. 04-09-00787-CV (Tex. App.—San Antonio June 16, 2010, no pet.) (mem. op.).

2. Endangering Conduct Towards Other Children Sufficient

K.B. is the fifth of mother's six children. Her four oldest children were in the managing conservatorship of the Department when K.B. was born; K.B. was removed from mother's care at birth. Initially, K.B. was placed with mother's aunt, but was later removed from the aunt when she violated the court-ordered condition that father only have supervised visitation with the child at the Department. The Department subsequently filed for termination.

At trial, mother testified about numerous violent past relationships. Between 1998 and 1999, the father of the two oldest children, "Phillip", would frequently push her into the wall when she was pregnant and would kick her when she was holding another child. They separated in 1999, resumed their relationship in 2002, and again in 2005 when mother moved in with Phillip, bringing her three children. Phillip assaulted her in February 2006, which required medical attention; he was charged with assault. Mother also had a violent encounter with yet another boyfriend, "Matt". In 2007, she began a relationship with another boyfriend, "Ben", who was violent towards her children, as he: (1) dragged the two-year old child up the stairs by his arm; (2) hit the two-year old child on the back of his head, causing him to fall down and hit his head on the floor; and (3) hit the two-year old and four-year old children in their mouths. Ben also pushed mother twice when she was pregnant. They had discussed marriage, but it never occurred because Ben entered a substance abuse program.

Mother displayed inappropriate behavior during visitation; she would frequently use profanity, would occasionally throw things, and on one occasion belted one of the children. Her psychological evaluation revealed that she had been abused by all four men with whom she had children, and that she had "personality traits associated with dependency" and "a history of depression and bipolar disorder". The psychologist also reported that the mother had a dependent personality and continued to repeat previous mistakes, particularly with regard to entering violent relationships. Mother's parental rights were terminated.

On appeal, mother maintained that evidence to support termination under TFC 161.001(1)(E) was insufficient because the child was removed from her custody at birth and only returned to her with instructions that their interaction be supervised. The appellate court disagreed. The endangering conduct at the heart of the (E) ground need not be directed at the child who is the subject of removal proceedings, as conduct towards other children may suffice to support a finding of endangerment. Evidence showing a clear pattern of endangerment of mother's other children was therefore legally sufficient to support termination. *In re K.B.*, No. 03-09-00366-CV (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.).

C. 161.001(1)(D) and (E) Factually Insufficient

Mother and father had two children: A.B. and H.B. In July 2007, when they separated, A.B. was three and H.B. was two. Mother testified that she left father because he was abusive. When they separated, mother moved in with father's sister and brother-in-law, Jennifer and Gary W. During the day, mother would take the children to father's apartment where he would care for them while mother worked. Father did not keep the children overnight. After about one month, mother moved. After the move, Jennifer W. watched the children while mother worked, and father saw them a couple of hours per week. Father did not want the children in his apartment for long periods of time due to maintenance issues.

On September 29, 2007, H.B. had a seizure and was taken to Cook Children's Hospital; the Department became involved. The cause of H.B.'s seizures was a chemical imbalance referred to as hypo low sodium, which is not a chronic condition. The doctor did not believe that the condition could be brought on by mother giving the child a lot of water after a day of activity in the warm weather. However, H.B. was also diagnosed with failure to thrive because her weight put her well below the fifth percentile on the growth chart; she was born at the twenty-fifth percentile. When asked if H.B.'s failure-to-thrive condition would have been obvious to relatives who saw the child everyday, the doctor said it would have been less obvious to people who saw the child every day than it would have been to someone who had not seen the child for three

months. He opined that H.B. was inadequately nourished when he saw her on September 29, 2007. The case was found "reason to believe" for neglect. An FBSS (Family Based Safety Services) case was opened and the children went to live with Jennifer W. for eight or nine months before being returned to father. During the time that Jennifer W. cared for the children, they gained weight and received early childhood intervention services.

Father participated in FBSS services. He took parenting classes, completed a psychological evaluation, and underwent a psychiatric evaluation. He started individual counseling, but he and the counselor mutually agreed to discontinue because there was not a good therapeutic relationship between them and she was siding with the Department. Father also took anger management classes. After he completed his services, he was allowed to spend more time with the children. After father corrected some concerns about his apartment, the children were returned to him in June 2008, under the condition that mother could not have contact with the children until she completed her services.

On July 1, 2008, the caseworker visited the father's apartment and observed that there was very little furniture or food. At a follow-up visit on July 8, 2008, she observed that the children's diapers were dirty and that A.B. had bruises on his face and ear. Father explained that A.B. had fallen and had no idea how he sustained the bruising on his face and ear. He denied striking the child. The caseworker made a referral regarding A.B.'s injuries. When Department investigator Brooks went to father's apartment to investigate on July 8th, father seemed annoyed and wanted them to leave. When he finally let Brooks into the apartment, other than noticing dirty dishes in the sink and that the furnishings were sparse, she did not see anything that was a danger to the children. Regarding A.B.'s injuries, father told Brook that A.B. had fallen off the toddler bed, that the mark on his eye was caused by him not getting enough sleep, and that the mark on his cheek was caused by the child rubbing his face on the carpet. Both children were taken to Cook Children's Hospital where the emergency room physician did not believe that A.B.'s injuries were accidental. Based upon the emergency room physician's opinion and the prior FBSS history, the Department removed the children and placed them in foster care.

Nurse Wright, a member of the hospital's CARE team, testified that the injury to A.B.'s ear could have been caused by someone grabbing the child's ear and then pulling or jerking it. She believed that the linear configuration on A.B.'s cheek was a slap mark, but other abrasions to the cheek could have been caused by a carpet burn. She was uncertain as to what caused the injury to the eye, but opined that a thumb from the hand that caused the slap mark might have reached A.B.'s eye socket. A.B. also had a small bruise on his abdomen and buttocks. Father was charged with injury to a child. He pleaded guilty to the charge, claiming that because his bond was set at $20,000.00, he probably would have had to remain in jail for two years pending his trial and would have had no chance of having his children returned to him. Father ultimately explained that when he and the children were walking down the street, A.B. had fallen on a "grate rail". He again denied ever slapping the child.

Although father completed his services and was substantially in compliance with his probation for injury to a child, almost every witness testified that the children would be in danger if they were returned to the father. Many of the witnesses' concerns related to his unresolved anger issues. At trial, father's parental right were terminated under TFC 161.001(1)(D), (E), and best interest. Father appealed.

The Fort Worth Court held that the evidence supporting (D) and (E) grounds was legally sufficient but was factually **insufficient** because: (1) A.B.'s bruises were of varying ages and A.B. said that his father "tried to pull his ear off" but never said that his father slapped him; (2) no one testified whether the bruises were less than or more than a month old—in other words, whether they occurred before or after father regained possession of A.B.; (3) the record contains no evidence of physical injuries to the children prior to the investigator's second visit to father's apartment one month after he regained possession of A.B.; (4) in viewing the evidence in a neutral light, the evidence that the father pinched A.B.'s ear and/or slapped his face and that A.B. had other small bruises on his body, is factually insufficient to establish under (E) ground that the father engaged in a continuing course of conduct; (5) medical personnel testified that H.B.'s failure to thrive would be less obvious to those who saw him frequently and it would be difficult for a parent to know that there was a problem unless the parent was told by a doctor; (6) because (D) ground contains a knowing requirement, the evidence is insufficient to establish that the father knew that H.B. was allowed to be underfed; (7) domestic violence between the mother and father did not result in injury to the children and father divorced the mother so that domestic violence would not be a continuing issue; (8) although father had emotional problems, there is no evidence that links his emotional problems with endangering conduct; (9) despite claims about father's apartment being unsanitary, the record demonstrates that the children were returned to him in June 2008, and he had the capability to provide a clean living environment for the children; (10) although various witnesses urged the court to terminate father's parental rights, this is not evidence supporting termination under (D) and (E) grounds because

father's lack of congeniality, the extreme odor and clutter in his apartment, his financially distressed condition, his harassing e-mails and phone calls concerning the children, and failure to exhibit behavioral changes in one person's opinion after his services is not evidence of endangerment under (D) or (E). *In re A.B. and H.B.*, No. 2-09-215-CV (Tex. App.—Fort Worth July 29, 2010, no pet.) (mem. op.).

D. 161.001(1)(F)

1. Ability to Pay

Father argued the evidence supporting termination under TFC 161.001(1)(F) was legally and factually insufficient. Mother filed her cross-petition for termination of father's parental rights on October 30, 2006. The court defined that the relevant twelve-month period of non-support from October 29, 2005 to October 29, 2006. Mother had the burden of proving by clear and convincing evidence that: (1) father had the ability to pay during each of these months; and (2) he failed to pay support commensurate with his ability.

Father testified that he accumulated $8,300 in savings from 2001 to 2005. His felony community supervision was revoked in June 2005, and he was sentenced to eighteen months confinement in a state-jail facility. During his incarceration, those funds remained in his savings account. Father was discharged in January 2006 and found a job paying about $1,200 per month. He left an unmarked envelope with a $100 money order in mother's mailbox for the child in August 2006. Mother returned the envelope to father unopened. Father testified that this was his only effort to pay child support during the relevant period.

In its reasoning, the court noted that, "although [Father] was incarcerated for a little more than two of the twelve months, he had at his disposal $8,300 in savings while incarcerated." "After release, he had a job that afforded him the ability to pay support." Father's wife had two children; however, there was no evidence that father had adopted the children, thus he had no legal obligation of support for his wife's two children. The court explained that under the applicable guidelines, father's child support obligations would be more than $200 per month based on his monthly earnings in 2006. The court stated: "There was no evidence that other financial obligations prevented him from paying more. One payment of less than half the usual monthly child support obligation does not equate to supporting a child in accordance with one's ability."

The court held: "The evidence is legally and factually sufficient to support a finding that [Father] had the ability to support [the child] because of his savings account and because of his job after he was released from the state jail and that he failed to support [the child] from October 29, 2005 to October 29, 2006 in accordance with his ability." *In re D.S.W.*, No. 10-10-00108-CV (Tex. App.—Waco Dec. 29, 2010, no pet.) (mem. op.).

2. Ability to Pay Must Be Regular and Consistent

Incarcerated father filed an affidavit of indigence with the trial court that stated that he "received approximately $10.00 per month as gifts from relatives and friends" and that his expenses were approximately $9.00 a month. There were two hearings on the termination petition; father appeared at both *via* telephone. Father testified at the first hearing that he had received twenty to thirty dollars from friends and relatives for his commissary funds. At the second hearing held several months later, father testified that he had received thirty dollars from his mother and had made arrangements with the office of the attorney general to withhold twenty percent of whatever funds were put into his commissary account for support of the subject child. Despite the fact that the "only evidence [heard at trial] was [father's] declarations of his inability to pay the costs associated with defending against the termination petition," the trial court made a finding under TFC 161.001(1)(F) that father had failed to support the child in accordance with his ability to pay and terminated father's parental rights.

On appeal, father argued the evidence was legally insufficient to support termination of his rights because "the evidence at trial failed to establish that he had the ability to support the child for each of the twelve months of the period considered by the court." In reversing the termination for legal insufficiency, the court explained that under TFC 161.001(1)(F), one year means twelve consecutive months, and there must be proof the parent had the ability to support during each month in the twelve-month period. The appellate court acknowledged that father testified that he had received twenty to thirty dollars from friends and relatives, but held that, absent any evidence that such assistance was regular or consistent, it was no evidence of father's ability to pay child support during each month of the relevant twelve-month statutory period. The appellate court also held that father's indigence declarations were not clear and convincing evidence of his ability to pay. It was not reasonable for the trial court to resolve the disputed facts regarding father's ability to pay in favor of termination, and no reasonable fact finder could have found (F) to be true based on father's declarations of indigence alone. *In re L.J.N.*, 329 S.W.3d 667 (Tex. App.—Corpus Christi 2010, no pet.).

E. 161.001(1)(H)

A trial court may terminate the parent-child relationship if a parent voluntarily and knowingly abandons the mother of the child during pregnancy, fails to provide adequate support and medical care during her pregnancy, and fails to support the child after birth. *See* TFC 161.001(1)(H). The abandonment must be with knowledge of the pregnancy and must occur both during the pregnancy and after birth. When the child is born out of wedlock and the father doubts his paternity, there is no enforceable support obligation until paternity is established. *In re C.J.O.*, 325 S.W.3d 261 (Tex. App.—Eastland 2010, pet. denied).

F. 161.001(1)(K)

On appeal, mother and father contended that they had involuntarily executed their affidavits of relinquishment. During a jury trial, mother's and father's counsel asked for a fifteen-minute recess to "finalize a conversation" she was having with mother and father. Four hours later, mother and father informed the trial court that they were waiving the jury trial and had executed affidavits of relinquishment. The Department moved for a trial amendment to include termination ground 161.001(1)(K), which the trial court granted. Mother and father testified that: 1) they had consulted with their attorney and reviewed the affidavits with her; 2) execution of the affidavits was in the child's best interest; and 3) by signing the affidavits they knew they were giving up their parental rights and could not change their minds. At the conclusion of the trial, the trial court found that mother and father had voluntarily relinquished their parental rights and entered an order of termination accordingly. Despite his trial testimony, father offered a bill of exception after the 263.405(d) hearing in which he alleged that he and mother "felt pressured" to sign the affidavit and that he "had no other choice" but to execute it. He also stated that he believed the Department would remove his third child if he did not execute the relinquishment.

The Family Code requires that an affidavit of relinquishment be voluntary. Because an affidavit of relinquishment waives a constitutional right, it must be made voluntarily, knowingly, intelligently, and with full awareness of the legal consequences. Once the proponent of the affidavit has met the burden of establishing by clear and convincing evidence that the affidavit was executed according to the terms of TFC 161.103, the burden then shifts to the affiant to establish by a preponderance of the evidence that the affidavit was executed as a result of fraud, duress, or coercion. Duress occurs when, due to some kind of threat, a person is incapable of exercising his or her free agency to withhold consent. In this case, the record established that father testified he was in agreement with the affidavit. Further, any alleged confusion as to the affidavit was rectified when father answered "oh, yes, yes" at trial when asked whether he voluntarily signed the relinquishment. Father also had an interpreter during the trial and four-hour break. The court rejected mother's and father's assertion, holding: "Based on the evidence presented in the record, we conclude that [mother and father] raised no evidence of duress." It continued, writing that although mother and father might have felt "pressured" and "forced" to sign the affidavits, there was no evidence of a "threat" that would have rendered them unable to withhold consent. *Montes v. Tex. Dep't of Family and Protective Servs*., No. 01-10-00643-CV (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet. h.) (mem. op.).

G. 161.001(1)(N)

Terrance is D.A.'s alleged biological father. Terrance is not the father of Lisza's other two children. D.A. was born on January 30, 2009, and was removed from Lisza together with her two other children after Lisza tested positive for cocaine at D.A.'s birth. In November 2009, after being arrested for robbery, Lisza executed an affidavit of relinquishment. At trial, the trial court terminated Terrance for failure to register with the paternity registry, and for constructively abandoning D.A. under TFC 161.001(1)(N). Terrance appealed, complaining that the evidence was legally and factually insufficient to show that: (1) the Department made reasonable efforts to return the child to him because the Department did not develop a service plan for him; and (2) Terrance demonstrated an inability to provide a safe environment for the child.

The Fort Worth Court found that although no service plan was prepared for Terrance, a diligent search was made to locate him at the time the children were removed. When he was located after his release from prison, he was advised of his right to visit the child. During a telephone call with the case worker, Terrance told her that he was not D.A.'s father. Two witnesses testified that he had no contact with the child. The caseworker advised him to sign an acknowledgement of paternity, but he never did. The caseworker also advised him to go to the courthouse to receive his paperwork, which he did not do. She attempted to call him but his phone had been disconnected. Lisza testified that Terrance was aware that he could appear in court for trial and how he could contact the Department. In finding the evidence legally sufficient, the Fort Worth Court held:

> It is apparent from the record that the Department made all reasonable efforts to return D.A. to Terrance. The Department contacted Terrance, but Terrance did not take any action to visit or get custody of D.A. Furthermore, a diligent search was made to locate Terrance.

> Terrance disconnected his phone, and neither Lisza nor the Department knew how to reach him. Additionally, the Department attempted to serve Terrance at different addresses.

Regarding Terrance's inability to provide the child with a safe environment, the Fort Worth Court found that the record contained no evidence that the child wanted to live with Terrance, or that Terrance wanted the child to live with him. Additionally, Terrance never visited with the child. The court held: "the evidence establishes Terrance's inability to provide D.A. with any environment, much less a safe environment." The judgment was affirmed. *In re D.A.*, No. 2-09-460-CV (Tex. App.—Fort Worth Sept. 16, 2010, no pet.) (mem. op.).

H. 161.001(1)(O)

Father could not rely on caseworker's alleged error in paperwork referring him to counseling and subsequent failure to notify him that the mistake had been corrected, as an excuse for father's failure to complete his service plan. "[T]he Family Code does not provide for excuses for failure to comply in assessing a statutory violation. . . . [A]ny excuse for failing to complete a family services plan goes only to the best interest determination[.]" (Citations omitted). The Family Code also "does not provide for substantial compliance with a family services plan[.]" *In re M.C.G.*, 329 S.W.3d 674 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (supp. op. on reh'g).

I. 161.001(1)(Q)

In challenging the sufficiency of the evidence pertaining to 161.001(1)(Q), father argues "that the trial court could not reasonably form a firm belief or conviction that appellant would remain incarcerated through August 19, 2011, if appellant's projected release date is June 27, 2011, and he 'may very likely be released from incarceration prior to the statutory two year timeframe.'" The court stated that it recognized that a two-year sentence does not automatically meet subsection Q's two-year imprisonment requirement. However, it continued: "[E]vidence of the availability of parole is relevant to determine whether the parent will be released within two years. Mere introduction of parole-related evidence, however, does not prevent a factfinder from forming a firm conviction or belief that the parent will remain incarcerated for at least two years." The court continued: "If the mere possibility of parole prevents a jury from ever forming a firm belief or conviction that a parent will remain incarcerated for at least two years, then termination under subsection Q will occur only when the parent has no possibility of parole. By that rationale, the party seeking termination would have to show that there is zero chance of early release. This would impermissibly elevate the burden of proof from clear and convincing to beyond a reasonable doubt." (Citations omitted).

In his specific challenge to factual sufficiency of the evidence supporting termination under Q, father argues "the mere fact that Appellant may be released from prison at any time prior to his maximum sentence date provides sufficient evidence to raise a legitimate question as to the probability of incarceration past the two year[s] provided by the statute." The court responded: "The issue in a factual sufficiency review is not whether there is a possibility of release, but whether the disputed evidence established that appellant would be released from prison before the second anniversary of the date of the filing of the termination petition." (Citations omitted). Father's issue was overruled. *In re C.A.C., Jr.*, No. 09-10-00477-CV (Tex. App.—Beaumont May 5, 2011, no pet. h.) (mem. op.).

J. 161.004 – Material Change of Circumstances

1. Failed Relative Home Study

N.R.T. was born on January 27, 2006. During both May and June 2006, father was sentenced, respectively, to six years in TDCJ for robbery and one year in state jail for failure to register as a sex offender. In September 2007, mother was sentenced to four years in TDCJ for robbery. When mother was initially jailed on the robbery charge, she left N.R.T. with her paternal grandmother, C.S. The Department became involved when C.S. was found caring for N.R.T. while intoxicated. C.S tested positive for cocaine and marijuana. N.R.T. also tested positive for cocaine. The Department was appointed temporary managing conservator and N.R.T. was placed in foster care with K.V. The Department sought termination. On December 12, 2008, all parties appeared for trial and announced an agreement, which provided: (1) the Department will be appointed permanent managing conservator of the child; (2) mother and father will not be appointed possessory conservators and would not be granted visitation, but their status will be reevaluated upon their release from prison; (3) mother and father will pay child support beginning January 1, 2009; and (4) N.R.T. will be placed with her maternal grandmother, J.G., if she passes a home study. The order was signed in February 2009, and contained the Mother Hubbard Clause "that all relief requested in this case and not expressly granted is denied." J.G. failed her home study because her daughter, who lived in the home with her, refused a hair follicle test. In April 2009, foster mother, K.V., filed a petition in intervention seeking termination, and then she filed a pleading in June 2009 seeking termination and adoption. On December 31, 2009, the Department filed a petition for termination. The case was tried to the court on June 25, 2010. Prior to the presenta-

tion of evidence, K.V. verbally withdrew her live plea in intervention to prevent a continuance. Both mother's and father's parental rights were terminated. They appeal, raising multiple issues including a complaint that there was no material and substantial change of circumstances under TFC 161.004 from the February 2009 order until the June 2010 termination trial.

The Amarillo Court disagreed, holding that the failed home study of J.G., leaving N.R.T. in the care of her foster parent while the parents continued to remain in prison, constituted a material and substantial change of circumstances. The Amarillo Court wrote, "the failure of J.G.'s home study worked a substantial change in the analysis of the best interest of the child. Without a feasible family member placement, termination became significantly more likely."

The Amarillo Court (citing to *Wright v. Wright*, 610 S.W.2d 553, 555 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ), also discussed that because there are no definite guidelines under TFC 161.004 as to what constitutes a material and substantial change of circumstances, the determination is made based upon the facts of each case. *In re N.R.T.*, No. 07-10-00313-CV (Tex. App.—Amarillo Mar. 22, 2011, no pet. h.) (mem. op.).

2. Res Judicata

In 2005, the Department initiated a suit requesting termination of father's parental rights to his children, D.S. and N.S. The suit resulted in an order signed in September 2007, in which the father's parental rights to the children were not terminated; rather, the order appointed the Department as permanent managing conservator of the children and the father as possessory conservator. Two years later, the mother signed an open adoption agreement with D.S.'s and N.S.'s foster family and an affidavit relinquishing her parental rights. The Department subsequently filed a petition to terminate father's parental rights in October 2009. In the second trial in March 2010, father's parental rights to D.S. and N.S. were terminated, in part, based on testimony elicited in the April 2007 trial.

Father appealed, contending that his trial counsel was ineffective for failing to interpose res judicata as a bar to litigating issues in the 2007 termination proceeding. The appeals court based its consideration of father's claim on TFC 161.004, which: (1) allows for termination of parental rights after rendition of an order that previously denied termination if the second petition was filed after the order denying termination was rendered; (2) the circumstances of the child, parent, sole managing conservator, or other party affected by the order denying termination have materially and substantially changed since the date the last order was rendered; (3) the parent committed an act listed under Section 161.001 before the date the order denying termination was rendered; and (4) termination was in the best interest of the child.

In rejecting the father's claim, the Amarillo Court held that the elements of 161.004(a) were established because: (1) the Department filed its second petition on October 2009, after the date of the September 2007 termination order; (2) the circumstances of the mother and the children materially and substantially changed when the mother signed an open adoption agreement and an affidavit of relinquishment; (3) the father had his rights to another child terminated on July 9, 2007, based upon a finding that his conduct violated TFC 161.001(1)(E); and (4) the evidence supported a finding that termination was in the children's best interest. Therefore, under 161.004(b), trial counsel was not required to challenge the admissibility of the evidence presented at the April 2007 trial during the March 2010 trial. TFC 161.004(b) reads: "At a hearing under this section, the court may consider evidence presented at a previous hearing in a suit for termination of the parent-child relationship of the parent with respect to the same child." Thus, father's trial counsel was not ineffective for failing to raise a res judicata objection because any such objection would have been without merit. *In re D.S., N.S.*, 333 S.W.3d 379 (Tex. App.—Amarillo 2011, no pet.).

K. 161.007

TFC 161.007 provides that the court may terminate the parent-child relationship if "the parent has been convicted of an offense committed under Section 21.01, 22.011, 22.021, or 25.02, Penal Code," and, "as a direct result of the commission of the offense by the parent, the victim of the offense became pregnant with the parent's child." The court explained:

> Here, there was undisputed evidence that [Father] had been convicted of an offense committed under section 22.011 of the penal code, specifically sexual assault of a child. The judgment of conviction was admitted into evidence without objection, and it reflects that [Father] pleaded guilty to committing that offense. Additionally, [Mother] testified that her sexual relationship with [Father] had resulted in her pregnancy, and [Father] testified that L.M. was his daughter, that [Mother] was his daughter's mother, and that he filed an Acknowledgment of Paternity while he was in prison.

On appeal, father concedes that mother became pregnant during their relationship and that he pleaded guilty "to the

technical penal code definition of sexual assault," but he "submits that he did not force [mother] to have an intimate relationship and argues the Court should at least consider this fact." The court held: "lack of consent is not an element of the offense of sexual assault of a child, and it is undisputed that [Mother] was younger than 17 years of age when she became pregnant with L.M." Father's issue was overruled. *Rigal v. S.M.*, No. 03-10-00008-CV (Tex. App.—Austin July 29, 2010, no pet.) (mem. op.).

L. Termination of Alleged Father

After alleged father was served, he filed a letter with the El Paso court clerk requesting paternity testing. The following day the Department filed a Certificate of Paternity Registry evidencing that no one had registered as the child's father. Alleged father signed a service plan which required him to maintain weekly contact with the Department. The trial court ordered the alleged father to submit to paternity testing. However, eleven days before he was to undergo paternity testing, he moved to San Antonio without informing the Department of his new address. Thereafter, the court extended the dismissal deadline to allow paternity testing to occur and again directed him to submit to paternity testing. The Department's caseworker made numerous unsuccessful attempts to arrange paternity testing in the months before trial in October 20, 2009. The alleged father never submitted to the testing he had requested.

The trial court determined that the alleged father's appeal was frivolous. He appealed and his second complaint was that the trial court erred in finding his appeal frivolous because the evidence was legally and factually insufficient to support termination of his alleged parental rights. The El Paso Court held that because he never admitted paternity and never filed a counterclaim for paternity, the trial court properly terminated his alleged parental rights under TFC 161.002(b)(1). Therefore, the trial court did not err in finding his appeal frivolous. *In re J.L.W.*, No. 08-09-00295-CV (Tex. App.—El Paso Dec. 29, 2010, no pet.) (mem. op.).

VI. BEST INTEREST

A. Parenting Abilities / Excuses

Father was imprisoned when C.L.T. was born. He had convictions for burglary of a vehicle, harassment, and failure to identify. Following the revocation of his probation for committing a second burglary, he was sentenced to eighteen years in TDCJ. Father was released on parole in 2001, but his probation was revoked in 2006 for misdemeanor theft. Regarding his parenting abilities, father testified that although C.L.T. was his first child, he helped care for his sister's three children. After the trial court terminated father's parental rights, he appealed the best interest finding. In affirming the termination, the Waco Court held that the evidence was legally and factually sufficient to support best interest but found that the evidence was "conflicting" regarding his parenting abilities because he took a parenting class in prison and had prior parenting experience with his sister's children. The Waco Court also found that because "[father's] primary excuse is that he was imprisoned for all of C.L.T.'s life up to the time of trial", the evidence did not support the *Holley* factor regarding excuses. *In re C.L.T. and R.D.T.*, No. 10-09-00402-CV, (Tex. App.—Waco Oct. 20, 2010, no pet.) (mem. op.).

B. Arrests and Criminal Charges

1. Evidence of Arrests

Mother complains of the trial court's admission of evidence relating to her arrest for driving while intoxicated. Mother testified that she was arrested and that the charge was still pending at the time of trial. She argued that the probative value of the evidence of arrest was substantially outweighed by the danger of unfair prejudice. In following well-established case law, the court wrote: "Because the best interest of the child must be the court's primary consideration in a suit affecting the parent-child relationship, [TRE] 403 is an extraordinary remedy that must be used sparingly." It continued: "Evidence of arrests is admissible for the purpose of determining the best interest of the child." *In re S.R. and D.G.*, No. 10-10-00063-CV (Tex. App.—Waco Dec. 8, 2010, pet. denied) (mem. op.).

2. Pending Criminal Charges

Mother is an undocumented immigrant with four children. The children were originally removed from mother because of a series of incidents where she neglected the oldest child's asthma problem and on one occasion, marijuana was found in her home. The Department placed the three older children in foster care in the beginning of July 2008, while the youngest child remained with her biological father. In late July 2008, mother was arrested for fraudulently destroying, removing, or concealing a writing; was sentenced to ten days in county jail, and then deported to Mexico. Mother kept in contact with the Department while she was in Mexico, and when she returned to the United States in November 2008, she began to work on her service plan, found a job, and a place to live. Mother was arrested in March 2009 for failing to identify herself to the police; she eventually pleaded guilty and was sentenced to twenty days in jail. Despite her arrest, mother was making significant progress in her services, and by May 2009, the Department was planning to eventually return the children to her. A 180-day extension of the statutory dismissal date was granted in May 2009. In July 2009, mother was ar-

rested for aggravated robbery. She was unable to post bail and remained in jail until the trial. Mother's parental rights were terminated under TFC 161.001(1)(D), (E), and (O), and a finding that termination of her parental rights s in the children's best interest.

Mother appealed the best interest finding. The Fort Worth Court noted that although the children did not testify, evidence indicated that the children wanted to continue to have a relationship with their mother. Mother testified that the children loved her very much and were suffering because they were not with her. Regarding the pending aggravated robbery case, the appeals court recounted that "mother admitted that Flores used Garcia's credit card to buy her things, but she did not know that it was Garcia's card at the time and that she 'is not that stupid'".

The Fort Worth Court held that the evidence was **legally sufficient** because: (1) mother has two criminal convictions; (2) her child was hospitalized two times because of her asthma while in her care; (3) the mother failed to complete her counseling, although she attended some of the classes; (4) the children were exposed to marijuana on at least one occasion; and (5) the mother was not in a position to provide significant physical, emotional, or financial support to the children at the time of trial or in the immediate future.

However, the Fort Worth held that the evidence was **factually insufficient**, writing:

> The Department's opinion seems to be that the trial court only has two options: (1) terminate Mother's rights with the children, or (2) grant the Department managing conservatorship and forever preclude the children's permanence through adoption (because Mother's parental rights would still be effective) even if Mother was convicted of aggravated robbery. However, the law provides a third option; the trial court could have named the Department the children's managing conservator, continued the children's placement with the foster family or move them to live with one of the individuals suggested by Mother, and later readdress either termination (if Mother was convicted of aggravated robbery) or reunification (if Mother was acquitted).

The Fort Worth Court also held, "We cannot conclude that the children's best interests are served by having their relationship with the mother permanently severed based on alleged facts that a court could later find to be unproven." In reaching its decision that the evidence was factually insufficient to support the best interest determination, the court also considered: (1) that although her child was hospitalized in the past for asthma, she also had to be hospitalized for three or four days for asthma while in foster care and her testimony about leaving the child's medicine with the babysitter was not contradicted; (2) although the children were exposed to drugs on one occasion, the Department was not concerned about whether the mother ever used drugs; (3) the mother took action to achieve the return of the children before her aggravated robbery arrest, and even while she was in Mexico, she frequently called to the Department to check on her children and completed most of her services when she returned; (4) at the time of the trial, the Department had not found a family interested in adopting the children; thus, the trial court could not achieve immediate permanence or stability for them even by terminating Mother's rights. The case was reversed and remanded. *In re N.A., L.M.A., and J.A.*, No. 2-10-022-CV (Tex. App.—Fort Worth Sept. 30, 2010, no pet.) (mem. op.); *cf In re L.T. and K.B.*, No. 02-10-00094-CV (Tex. App.—Fort Worth Feb. 17, 2011 no pet.) (mem. op.) (holding the evidence was factually sufficient to support the trial court's best interest finding when Mother's criminal case was still pending).

C. Mere Participation in Services Insufficient to Negate Best Interest Finding

At trial, mother testified about her violent relationships with multiple partners from 1998 until 2008. These relationships resulted in violence being perpetrated on her and the children, including her being assaulted several times while pregnant. Mother began an on-and-off relationship with an abusive partner, Ben, in 2007. In February 2009, she discussed plans to marry Ben, which were interrupted due to his entry into a substance abuse program. However, mother admitted sending several text messages to Ben just before trial.

Mother would become frustrated and overwhelmed when attempting to care for her children and would rarely show her children affection. Sometimes she would become agitated to the point of throwing things in the vicinity of her children, striking them, spanking one child with a belt, and hitting them with wooden spoons. Despite services available to mother to aid in her parenting, Department caseworkers indicated that she had not significantly improved despite being provided with services, including parenting classes and counseling, for approximately a decade.

According to her counselor, mother received counseling services in 2002, but by 2006, many of those improvements "had eroded." Her counselor became concerned about mother's lack of financial independence and her tendency to rely on the men she was dating for support, particularly as mother's many relationships involved domestic

violence. Mother received a psychological evaluation several months before trial. The psychologist testified that during the evaluation, mother informed him of additional incidents of violence involving the children and her abusive relationship with Ben. The psychologist gave mother a "diagnosis of Depressive Disorder, ... a neglect of children diagnosis, and physical abuse of a child as a victim, self report." He also stated that mother had difficulty with anger, aggression, and impulsive behavior, and that based on his observations, mother's prognosis for making and sustaining progress was "very poor".

On appeal, mother argued that the evidence supporting the court's best-interest finding was factually insufficient because she had participated in services, separated from Ben and found stable housing. In rejecting her issue, the Austin Court found that, "the evidence regarding [mother's] exposure of her children to domestic violence informs us of the third *Holley* factor, which involves emotional and physical danger to the child now and in the future". Regarding mother's contention that she participated in services, the Austin Court concluded: "As noted above, while [mother] participated in services, this participation has not led to lasting improvement. … The testimony at trial indicated that her pattern of behavior was ongoing, as she discussed marriage with Ben at least three months prior to trial and reunited with him numerous times in the past after telling caseworkers that she had permanently ended her relationship with him. Further, even if the jury concluded that she had improved, the jury was free to determine that any recent improvements did not outweigh her past behavior." *In re K.B.*, No. 03-09-00366-CV (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.).

D. Age of Proposed Placement

On appeal, father argued that the Department's plan to place the child with his 73-year old grandmother was not in the child's best interest. The appellate court rejected the argument, writing: "We are aware of no authority, and [father's] counsel cited to none at the hearing, holding that termination of parental rights is not in a child's best interest simply because the Department plans to place the child with a person of [the grandmother's] age." *Spencer v. Tex. Dep't of Family and Protective Servs.*, No. 03-10-00498-CV (Tex. App.—Austin Dec. 31, 2010, no pet.) (mem. op.).

E. Finalization of Plans Not Required

Father contended that the evidence supporting the trial court's best interest finding was insufficient because the Department's post-termination plans for the child were not finalized. The appellate court relied on established precedent to reject this assertion, writing that the lack of evidence for permanent placement or adoption is not dispositive of the best interest consideration. In this case, the Department presented the child's maternal grandmother as a placement, and offered a contingency placement with the child's paternal grandmother. At the TFC 263.405(d) hearing, the Department argued that it decided to seek termination a month before the hearing, the Department had taken sufficient steps for finalization by presenting two plans for the child's permanence. In addition to other evidence supporting the best interest finding, the court found that there was evidence that the Department planned to place the child with relatives who had previously provided care for him and there was no evidence presented that the Department's proposed or alternative placements were unsuitable in any way. *Spencer v. Tex. Dep't of Family and Protective Servs.*, No. 03-10-00498-CV (Tex. App.—Austin Dec. 31, 2010, no pet.) (mem. op.).

F. Recent Turnaround

After the child had been removed from her home for two years, mother finally began to make progress in counseling. She began to take medication for her bipolar disorder and began addressing her history and issues with men and relationships. She was employed almost entirely throughout the pendency of the case and had an apartment at the time of trial. She had also completed her parenting classes, attended counseling, and eventually completed her service plan. Looking to the trial court's right to determine the credibility and demeanor of the witnesses, the appellate court affirmed the trial court's finding that termination of mother's parental rights is in the child's best interest. Citing *J.O.A.*, the court wrote: "Although the evidence showed [mother] has made relatively recent improvements to her past situation, those improvements cannot absolve her of her long history of irresponsible choices." *In re T.C.*, No. 10-10-00207-CV (Tex. App.—Waco Dec. 1, 2010, pet. denied) (mem. op.).

G. Order Prohibiting Visitation for Incarcerated Parent in Child's Best Interest

T.R.D. and S.S. were Mother's children. Mother was convicted of murdering S.S.'s father and two counts of tampering with evidence. She was sentenced to twenty-five years in TDCJ. On August 25, 2006, T.R.D.'s maternal grandparents filed for conservatorship of T.R.D. Three days later, mother filed a sworn waiver of service. The case languished until December 22, 2008, when the court entered an order appointing the maternal grandparents sole managing conservators and mother possessory conservator of T.R.D. However, the court prohibited the grandparents from taking T.R.D. to visit mother in prison and permitted visitation only after mother was released from prison and only with the court's consent. The court also required mother and grandparents to "optimize the development of

a close and continuing relationship" with T.R.D. The grandfather testified at trial that: (1) mother had served only two years of her twenty-five year sentence; (2) because mother was barred from visiting S.S., the older child, visitation with T.R.D. would be unworkable; (3) T.R.D.'s counselor recommended that the child not visit mother at prison; and (4) he believed that a no-visitation order was in T.R.D.'s best interest. Mother was not present at the hearing and no conflicting evidence was presented.

Following the denial of mother's motion for new trial, mother appealed, arguing: (1) her waiver of service was limited to temporary orders; (2) grandfather's testimony is unsubstantiated hearsay; (3) general policy and prison system policy encourages substantial contact between children and parents; (4) the prison family visitation facility is friendly and no trauma to child will result from prison visitation; (5) the court's failure to terminate her parental rights is evidence that she is not a danger to the child and should have visitation; and (6) the visitation ban violates her constitutional rights.

In rejecting mother's arguments, the Austin Court held that mother's claim about the waiver is not supported by the evidence, and grandfather's uncontroverted testimony is sufficient to support the trial court's no-visitation order. Mother argued that because she is not a danger to the child, she should have visitation, citing the *Walters'* decision, (39 S.W. 3d. 280, 286-76 (Tex. App.—Texarkana 2001, no pet.). The appellate court stated that the trial court's decision to prohibit visitation while mother was incarcerated is consistent with the decision in *Walters.* In *Walters*, the Texarkana Court stated that "complete denial of access is limited to those situations in which the parent's access will not endanger the physical or emotional welfare of the child but *is not in the best interest of the child.*" (Emphasis in the original). The Austin Court explained that the policy of optimizing relationship between parent and child is not inconsistent with limiting visitation, and because parental rights are not absolute, and the mother was not barred from other means of communicating with the child, there was no constitutional violation. *In re T.R.D.*, No. 03-09-00150-CV (Tex. App.—Austin June 18, 2010, no pet.) (mem. op.).

VII. APPEALS

A. Improper Jury Argument

To obtain a reversal of a judgment on the basis of an improper jury argument, a complainant must prove (1) an error (2) that was not invited or provoked, (3) that was preserved at trial by a proper objection, motion to instruct, or a motion for mistrial, (4) and that was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the trial court, and that (5) the argument by its nature, extent, and degree constituted reversibly harmful error. Reversal is proper only upon a showing that "the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence." *Conti v. Tex. Dep't of Family and Protective Servs.*, No. 01-10-00185-CV (Tex. App.—Houston [1st Dist.] Jan. 27, 2011, pet. denied) (mem. op.).

B. Motion for New Trial Does Not Extend Time for Filing Notice of Appeal

Parents appeal from a judgment terminating their parental rights. The trial court's judgment was signed on June 17, 2010. Therefore, the notice of appeal had to be filed on or before July 7, 2010 because it was an accelerated appeal under TFC 109.002(a) and TRAP 26.1. Appellants did not file their notice of appeal until August 23, 2010. The Tyler Court held that although appellants filed a motion for new trial, the motion did not extend the time for filing a notice of appeal. Therefore, Appellants' notice of appeal was untimely, and the Tyler Court had no jurisdiction of the appeal. The appeal was dismissed for lack of jurisdiction. *In re C.H., C.H., C.H., and P.H.*, No. 12-10-00285-CV (Tex. App.—Tyler Sept. 22, 2010, no pet.) (mem. op.).

C. Notice of Appeal of Associate Judge's Order Does Not Invoke Appellate Jurisdiction

Mother filed a notice of appeal of the associate judge's order terminating her parental rights. The District Judge denied a de novo hearing. Although no party filed a notice of appeal following the judgment, a clerk's record was forwarded to the appellate court. The appellate court ordered the parties to show cause why the appeal should not be dismissed. No party replied. A timely notice of appeal is necessary to invoke the appellate court's jurisdiction, therefore, appeal dismissed for lack of jurisdiction. *In re J.A.G., A.R.O., F.A.G., and K.M.G.*, No. 04-10-00270-CV (Tex. App.—San Antonio June 2, 2010, no pet.) (mem. op.).

D. Restricted Appeals

1. Mother's Execution of Affidavit of Relinquishment Defeats Restricted Appeal

On July 2, 2009, mother executed an affidavit of voluntary relinquishment of her parental rights regarding her three children. On August 26, 2009, a final hearing was held wherein the trial court terminated her parental rights based on her affidavit of relinquishment and because it is in the children's best interest.

Mother brought a restricted appeal from the trial court's termination of her parental rights. She argues the trial court erred in entering the termination decree: (1) based on insufficient and fraudulent testimony; (2) without notice to any other party; and (3) without any pleadings to support the termination decree. Father filed a motion to dismiss the appeal for want of jurisdiction, arguing mother failed to meet one of the requirements for perfecting a restricted appeal and accepted the benefits of the judgment.

To prevail on a restricted appeal, an appellant must demonstrate: (1) the notice of restricted appeal was filed within six months of the date of the judgment or order; (2) she was a party to the suit; (3) she did not participate in the hearing that resulted in the judgment complained of, and did not file a timely post-judgment motion or request for findings of fact and conclusions of law; and (4) error is apparent from the face of the record. Lack of participation is a jurisdictional requirement for review by restricted appeal.

The nature and extent of participation is a "matter of degree" because courts "decide cases in a myriad of procedural settings." Therefore, the relevant question is: "whether appellant has participated in 'the decision-making event' that results in the judgment adjudicating appellant's rights."

In determining it lacked jurisdiction to review mother's claim by restricted appeal, the court explained: "Although mother was not present at the hearing in which the termination of parental rights decree was ordered, she signaled her agreement to the termination by signing a sworn and very detailed affidavit of relinquishment of her parental rights." Therefore, the court reasoned that, based on her sworn statements, mother participated in the decision-making event that resulted in the judgment terminating her parental rights. The court held: "Because mother participated in the decision-making event resulting in the termination decree, we conclude we lack jurisdiction over this restricted appeal."

In attempting to argue she did not participate in the underlying litigation, mother submitted affidavits and other materials that are not part of the appellate record. The court stated: "The participation issue is limited to the evidence presented before the trial court at the time it rendered its decision, so we cannot consider such material in this appeal." (Citation omitted). Father's motion to dismiss granted; appeal dismissed for lack of jurisdiction. *In re B.H.B., C.M.B., and D.R.B.*, 336 S.W.3d 303 (Tex. App.—San Antonio 2010, pet. struck).

2. Father's Non-Participation in Trial and Not Filing Post-Trial Motions Qualifies for Restricted Appeal

Incarcerated father did not file an answer in the Department's termination suit despite being properly served nor did he appear at trial. The termination order was signed on July 30, 2010; father "forwarded" a notice of appeal to the district clerk on September 15th, which was subsequently filed on September 22nd. The court applied the "mailbox rule" as per father's representations and presumed that the notice of appeal was filed on the former date. However, even after the Amarillo Court applied the *Verburgt* extension of fifteen days, the notice of appeal was still untimely. Therefore, appellate jurisdiction was not invoked as to a direct appeal.

The Amarillo Court, *sua sponte*, next considered whether the father could proceed with a restricted appeal. The appeals court noted that since 2009 at least two private termination cases have proceeded as restricted appeals. It further noted that there does not appear to be authority prohibiting a termination case initiated by the Department from proceeding in a similar manner. The court further found that TFC 161.211(a) provides that an order terminating the parental rights of a person who was personally served is not subject to collateral or direct attack after six months from the date the termination order was signed, supports the availability of a restricted appeal.

The Amarillo Court held that it could exercise jurisdiction over father's appeal as a restricted appeal because: (1) his notice of appeal was filed within six months of the date the termination order was signed; (2) he was a party to the underlying suit and he did not file any post-judgment motions; and (3) he did not participate in the hearing. To prevail on a restricted appeal, father must then demonstrate error apparent on the face of the record. The case remanded to the trial court for a determination of indigence and appointment of appellate counsel. *In re J.D.O., Jr.*, No. 07-10-0370-CV (Tex. App.—Amarillo Dec. 6, 2010, order). Father filed a motion to dismiss the appeal; the appellate court obliged.

E. Collateral Attack on Termination Order

TFC 161.211 provides for a six-month deadline for challenging the validity of a termination order affecting the parental rights of a person served by citation by publication notwithstanding TRE 329 (motion for new trial). The purpose of section 161.211 was to establish a six-month window after which the validity of an order terminating the parental rights of a person would not be subject to attack. The court explained that "[t]he mandatory language of family code section 161.211 leaves no room for a construction other than a requirement that any collateral or

direct attack on the termination of parental rights, including a motion for new trial, be filed no more than six months after the termination order is signed." (Citations omitted). Although other courts have held that failure to raise 161.211 as an affirmative defense results in a waiver of the issue, the Dallas Court stated: "We are unpersuaded by appellant's contention that, by failing to raise it in the trial court, the DFPS waived reliance on the six-month deadline contained in family code section 161.211(a) as a bar to appellant's challenge to the termination decree." It reasoned: "The six-month deadline in family code section 161.211 is not a plea in avoidance, but is, rather, a bar to or preclusion of a challenge to a termination order more than six months after the termination order is signed. We disagree that the six-month deadline in section 161.211 is a statute of limitations affirmative defense that is waived if not pleaded or presented to a trial court."

The court further explained: "Construing the six-month deadline for challenging a termination of parental rights in section 161.211 to be merely a statute of limitations affirmative defense that is waived if not asserted ignores the clearly expressed intent of the legislature that the best interest of children are promoted by finality of decisions terminating parental rights." *In re E.R., J.B., E.G., and C.L.*, 335 S.W.3d 816 (Tex. App.—Dallas 2011, no pet. h.).

NOTE: The following cases have construed TFC 161.211 as an affirmative defense that is waived if not raised in the pleadings: *In re M.Y.W.*, No. 14-06-00185-CV (Tex. App.—Houston [14th Dist.] Nov. 21, 2006, pet. denied) (mem. op.); *In re Bullock*, 146 S.W.3d 783 (Tex. App.—Beaumont 2004, orig. proceeding); and *In re S.A.B.*, No. 04-01-00795-CV (Tex. App.—San Antonio Sept. 18, 2002, no pet.) (mem. op.) (supp. op. on reh'g) (not designated for publication).

F. Equitable Bill of Review

In a private termination case, father filed a bill of review in connection with a termination proceeding brought by his ex-wife in which father, who was represented by counsel, contested the termination of his parental rights based upon his ex-wife's allegation that he abandoned his child. The father claimed that he was unable to see his daughter because his ex-wife secreted her. The trial court found that the father "voluntarily left his child in the possession of another" and "failed to pay child support in accordance with his ability for at least one year before [his ex-wife's] filing of the termination suit". The trial court terminated his parental rights to the child and granted a step-parent adoption.

The father filed a direct appeal of the termination case, but not the adoption. However, his notice of appeal was filed late, and the Houston First Court dismissed his case for lack of jurisdiction. During the direct appeal, the father filed his bill of review in the trial court asking the trial court to set aside the termination order because: (1) his ex-wife had fraudulently secreted his daughter and prevented him from seeing her; (2) he did not voluntarily abandon his daughter; and (3) he paid child support for at least one year prior to the termination suit.

In his bill of review, he made general assertions that: (1) he had meritorious claims or defenses in the underlying termination action; (2) he was prevented from raising these claims or defenses by fraud, accident, or wrongful acts and omissions through no fault of his own; (3) the acts and omissions complained of were unmixed with any negligence on his part; and (4) he exercised due diligence in attempting to present any and all known claims. The ex-wife filed a motion to dismiss, which was granted by the trial court because the petition for bill of review was inadequate.

The father appealed the dismissal of his bill of review. In affirming the trial court, the Houston First Court held that a petition by bill of review must allege, with particularity, sworn facts sufficient to constitute a meritorious ground of appeal or a defense and must present prima facie proof to support the contention at a pretrial hearing. Although the father participated at trial, his verified petition included general claims, he did not plead specific facts or outline specific claims or defenses that he was prevented from presenting at trial. He also failed to file or present any evidentiary materials to support his underlying allegations, such as documents, answers to interrogatories, admissions, or affidavits. *In re B.G.*, No. 01-09-00579-CV (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, pet. denied) (mem. op.).

G. *Anders* Brief

1. Applicable in Parental Termination Cases

Professional responsibility demands that trial counsel act as a zealous advocate for a client's interests. The same is no less true post-trial; however, appointed counsel may often confront the ethical limits of such advocacy in the face of a frivolous appeal. The courts of appeal have therefore applied the standard articulated in *Anders v. California*, 386 U.S. 738 (1967), to parental rights termination cases.

Following the procedures outlined in *Anders*, court-appointed counsel filed a motion to withdraw and a supporting brief wherein she stated upon a conscientious examination of the record and applicable law that an appeal of the underlying termination lacks an arguable basis in

law or in fact. Counsel provided the client with the withdrawal motion and supporting brief and advised the client of her right to review the record and file a *pro se* response. Upon conducting an independent review of the record, the appellate court concurred with appointed counsel. *In re A.N.J.*, No. 07-10-00491-CV (Tex. App.—Amarillo May 23, 2011, no pet. h.) (mem. op.). A*ccord In re L.K.H.*, No. 11-10-0080-CV (Tex. App.—Eastland, Mar. 10, 2011, no pet.) (mem. op.); *Taylor v. Tex. Dep't of Protective & Regulatory Servs.*, 160 S.W.3d 641 (Tex. App.—Austin 2005, pet. denied); *In re D.E.S.*, 135 S.W.3d 326 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *In re K.D.*, 127 S.W.3d 66 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Porter v. Tex. Dep't of Protective & Regulatory Servs.*, 105 S.W.3d 52 (Tex. App.—Corpus Christi 2003, no pet.); *In re K.M.*, 98 S.W.3d 774 (Tex. App.—Fort Worth 2003, no pet.); *In re R.R.*, No. 04-03-00096-CV (Tex. App.—San Antonio May 21, 2003, order); *In re E.L.Y.*, 69 S.W.3d 838 (Tex. App.—Waco 2002, no pet.); *In re K.S.M.*, 61 S.W.3d 632 (Tex. App.—Tyler 2001, no pet.); and *In re A.W.T.*, 61 S.W.3d 87 (Tex. App.—Amarillo 2001, no pet.).

2. Improper Anders *Brief*

The trial court terminated father's parental rights on multiple statutory grounds and appointed counsel for appeal. Together with a motion to withdraw, counsel submitted what he deemed an "*Anders*-style" brief. The brief contained counsel's certification that it is his opinion the appeal does not present reversible error and is without merit and is frivolous.

Counsel identified two "potential issues". The first issue began with a statement that the evidence was legally and factually insufficient to support the judgment of termination. Counsel cited five grounds on which the trial court based its termination and then argued that appellant "does not believe the record supports these findings and would move this Court to overturn the Trial Court's decision." In two sub-issues, counsel detailed the evidence and cites authorities "to support his conclusion that insufficient evidence supports the trial court's judgment."

In the second issue, counsel discussed the trial court's determination that termination of the parent-child relationship was in the children's best interest. Counsel pointed to record evidence of his positive acts to conclude appellant "will be ready to resume his parental [role] in the near future" and each act supports the "strong presumption that the best interest of the child(ren) would be served by preserving the parent-child relationship." Despite the foregoing, counsel's prayer requested withdrawal from representation.

In explaining the purpose of an *Anders* brief, the Amarillo Court wrote:

> The sole purpose of an *Anders* brief is to explain and support the attorney's motion to withdraw. […] Specifically, the *Anders* brief provides assurance to the appellate court that counsel has thoroughly and conscientiously examined the record and the applicable law, and has provided the court with the appropriate facts, procedural history, and "any potentially plausible points of error." […] The brief also, however, must express and explain counsel's conclusion "there is no plausible basis for appeal." (Internal citations omitted).

The court found that counsel's brief did not support his motion to withdraw. "Rather, it materially contradicts the basis of the motion by arguing and concluding the evidence was insufficient and termination of the parent-child relationship was not in the best interest of the children." The court acknowledged that "counsel's purpose [could have been] to discuss arguable issues," however, it found that "the brief does not demonstrate the issues it raises are frivolous but advances an argument of reversible error. The argument counsel advances is that of a brief on the merits of the appeal. [Thus, it] is not an *Anders* brief." The court granted counsel's motion to withdraw, abated the appeal, and remanded the case to the trial court for appointment of new appellate counsel. *In re D.S. and N.S.*, No. 07-10-00184-CV (Tex. App.—Amarillo July 15, 2010, order).

3. Anders *Brief in Appeal of Frivolous Finding*

The trial court terminated mother's parental rights to the child and appointed the Department as permanent managing conservator of the child. After a hearing held pursuant to TFC 263.405(d), the trial court found mother's appeal to be frivolous. Appellate counsel filed an *Anders* brief addressing the merits of the trial court's appointment of the Department as permanent managing conservator and moved to withdraw as counsel. The Eastland Court initially granted the motion to withdraw and dismissed the case; a week later, it withdrew its opinion and reinstated the appeal.

In an order issued after the reinstatement, the Eastland Court explained that, because the trial court had found mother's appeal frivolous, the merits of trial court's appointment of the Department as permanent managing conservator was not the issue before the appellate court. Rather, appellate review was limited to a review of the trial court's exercise of its discretion in determining that mother's appeal was frivolous. The appellate court abated the

appeal in order for appellate counsel to address the issue of whether the trial court abused its discretion in determining that mother's appeal was frivolous; if counsel concluded that an appeal from the trial court's frivolous finding was without merit, counsel could proceed under *Anders* examining the record and applicable law as it applied to the trial court's frivolousness ruling. *In re L.K.H.*, No. 11-10-00080-CV (Tex. App.—Eastland, Sept. 16, 2010, order).

H. Grant of Mistrial Not Reviewable on Appeal

A trial court's decision to declare a mistrial is not reviewable on appeal. *In re K.V.C., Q.V.C., and V.C.*, No. 02-10-00242-CV (Tex. App.—Fort Worth Mar. 24, 2011, no pet.) (mem. op.).

VIII. MISCELLANEOUS

A. Child Support – Net Resources

Single mother filed petition to adjudicate paternity and assess child support against father, a professional basketball player. Father declined positions in the U.S. leagues, instead signing on with various international teams. At trial, he stated that he had earned less than minimum wage as a professional athlete and relied on his sister to help support him. He also testified, "I play nine hard months. I don't think I was obligated to work twelve months out of the year." Mother and father provided conflicting explanations of father's income.

The appellate court observed that a trial court has broad discretion in determining child support payments and that, by statute, the obligor is required to furnish information sufficient to identify his net resources and ability to pay child support. Further, the trial court is not required to accept the obligor's evidence of income and net resources as true; as arbiter of witness credibility, it may properly impute to obligor higher net resources than alleged based on testimony by the obligee and other evidence in the record. An obligor can be ordered to pay child support commensurate with his potential earnings, notwithstanding voluntary unemployment or underemployment. The appellate court ultimately upheld the trial court's imputation of $7,000 in monthly income and $2,200 in net resources to father for purposes of determining his child support obligation, in addition to its confirmation of a child support arrearage exceeding $30,000. *In re N.T.*, 335 S.W.3d 660 (Tex. App.—El Paso 2011, no pet.).