Termination Case Law Update

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I. STANDING AND JURISDICTION

A. TFC § 161.211—Limitations on Direct or Collateral Attack

Paternal grandparents adopted the child after mother and father relinquished their parental rights. Four years after the trial court entered its order terminating the mother's parental rights, mother filed a petition for bill of review alleging that the termination of her parental rights to the child was improper because her voluntary affidavit of relinquishment of parental rights was not "witnessed by two credible persons" as required by TFC § 161.103. Mother did not plead any facts suggesting that fraud, duress, or coercion influenced her execution of the affidavit. Paternal grandparents responded to mother's petition by filing a plea to the jurisdiction arguing that TFC § 161.211 barred mother's challenge to the termination and adoption order because mother waited more than six months to assert her challenge.

TFC § 161.211(c) limits a direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights "to issues relating to fraud, duress, or coercion in the execution of the affidavit".

The trial court granted the grandparent's plea to the jurisdiction and dismissed mother's bill of review. On appeal, mother argued that the six-month time limit for challenging the order terminating her parental rights pursuant to TFC § 161.211 is inapplicable to her petition for bill of review because the fact that the relinquishment was not witnessed by two credible persons rendered the affidavit void.

In following precedent from the Austin Court of appeals, the court held that a complaint under TFC § 161.211(c) based solely on noncompliance with the requirements of TFC § 161.103, in this case the lack of two credible witnesses to the affidavit, is prohibited. The court affirmed the trial court's order granting the grandparents' plea to the jurisdiction. *In re C.O.G.*, No. 13-12-00577-CV (Tex. App.—Corpus Christi Dec. 12, 2013, no pet.) (mem. op.).

B. TFC § 102.006 Does Not Confer Standing

Within 90 days of the termination of mother's and father's parental rights, grandmother filed a petition to modify the final order in which she sought managing conservatorship of the children. Grandmother alleged that she had standing to bring her suit under TFC § 102.006(c) and asserted no other basis for standing. TFC § 102.006(a) provides in relevant part, that "[e]xcept as provided by Subsections (b) and (c), if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by: […] (3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child." TFC § 102.006(c) provides that "[t]he limitations on filing suit imposed by this section do not apply to an adult sibling of the child, a grandparent of the child, an aunt who is a sister of a parent of the child, or an uncle who is a brother of a parent of the child if the adult sibling, grandparent, aunt, or uncle files an original suit or a suit for modification requesting managing conservatorship of the child not later than the 90th day after the date the parent-child relationship between the child and the parent is terminated in a suit filed by the Department of Family and Protective Services requesting the termination of the parent-child relationship." The Department filed a plea to the jurisdiction "based on lack of standing." The trial court granted the Department's plea to the jurisdiction and dismissed grandmother's petition.

On appeal, grandmother argued that TFC § 102.006(a) only applies to original suits and therefore subsection (c)'s inclusion of the phrase "suit for modification" "confers 'special standing' on certain relatives as long as they file suit within 90 days of a final decree terminating parental rights." To support her assertions, grandmother alleged the statute was ambiguous and cited to legislative history to support her contention. However, the court concluded "that section 102.006(c) is not ambiguous and interpret[ed] it based on the plain text in the context of the statutory scheme." The court held that TFC § 102.006, "including subsection (c), expressly does not confer standing but limits the standing of persons who would otherwise have standing."

Accordingly, the court explained that under TFC § 156.002(a) and (b), standing to file a modification requesting managing conservatorship is "limited to 'a party affected by an order' or a 'person . . . who, at the time of filing, ha[d] standing to sue under Chapter 102.'" Grandmother did not contend she was a party when the final termination was signed, and did not otherwise assert standing under chapter 102. The appellate court held that because "section 102.006(c) does not confer but limits standing," grandmother failed to allege and establish standing to pursue her modification of managing conservatorship of the children, and the trial court properly granted the Department's plea to the jurisdiction. *L.H. v.*

Tex. Dep't of Family and Protective Servs., No. 03-13-00348-CV (Tex. App.—Austin Mar. 6, 2014, no pet. h.) (mem. op.); *see also In re J.M.F.*, No. 13-12-00640-CV (Tex. App.—Corpus Christi Sept. 26, 2013, no pet.) (mem. op.) (because appellant uncle established standing under TFC § 102.005(4), subsection 102.006(c) allowed him to file original petition for adoption of nephew within ninety days after Department obtained termination); *In re J.C.*, 399 S.W.3d 235 (Tex. App.—San Antonio 2012, no pet.) (under plain text of sections 102.005 and 102.006, "[s]ection 102.006 does not confer standing, but instead limits which parties have standing to file a petition for adoption pursuant to section 102.005").

C. Sanctions Resulting from Void Orders

A juvenile-justice proceeding was initiated against a child alleging that he had engaged in deadly conduct. The child appeared for his first hearing accompanied by his mother and five siblings. Child's attorney noticed that child's mother appeared to be impaired to the point that she could not speak intelligibly. The attorney sought the assistance of the Department's court liaison to intervene on an emergency basis and take custody of the child before child's mother drove with the children. After being advised by the child's attorney of the situation, the Department's liaison, who did not have the authority to effect the removal herself, went into the courtroom and saw the mother and her children and then contacted the Department and learned that it had an open investigative file relating to the family. She then informed the child's attorney and the trial court that Department's files revealed that the mother had psychiatric and drug issues as well as an extensive history with the Department, but that the Department would not pick up the children without a court order.

> Note: The Department liaison is employed at the courthouse, helps to facilitate communications with Department employees in the field, keeps Department staff informed about court matters, and assists with matters in which the Department appears before the courts.

The day after the hearing, the child's attorney presented the Department's court liaison with a signed emergency order for the Department to "take immediate custody of the child . . . and file additional pleadings and paperwork to facilitate its authority to request appointment of [the Department] as Temporary Managing Conservator of the child". The trial court also signed an order authorizing child's attorney to hire an independent expert to assist in the juvenile proceeding and signed another order requiring, in part, that any agency that received a request from the expert related to investigations of abuse or neglect must produce such information, within four hours of the request, without delay for redaction.

The next day, the Department filed two petitions and removed the children from mother. The suit with regard to the child was assigned to the same court as the child's pending juvenile case, while the case involving his siblings was assigned to another court. The Department learned of the order regarding the production of records four days after the child's removal, when the Department received a request for records, and provided the expert with the records in 5 separate installments.

Child's attorney from the juvenile case moved for sanctions against the Department in the Department's pending SAPCR. The attorney requested the trial court issue an order requiring the Department to show cause why it should not be held in contempt of court for violating the trial court's two orders entered in the juvenile justice case. The Department responded to the motion for sanctions and argued "that it was not a party to the juvenile proceeding, and the trial court had no jurisdiction to enforce the orders that it had issued by sanctions or contempt proceedings against the Department." After a three-day sanctions hearing, the trial court ruled against the Department and found: "(1) The trial court and the Department were aware of an immediate danger to the physical health and/or safety of the child and his siblings on July 25, 2012; (2) to ensure the child's safety, the trial court issued an emergency order directing the Department to take immediate possession of the child; (3) the Department did not take immediate possession of the child; (4) the Department's failure to comply with the court's orders relating to the court's management and administration of its cases interfered with the court's exercise of its jurisdiction, the administration of justice, and the preservation of the independence and integrity of the court; and (5) the Department knowingly and willfully ignored a court order to take the child [into custody] for approximately 48 hours." Accordingly, the trial court ordered the Department be fined for "the two days" that the Department "willfully and wantonly disregarded" its order to take possession of the child. It further ordered the Department to reimburse child's attorney in the juvenile proceeding for the time incurred in prosecuting the motion for sanctions and expert's fees. The trial court "refused" the Department's request to reconsider its order. The Department sought mandamus relief.

Personal Jurisdiction

In the court of appeals, the Department first argued that "the trial court's sanctions order [was] void because it [was] predicated on the Department's violations of orders that the trial court entered in the juvenile justice case, in which the Department did not appear as a party." Citing *In re Suarez*, 261 S.W.3d 880, 882-83 (Tex. App.—Dallas 2008, orig. proceeding), the court concluded that a trial court "does not have jurisdiction to enter an order or judgment against a person unless the record shows proper service of citation on that person, an appearance by the person, or a written memorandum of waiver of appearance on or before the date of entry of the order." Here, there were no pleadings in the juvenile proceeding naming the Department as a party to the juvenile proceeding, nor did the record reveal a return of citation or written waiver of citation by the Department implying an appearance. Additionally, the court noted that there was "nothing in the record support[ing] a finding that the Department made a general appearance in the juvenile case."

Child's attorney responded by asserting that the Department's liaison's actions in reporting her efforts within the Department to remove the child from the mother's custody constituted a legal appearance on the Department's behalf. The appellate court rejected this contention stating, "[the Department liaison's] testimony shows that she cooperated with child's attorney and tried to help the Department comply with the trial court's requests, but we reject the contention that her assistance constitutes an appearance through intervention in the pending juvenile justice suit. Instead, the appellate court found that, "the record shows in several places that it was [the child's] counsel that sought the orders from the trial court for the immediate removal of the child; counsel directly acknowledged as much in the sanctions proceedings. The Department did not appear in the juvenile justice proceedings, nor did it ask for affirmative relief from the trial court. Instead, the Department filed its own SAPCR petition seeking removal of the child the next day." Accordingly, the appellate court held "that the trial court lacked personal jurisdiction over the Department in the juvenile case; thus, its orders compelling the Department to act in that case are void."

Subject Matter Jurisdiction

The Department further asserted that the trial court lacked subject-matter jurisdiction to enter the sanction order, "because the court's plenary power had long-expired in the juvenile justice case." In agreeing with the Department, the court reasoned that "judicial action taken after the trial court's plenary power has expired is void". It further explained that a "court cannot issue sanctions order after its plenary power has expired".

Tex. Gov't. Code § 21.001(a) provides that "a court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction." The appellate court recognized that "a trial court has inherent power to sanction bad faith conduct during the course of litigation that interferes with administration of justice or the preservation of the court's dignity and integrity." The court also noted that "the inherent power to sanction, however has limits", and "is not a substitute for plenary power." The court further explained that "the trial court's invocation of its inherent powers does not confer jurisdiction where none exists in the first instance." In concluding that "a court cannot rely on its inherent power to issue sanctions after its plenary power has expired", the appellate court held that "the trial court could not use the SAPCR proceedings as a vehicle to revive its authority to sanction the Department for its conduct in response to the trial court's orders in the juvenile justice case." *In re Tex. Dep't of Family and Protective Servs.*, 415 S.W.3d 522 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding).

> Note: "Mandamus is proper if a trial court issues an order beyond its jurisdiction." *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam). A realtor must show that the court had no jurisdiction over the parties or property, no jurisdiction over the subject matter, no jurisdiction over the parties or property, no jurisdiction over the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).

II. PRE-TRIAL ISSUES

A. ICWA—Involuntary Termination Protections Inapplicable to Parent Who Abandoned Child and Never Had Custody

Father and mother were engaged in December 2008, and one month later, mother told father that she was pregnant. After he learned of the pregnancy, father asked mother "to move up the date of the wedding. He also refused to provide any financial support until after the two had married." Mother ended the engagement in May 2009 because their "relationship deteriorated". In June, mother "sent [] Father a text message asking if he would rather pay child support or relinquish his parental rights" and

father "responded via text message that he relinquished his rights." Mother "then decided to put [the child] up for adoption."

It is undisputed that the subject child is an "Indian child" under ICWA "because she is an unmarried minor who 'is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe'". Child's biological father was "identified" as a "registered member" of the Cherokee Nation.

Mother selected a "non-Indian[]" adoptive couple living in South Carolina to adopt the child. The adoptive couple went to Oklahoma for the birth of the child. The day after the child's birth, mother "signed forms relinquishing her parental rights and consenting to the adoption". A "few days" after returning to South Carolina with the child, the adoptive couple initiated adoption proceedings. About four months after the child's birth, the adoptive couple served father with notice of the pending adoption.

> NOTE: The Court observed that despite having the "ability to do so", father did not provide any "financial assistance" to mother throughout the duration of her pregnancy or for the first four months after the child's birth. The Court stated: "Father 'made no meaningful attempts to assume his responsibility of parenthood' during this period."

The notice provided by the adoptive couple was the first notice father received regarding the adoption proceedings. In response, father "signed papers stating that he accepted service and that he was 'not contesting the adoption.'" However, father subsequently testified that "he thought that he was relinquishing his rights to" mother, not the adoptive couple.

The day after father signed "the papers", he contacted a lawyer who "requested a stay of the adoption proceedings." It was around this time that "the Cherokee Nation identified [] father as a registered member and concluded that [the child] was an 'Indian child' as defined in the ICWA." During the adoption proceedings, in which the Cherokee nation intervened, Father "sought custody and stated that he did not consent to" the child's adoption. At the conclusion of the proceedings, the trial court denied the adoptive couple's adoption petition and awarded father custody because it "concluded that [the a]doptive [c]ouple had not carried the heightened burden under §1912(f) of proving that [the child] would suffer serious emotional or physical damage if [] Father had custody." The South Carolina Supreme Court affirmed the judgment of the trial court.

In its opinion, the South Carolina Supreme Court "determined that the ICWA applied because the case involved a child custody proceeding relating to an Indian child", it "concluded that [] Father fell within the ICWA's definition of a 'parent'", and "held that two separate provisions of the ICWA barred the termination of [] Father's parental rights." The South Carolina Supreme Court "held that [the a]doptive [c]ouple had not shown that 'active efforts ha[d] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family", and it "concluded that [the a]doptive [c]ouple had not shown that [] Father's 'custody of [the child] would result in serious emotional or physical harm to her beyond a reasonable doubt.'"

§1912(f) -- Involuntary Termination

In finding the South Carolina Supreme Court's holding that the adoptive couple "failed to satisfy §1912(f) because they did not make a heightened showing that [] Father's '*prospective* legal and physical custody' would likely result in serious damage to the child" "was error", the United States Supreme Court explained that "§1912(f) provides that '[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.'" The Court explained: "Section 1912(f) conditions the involuntary termination of parental rights on a showing regarding the merits of '*continued* custody of the child by the parent.'" The Court cited to the definition of "continued" as contained in numerous dictionaries and reasoned: "The phrase 'continued custody' therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, §1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child."

The Court explained: "Our reading of §1912(f) comports with the statutory text demonstrating that the primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts." The Court continued: "In sum, when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated." Additionally, the Court reasoned: "Under our reading of §1912(f), [] Father should not have been able to invoke §1912(f) in this case, because he had never had legal or physical custody of [the child] as of the time of the adoption proceedings." Accordingly, the Court held that

"the South Carolina Supreme Court erred in finding that §1912(f) barred termination of [] Father's parental rights."

§1912(d) -- Remedial Services

The Court "disagree[d]" with the South Carolina Supreme Court's finding that father's "parental rights could not be terminated because [the a]doptive [c]ouple had not demonstrated that [] Father had been provided remedial services in accordance with §1912(d)." The Court explained that the subsection "provides that '[a]ny party' seeking to terminate parental rights to an Indian child under state law 'shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed *to prevent the breakup of the Indian family* and that these efforts have proved unsuccessful." The Court reasoned that the "term 'breakup' refers in this context to '[t]he discontinuance of a relationship,' . . . or 'an ending as an effective entity'" and therefore held "that §1912(d) applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights." The Court explained: "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]'—and no 'effective entity' that would be 'end[ed]'—by the termination of the Indian parent's rights." It continued: "Our interpretation of §1912(d) is, like our interpretation of §1912(f), consistent with the explicit congressional purpose of providing certain 'standards for the *removal* of Indian children from their families." Relying on the BIA's Guidelines, the Court stated that the guidelines "confirm that remedial services under §1912(d) are intended 'to alleviate the need to *remove* the Indian child from his or her parents or Indian custodians,' not to facilitate a *transfer* of the child *to* an Indian parent."

The Court explained that its interpretation of §1912(d) was also "confirmed by the provision's placement next to §1912(e) and §1912(f), both of which condition the outcome of proceedings on the merits of an Indian child's 'continued custody' with his parents." The Court reasoned: "That these three provisions appear adjacent to each other strongly suggests that the phrase 'breakup of the Indian family' should be read in harmony with the 'continued custody' requirement." Based on its interpretations, the Court concluded that subsections (d), (e), and (f) do not create "parental rights for unwed fathers where no such rights would otherwise exist." Therefore, Indian parents who are already part of an "Indian family" are provided with access to "remedial services and rehabilitative programs" under §1912(d) so that their "custody" might be "continued" in a way that avoids foster-care placement under §1912(e) or termination of parental rights under §1912(f). In other words, the provision of "remedial services and rehabilitative programs" under §1912(d) supports the "continued custody" that is protected by §1912(e) and §1912(f).

In holding the South Carolina Supreme Court erred in finding that §1912(d) barred termination of father's parental rights, the Court reasoned: "Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families. It would, however, be unusual to apply §1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child." The judgment of the South Carolina Supreme Court was reversed and the case remanded "for further proceedings not inconsistent with this opinion." *Adoptive Couple v. Baby Girl*, 570 U.S. __, 133 S. Ct. 2552 (2013).

> ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and BREYER, JJ., joined. THOMAS, J., and BREYER, J., filed concurring opinions. SCALIA, J., filed a dissenting opinion. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, and in which SCALIA, J., joined in part.

B. TFC § 262.201 — Removal of Child

Prior to the required adversary hearing, the Department removed the child from mother after receiving a report of neglectful supervision, alleging illegal drug use and that there was no food in the house. The removal affidavit indicated that the Department's investigator went to the house and found the child unsupervised, wearing an "extremely soaked" diaper, and sleeping in a bed also soaked with urine. An individual present in the home admitted to using marijuana and law enforcement found marijuana scales and a blowtorch in the home. Mother had history with the Department as a victim child and as a parent. The child had been previously removed after mother "intentionally [cut] her arm with a knife while caring for" the child and tested positive for drugs at the hospital. After mother's release from the hospital, mother was discovered with the child without an approved person supervising the contact. Due to mother's "mental instability, her drug use, and her possibly fleeing the state with [the child]", the child was removed and mother and father were both validated for neglectful supervision. During the conservatorship case, mother completed her services and the child was returned to her care. The Department's removal affidavit then concluded with the language "[a]ll reasonable efforts, consistent with time and

circumstances have been made by the [Department] to prevent or eliminate the need for removal of the child."

At the adversary hearing, the Department's investigator testified that the Department received a referral alleging that there were weapons in the child's house and that the child was found in a "soggy diaper" with colored marker on his arms and legs. The investigator also testified that "the two men in the home were arrested for drug possession." She also explained that mother gave verbal confirmation for the Department to take the child to the Department offices. Mother agreed to submit to a drug test and she tested positive for amphetamine and methamphetamine.

Mother had prior history with the Department, in which the child had been removed from mother's care eight to nine months before this latest incident due to mother testing positive for "illegal drugs". At the time of that removal, the Department "checked to see" if the child's father was a viable placement option, but he was not. The investigator further testified that in this case, "the child was in immediate danger and there were no suitable caregivers", including mother and father, and paternal grandmother was also determined to be an inappropriate caregiver. The investigator also related that although the child had been placed with the maternal great-grandmother during the prior case, she was not considered for placement during this case. Further, the Department did not offer a child safety plan to mother as the investigator stated this "was not an option because of [mother's] history with the Department."

The trial court also heard testimony that in the prior case, the Department became involved when mother was in the emergency room with "cuts on her arm and had tested positive for marijuana, methamphetamine, and PCP." At the time, mother voluntarily permitted the child to live with maternal grandmother and maternal great-grandmother. Father was "determined not to be a viable placement for the child" at that time due to "domestic violence and drug use". The child was subsequently removed "on an emergency basis because [mother] did not follow the safety plan". The child was later returned to mother's care after mother "completed the safety plan".

At the conclusion of the adversary hearing, the trial court found that "there was a danger to the child at the time of the removal and there is a continuing danger to the physical health of the child and that continuation of the child in the home would be contrary to the child's welfare." The trial court further found, "the Department has made those efforts as needed by statute and, under the circumstances, that there was no family placement or other places to place the child that would alleviate the necessity for the removal."

Mother requested mandamus relief asserting that the trial court erred in not returning the child to her at the conclusion of the chapter 262 adversary hearing because there was a lack of evidence of reasonable efforts by the Department to return the child to her. Pursuant to TFC § 262.201(b)(3), the Department is required to provide evidence that "reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home."

In response to mother's argument regarding the lack of evidence of reasonable efforts to return the child to her, the appellate court explained, "Removing a child from his home and parents on an emergency basis before fully litigating the issue of whether the parents should continue to have custody of the child is an extreme measure that may be taken only when the circumstances indicate a danger to the physical health and welfare of the child and the need for his protection is so urgent that immediate removal from the home is necessary." The court further stated that "[u]nless evidence demonstrates the existence of each of the requirements of section 262.201(b), the court is required to return the child to the custody of the parents pending litigation."

If further explained that the Department is excused from its obligation to make reasonable efforts to return a child home only if there is a finding of aggravated circumstances under TFC § 262.2015(a). After enumerating the instances supporting an aggravated circumstances finding the court stated: "In this case, there was evidence of a prior removal, but no evidence of a prior termination." Because none of the evidence at the adversary hearing supported a finding of aggravated circumstances, the Department was required to prove reasonable efforts to return the child home were made under TFC § 262.201(b)(3). In considering the evidence at the adversary hearing, the court noted that at the hearing, the Department "argued that no safety plan was necessary because of [mother's] history with the child's previous removal." The court also considered that in its response filed in the appellate court, the Department "continue[d] to rely on [mother's] positive drug tests and her previous history with removal of the child." Because the evidence of "a previous removal"," without evidence of a "previous termination of another child" does not constitute aggravated circumstances and the evidence demonstrated that the Department did not make reasonable efforts to enable the child to return home, the court held that the trial court would have reached "only one reasonable conclusion—that the Department failed to satisfy the

requirements of Section 262.201(b)(3) and that possession of the child should have been returned to his mother as required under Section 262.201." The court conditionally granted mandamus relief and ordered the trial court to vacate its temporary orders and order the return of the child. *In re Pate*, 407 S.W.3d 416 (Tex. App.—Houston [14th Dist.] 2013, orig. proceeding).

C. Reinstatement of Jury Trial

In a suit involving the termination of her parental rights, mother filed a timely request for jury trial with her original answer. Because mother had completed most of the services required of her, the child was returned to her care. On the Friday prior to the originally scheduled jury trial, mother filed a withdrawal of her jury demand; however, later that same day, the child was again removed from her care because mother: (1) had unauthorized contact with father; and (2) let the child stay overnight with mother's friend without the Department's permission. On Monday, three days after the child was removed, the trial court called the case for final hearing. Mother's counsel informed the court that she was not ready to proceed to trial as the Department's plan had just changed to termination. The trial court granted a one-day continuance and set a new dismissal date in the suit.

The next day, mother's counsel filed a motion for continuance and a motion to revoke the waiver of jury trial. Regarding the jury waiver, mother's counsel argued that the "facts changed considerably" after she had filed her waiver because the child was removed later that same day. The Department argued that mother was "aware" that the Department "had already been moving forward on the termination" "when she filed her jury waiver." The trial court denied mother's revocation, and stated, "Had you told me yesterday morning, I could have had a jury ready to go for trial today. But because I was not informed of this until now, when we've already cancelled the jury, then I'm going to deny the revocation of waiver of jury trial and go forward with the bench trial." However, it granted a six-day continuance to provide mother's counsel more time to prepare for the bench trial. Mother's counsel "once more reurged the jury request, but the trial court stated, 'I believe that you still have 30 days notice.'" A bench trial was held over four different days and concluded more than one month before the dismissal date.

On appeal, mother argued that the trial court abused its discretion by denying her a jury trial. The appellate court agreed, and relied on well-established caselaw that holds that a "request for jury trial made at least thirty days before the date set for trial is presumed to have been made a reasonable time before trial." In finding that the trial court abused its discretion, the court considered the following: (1) mother "made her original jury trial request well in advance of the thirty-day deadline"; (2) "the unusual timing and the circumstances of [the Department's] actions immediately after Mother relinquished that right raise some concerns about due process in light of the strict scrutiny that we apply to termination proceedings"; (3) the trial court denied the request to reinstate the jury trial "apparently under the impression that to obtain a jury trial 'you still have to have 30 days' notice'"; and (4) the trial court "both extended the case's dismissal date and granted a continuance."

The court reasoned that granting of the extension of the dismissal date and a continuance in the case "tend to show that reinstating the jury trial would not have unduly interfered with the docket, delayed the trial, or injured the opposing party, particularly as the trial ultimately concluded over thirty days after Mother reurged her jury request." The appellate court held that "given the constitutional magnitude of the rights at issue, Mother's jury trial should have been reinstated and the failure to do so, despite extending the case's dismissal date and granting a continuance, constituted an abuse of discretion." The case was reversed and remanded for new trial because the trial court's error was not harmless due to the "conflicting evidence regarding Mother's ability and intent to be protective of the child—a major material fact issue and one that pertains to the grounds for termination found be the trial court and challenged by Mother on appeal." *In re P.L.G.M.*, No. 02-13-00181-CV (Tex. App.—Fort Worth Nov. 7, 2013, no pet.) (mem. op.).

D. Bench Warrant—Granting of First Motion Does Not Mandate Inmate's Right to Appear

Father was incarcerated throughout the entirety of his termination case. For the initial trial setting, father requested, and was granted, a bench warrant for father's participation "*via video-link*" at trial. Father's bench warrant motion "set forth why [Father's] personal participation was important, what his testimony would be, and how it would be relevant to the matters at hand." Father also filed several letters with the court regarding his "love for his son, his desire for the child's placement with one of [his] family relatives, and his attempts to comply with the court-ordered service plan." At the time of the request, father was incarcerated in San Antonio. The trial was subsequently reset and "the trial court signed a new bench warrant order" ordering the Bexar County Sheriff's Office "to produce" father "in person" for the second trial.

Prior to this second trial setting, father was transferred to a facility in Oklahoma City and then subsequently transferred to another facility in another state. Neither father's attorney nor the Department caseworker were made aware of the transfer, the date of the transfer or the name of the facility to which father was moved. Based on the father's absence and lack of contact with his trial counsel, the trial court again "postponed" the trial date for one month. The appellate court noted "[t]he record does not contain any request for the trial court to issue a new bench warrant for [Father's] appearance, either in person or by video link, at the last scheduled hearing." Upon commencement of the trial on the merits, father's attorney again announced "not ready" because father was "not present." The trial court "denied the 'not ready' announcement" and proceeded with the trial on the merits.

On appeal, father alleged that the trial court erred by failing to issue a new bench warrant for his appearance at the trial on the merits because it had previously "granted a bench warrant for the original hearing date." Father argued "that when the trial court discovered the State's failure to produce [Father] pursuant to the bench warrant, the trial court should have reset the matter and compelled the State to comply with the July 3, 2013 bench warrant to appear or at least procure [Father's] testimony by some other means." The Department argued that father's attorney "never sought a new bench warrant for the [trial on the merits]". Relying on *In re Z.L.T.*, 124 S.W.3d 163 (Tex. 2003), father asserted that litigants cannot be denied access to the courts simply because they are inmates. The court construed father's argument to raise the issue of "whether the [initial] bench warrant [order] is evidence of the trial court's previous determination that [Father's] presence was required."

Father's reliance on *Z.L.T.* failed to take into consideration that *Z.L.T.* also holds that "an inmate does not have an absolute right to appear in person in every court proceeding" and "the inmate's right of access to the courts must be weighed against the protection of the correctional system's integrity." The appellate court looked to the *Z.L.T.* factors which are to be considered when a bench warrant is requested. The *Z.L.T.* factors include: (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's resolution can reasonably be delayed until the prisoner's release; (5) whether the prisoner can and 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 a jury; and (8) the prisoner's probability of success on the merits. The court reiterated that *Z.L.T.* also holds that the "inmate further bears the burden to justify the necessity of his presence by producing the information showing the above-listed factors."

Accordingly, the court rejected father's argument and explained that "[w]ithout further evidence as to the judge's reasons, for issuing the previous bench warrant or the location and costs associated with procuring [Father's] testimony at the time of the [trial on the merits], we cannot assume the trial court would have made the same determination with regard to signing an application for a bench warrant."

The court noted that during the originally requested bench warrant, father was being held in a facility in San Antonio; therefore, "the cost of procuring [father's] presence was minimal." In contrast, during the trial on the merits, father was being held in another state. The court also considered that the record supports "(1) that the trial court took judicial notice of the letters and statements written by [Father] and proffered by his counsel and (2) that [Father] was represented at all hearings by counsel. Further, father's trial "counsel neither suggested that [Father's] testimony would have been different than the copious letters included in the record nor made an objection to the trial court's failure to order a new bench warrant."

The appellate court held that the trial court's decision to issue a bench warrant for the prior hearings "does not mandate a conclusion that the trial court's subsequent decision to proceed on the . . . termination hearing in [father's] absence, when no bench warrant was requested, was an abuse of discretion." *In re R.F.*, III, 423 S.W.3d 486 (Tex. App.—San Antonio 2014, no pet.).

E. TFC § 153.0071 — Mediated Settlement Agreement

Prior to trial on a petition to modify a conservatorship order, mother and father executed a mediated settlement agreement (MSA), which gave father the right to designate the child's primary residence and gave mother periodic access and possession. The MSA contained restrictions placed on mother and her new husband which "enjoined him from being within 5 miles" of the child. Father appeared before an associate judge to present and prove up the MSA. During father's testimony in support of the MSA, the associate judge inquired about the injunction regarding mother's husband. Father informed the court that mother's husband was a registered sex offender, who "violated conditions of his probation with [the child] in the house" and that mother's husband "slept naked in bed with

[the child]." Mother did not attend the hearing and was not able to respond to these allegations. After the associate judge refused to enter judgment on the MSA, father filed a written motion withdrawing his consent to the MSA and mother sought to have the district court enter judgment on the MSA.

At the hearing on mother's motion to enter judgment on the MSA, the district court heard that the father had not been a victim of family violence. In addition, the trial court considered testimony regarding whether the MSA was in the child's best interest. The court heard testimony about mother's husband's status as a registered sex offender. Mother testified that, in 2009, her husband was served with a violation of his deferred adjudication because of his contact with the child. Mother also admitted that, although her husband was placed on additional probation conditions in 2011, she allowed him to have contact with the child and to reside in the same house with her and the child in violation of those conditions. Mother specifically denied that she ever allowed her husband to take care of the child without her supervision. Father testified that he knew about mother's husband's status as a registered sex offender, but he did not repeat the allegation that the husband had slept naked with the child. After hearing the testimony, the trial court denied mother's motion to enter judgment concluding that entry of the MSA was not in the child's best interest.

Mother petitioned the court of appeals for a writ of mandamus ordering the trial court to enter judgment on the MSA. She argued that the trial court "lacked discretion to refuse judgment based on the best interest determination." The court of appeals disagreed and held "that the trial court [did] not commit[] a clear abuse of discretion in refusing to enter judgment on a mediated settlement agreement that is not in the child's best interest."

Mother sought mandamus relief from the Texas Supreme Court, contending that the trial court abused its discretion in refusing to enter the MSA because under TFC § 153.0071, she was "entitled to judgment on the [MSA] because it complied with the statutory requirements." She further argued that "a court may refuse to enter judgment on a properly executed MSA only when the family violence exception is met and the court finds that the MSA is not in the child's best interest."

In response, Father argued that "despite section 153.0071's plain language, 'nothing precludes the court from considering the best interest of the child, including a request for entry on a mediated settlement agreement.'" Father also contended that: (1) TFC § 152.002 mandates that "[t]he best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession"; (2) entry of judgment on an MSA that is not in the child's best interest violates public policy and is unenforceable; and (3) trial courts have discretion to void all or part of an MSA that is not in the child's best interest.

The Court reiterated that TFC § 153.0071(d) provides that an MSA is binding on the parties if it is signed by each party and by the parties' attorneys who are present at the mediation and states prominently and in emphasized type that it is not subject to revocation. TFC § 153.0071(e) provides that a party to an MSA is "entitled to judgment" on the MSA if it meets subsection (d)'s requirements. Finally, TFC § 153.0071(e-1) provides a narrow exception to subsection (e)'s mandate and allows a court to decline to enter judgment on a statutorily compliant MSA if a party to the agreement was a victim of family violence, the violence impaired the party's ability to make decisions, and the agreement is not in the best interest of the child.

The Supreme Court recognized that father was correct that TFC § 153.002 provides that "the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." However, the Court also noted that "section 153.0071(e) reflects the Legislature's determination that it is appropriate for parents to determine what is best for the children within the context of the parents' collaborative effort to reach and properly execute an MSA."

The Supreme Court concluded that "as is relevant to section 153.0071, the MSA is signed by the parties and their lawyers, and it did display in boldfaced, capitalized, and underlined letters that it is irrevocable; thus it meets the statutory requirements described in the statute to make the agreement binding on [mother] and [father]." Additionally, the Court found that the parties admitted that father was not a victim of family violence, and "thus the exception in subsection (e-1) does not apply." The Court held that because the trial court denied the motion to enter judgment based solely on the court's conclusion that the MSA was not in the child's best interest "the court's actions were an abuse of discretion." The Court conditionally granted mandamus relief and ordered the trial court to withdraw its order denying entry of judgment on the MSA. *In re Lee*, 411 S.W.3d 445 (Tex. 2013) (orig. proceeding); *see also In re J.A.S.C., J.A.L.C., N.D.C, and G.S.C*, No. 05-13-01577-CV (Tex. App.—Dallas Apr. 22, 2014, no pet. h.) (mem. op.) (holding that because no allegation of family violence was made, trial court was

required to enter judgment on MSA without determination of whether it was in children's best interest).

NOTE: A concurring opinion and a dissenting opinion were also issued. In her concurring opinion, Justice Guzman agreed with the dissent that TFC § 153.0071 "precludes a broad best-interest inquiry. A trial court may, however, when presented with evidence that entering judgment on an MSA could endanger the safety and welfare of a child, refuse to enter judgment on the MSA." In this case, she found the evidence legally insufficient to support an endangerment finding.

In a dissenting opinion, Justice Green, joined by Chief Justice Jefferson and Justices Hecht and Devine, stated that: (1) pursuant to TFC § 153.002 "The best interest of the child shall always be the primary consideration of the court"; and (2) under TFC § 153.0071 and "the Family Code as a whole", a trial court has discretion to refuse to enter judgment on a modification pursuant to an MSA that could endanger a child's safety and welfare.

F. TFC § 161.2011 v. TFC § 263.401

Father was incarcerated at the time of trial. He filed a motion to extend the dismissal deadline and a motion for continuance of the final hearing. In his motions, father stated that he "was in jail, where he had been the entire time this case was pending, but that he expected the criminal charges against him to be disposed of soon" and "that DNA testing had not been completed". Father offered no evidence or testimony in support of his motion. The trial court denied father's motion for extension but postponed the trial for 18 days pending the outcome of the DNA testing. Trial was held six days before the dismissal deadline. On appeal, father's complaints included an assertion that the trial court abused its discretion by denying his motions "based upon the impending resolution of his criminal charges." In holding that the trial court did not abuse its discretion in denying father's motion for extension, the court discussed TFC § 263.401's dismissal deadline provisions and stated that "[a] trial court has discretion to grant an extension, but the language in *Section 263.401* 'prefers finality to suit.'"

The court also considered father's complaint under TFC § 161.2011(a), which "authorizes a trial court, in its discretion, to grant a motion for continuance filed by a parent 'against whom criminal charges are filed that directly relate to the grounds for which termination is sought.'" The court continued: "The case may be continued 'until the criminal charges are resolved,' but the trial court nevertheless 'shall comply with the dismissal date under *Section 263.401*.'" In rejecting father's complaint, the court explained: "the father's reliance on Section 161.2011(a) is misplaced because a trial court, '[n]otwithstanding any continuance granted,' must comply with *Section 263.401*'s dismissal guidelines". *In re K.L.E.C.*, No. 11-13-00159-CV (Tex. App.—Eastland Nov. 14, 2013, no pet.) (mem. op.).

III. TRIAL PRACTICE

A. TRE 612(2)—Writings Used to Refresh Memory

A testifying counselor admitted to reviewing her notes prior to trial, and mother's attorney asked to see the notes pursuant to TRE 612(2). The trial court denied this request. On appeal, mother complained that the trial court erred in not allowing her trial counsel to review the therapist's notes made in preparation for her testimony "because she was entitled to review them."

The court explained that TRE 612(2) provides that "[i]f a witness uses a writing to refresh her memory, an adverse party 'is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.' In civil cases where the witness refreshes their memory before testifying, the trial court has discretion to allow an adverse party to review the writing if it is 'necessary in the interests of justice.'"

The court of appeals expounded that because the counselor reviewed her notes prior to testifying, the trial court had discretion to deny mother access to the notes unless such a review was "necessary in the interests of justice." The court further considered the trial court's statement that the therapist's "notes were cumulative of testimony that had already been presented", and also noted the therapist's testimony was likewise cumulative. The appellate court concluded that the trial court's denial of mother's request to view the counselor's notes was not "arbitrary or unreasonable" and therefore, "the trial court did not abuse its discretion in denying [mother's] request." *In re H.L.B., T.K.B., and C.L.B.*, No. 01-12-01082-CV (Tex. App.—Houston [1st Dist.] July 23, 2013, no pet.) (mem. op.).

IV. EVIDENTIARY ISSUES

A. Fifth Amendment Assertions

"In a civil action, a jury may draw an adverse inference against a party who pleads the *Fifth Amendment*. . . .

Refusal to answer questions by asserting the privilege is relevant evidence from which the finder of fact in a civil action may draw whatever inference is reasonable under the circumstances. . . . Here, the jury was entitled to draw an adverse inference from Mother's refusal to answer questions concerning the fact of her incarceration and the reason for her incarceration." *In re Z.C.J.L. aka Z.C.J.V.*, Nos. 14-13-00115-CV, 14-13-00147-CV (Tex. App.—Houston [14th Dist.] July 9, 2013, no pet.) (mem. op.).

B. TRE 803(6) — Personal Knowledge of Record Contents Not Required

Following a jury trial in which mother's parental rights were terminated, mother complained that the trial court erred by admitting several reports prepared by Adult Protective Services (APS) caseworkers. The challenged reports regarded investigations of allegations that mother suffered from physical and medical neglect, exploitation, and homelessness in the two years preceding the child's birth.

Mother argued that the sponsoring witness failed to meet the business-records exception to the hearsay rule under TRE 803(6) because he had prepared only some of the reports and lacked personal knowledge of those he had not prepared. The court disagreed, explaining that TRE 803(6) does not require the sponsoring witness, whether the custodian of the records or other qualified witness, to create the records or have personal knowledge of the content of the records. Rather, the sponsoring witness need only have "personal knowledge of the manner in which the records were prepared." The court held that because: (1) the record showed the sponsoring witness caseworker adequately established his knowledge of the manner in which the reports were prepared; and (2) the caseworker's supervisor also testified that all of the challenged reports were prepared according to standard APS procedures, the reports were admissible under TRE 803(6). *T.V.N. v. Tex. Dep't of Family and Protective Servs.*, No. 03-13-00806-CV (Tex. App.—Austin Mar. 27, 2014, no pet. h.) (mem. op.).

C. TRE 603—Truth, Oath, or Affirmation

Father filed a petition to modify the custody provisions contained in a prior divorce decree. The child's testimony was taken by recording. TFC § 104.003 provides, in part, that "[t]he court may . . . order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court . . . ." TRE 603 requires that "before testifying, every witness is required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."

In the child's recorded testimony, father's attorney began questioning the child without any oath or admonishment, and the child was not asked if he understood his responsibility to be truthful while giving testimony. Shortly before commencement of trial, the trial court ruled that the child's recorded statement was inadmissible hearsay because no oath was administered and no preliminary questions were asked of the child to elicit any indication he understood his testimony had to be truthful.

The court explained that "[t]he reliability of a child witness's testimony may be assured absent a face-to-face encounter through the combined effect of the witness's testimony under oath (or other admonishment) appropriate to the child's age and maturity to testify truthfully and cross-examination." The court also stated "[b]efore a child's recorded statement may be admitted into evidence there must be a showing of competence at the time the testimony is given and a showing that an oath was given or some discussion had with the child about the issue of truthfulness." Father pointed to excerpts from the child's statement "which he asserts reflect [the child's] understanding of the difference between a lie and the truth." However, the court determined that was insufficient, as nothing in the transcript of the child's statement indicated any of the attorneys present impressed upon the child the duty to be truthful or that there was an oath administered. The court held that because the trial court's ruling was consistent with guiding rules and principles, the trial court did not abuse its discretion in excluding the child's recorded statement. *Nichol v. Nichol*, No. 07-12-00035-CV (Tex. App.—Amarillo Jan. 15, 2014, no pet.) (mem. op.).

V. TERMINATION GROUNDS

A. TFC § 161.001(1)(C)

In 2011, mother and father signed a written authorization for the child, who was living with them in Indiana, to live with his adult half-sister in Texas for two months. The child's half-sister had concerns about the child's well-being because mother and father lived in a "dirty and cluttered residence", father was a "heavy alcoholic" and mother was "not taking her medication for mental illness", and mother and father were unstable in their residence and employment. Upon attempting to return the child to father and mother, father refused to tell the half-sister where he and mother were. The half-sister contacted Indiana CPS and was advised that "because [mother] and [father] had . . . abandoned [the child] into [her] care", to contact CPS in

Texas, which she did. Because the child's half-sister could no longer care for the child, and because mother and father did not come to Texas to retrieve the child, the Department filed for conservatorship.

At trial, the first Department caseworker testified that she was assigned to the case for seven months following the child's removal and that she had difficulty locating mother because she was "very transient" and "was often in various psychiatric hospitals." She also testified that she was only able to speak to mother one time during the case, when mother was "in an Indiana psychiatric hospital and was not coherent." The second Department caseworker was assigned to the case for the nine months preceding trial, and testified that she only had four telephone contacts with mother, who would quickly end calls. Mother failed to contact or visit the child during the case, did not come to Texas, and did not appear at trial.

On appeal, the court addressed mother's challenge to the jury's termination of her parental rights under TFC § 161.001(1)(C). TFC § 161.001(1)(C) provides for the termination of parental rights if the parent has "voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months."

Mother only challenged the sufficiency of the evidence supporting the jury's finding that she did not provide adequate support for the child for at least six months. Specifically, she argued that the trial court did not order her to pay child support and the Department never requested that she pay child support. The court rejected this argument, explaining that while a parent "is not required to 'personally support' the child, an abandoning parent does not provide adequate support if she does not 'make arrangements' for the child's adequate support." Mother argued that she made arrangements for the child's support by entering into an agreement with the half-sister to care for the child. However, that agreement was only for two months. When mother was notified the child was in the Department's care, she did not make any support payments, and did not provide any diapers, food, or other necessities. Mother never made arrangements for the child's support.

Mother also argued that there was no evidence of her ability to pay support. The court also rejected this contention and explained that proving a parent's ability to pay support is not a requirement under (C) and is required only under TFC § 161.001(1)(F). Accordingly, the evidence supporting termination under (C) was legally and factually sufficient. *In re C.L.B.*, No. 10-13-00203-CV (Tex. App.—Waco Feb. 20, 2014, no pet.) (mem. op.).

> NOTE: TFC § 161.001(1)(F) provides for the termination of parental rights if the parent has failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition.

B. TFC § 161.001(1)(D)

1. Knowledge of Parent's Drug Use

Father challenged the legal and factual sufficiency of the evidence supporting termination of his parental rights under (D). TFC § 161.001(1)(D) provides that a court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child.

Father and mother were not married and did not live together when the child was born. The Department received a referral alleging neglectful supervision by mother when the child was nine months old. The referral alleged that the child was injured while in mother's care when she "was under the influence of drug(s)." The case was referred to Family Based Safety Services; however, the Department filed a termination petition six months after it received the referral.

Mother had an extensive history of drug use and criminal convictions dating back to 1992, including two convictions for prostitution. A friend of mother's, who "she met through prostitution", testified that she and mother used drugs and that father paid mother for sex. The friend testified that she and mother used drugs at the house numerous times while father "was in the back room." The friend also testified that father knew she and mother were using drugs. However, mother testified that father did not know about her and her friend's drug use in the home. Father also testified that he did not know of mother's drug use and he "never felt that [the child] was in danger in Mother's care, and he never made any steps to remove [the child] from Mother's care."

Father claimed that the Department failed to produce "any evidence" of his actual awareness of mother's drug use because he testified that he did not know of mother's drug use, mother's friend testified that he was "in the back room" when she and mother were doing drugs, and mother testified that "she did not think" father knew they were using drugs in his home. The court explained that

"Subsection D is not a basis for terminating parental rights if the parent was unaware of the endangering environment. . . . However, a parent need not know for certain that the child is in an endangering environment; awareness of such potential is sufficient."

In looking to mother's friend's testimony that father knew that she and mother were using drugs, the court affirmed the termination of father's parental rights under (D) and held that "[o]ne parent's drug-related endangerment of the child may be imputed to the other parent". *In re Z.C.J.L. aka Z.C.J.V.*, Nos. 14-13-00115-CV, 14-13-00147-CV (Tex. App.—Houston [14th Dist.] July 9, 2013, no pet.) (mem. op.).

2. Actual Knowledge Not Required

The evidence at trial demonstrated that while in his parents' care the child sustained multiple serious injuries. The mother testified that, in early July, the child started crying when she would pick him and that his shoulder appeared to hurt him. Mother testified that after a few days of crying he would "be over it" but that in mid-July he started crying again, so she took the child to the hospital for a shoulder x-ray. The doctors that examined the child's x-rays discovered the multiple serious injuries, including fractures in various stages of healing and subdural haemorrhaging that had filled the child's fontanel with blood and required the child's admission to the intensive care unit. Both of the child's femurs were fractured near the growth plate at the knees, he had a fracture in the scapula of his left shoulder and he experienced trauma causing extensive bruising across his shoulders and back and on his legs. The parents were unable to explain the subdural haemorrhaging or fractures. Father testified he did not know that the child had these injuries until he was taken to the hospital. And both parents claimed that the child bruised easily. Both parents denied knowing what caused the child's injuries. In later interviews, mother speculated that the child could have hit his head on the crib or that his cousin "may have hurt" the child, but conceded that the cousins had never been left alone with the child. The expert witnesses ruled out the possibility that these kinds of incidents could have caused the child's injuries. Expert testimony also eliminated the possibility that any underlying medical condition could have caused the child's injuries.

On appeal, mother and father challenged the sufficiency of the evidence supporting the termination of their parental rights under (D). They argue that there was no evidence showing that either parent was the one that injured the child. Further, mother and father relied on the Department caseworker's testimony that she did not know who caused the child's injuries.

The appellate court explained that, "it is true that no direct evidence identifies one parent as the perpetrator of the injuries to [the child]. Strong circumstantial evidence, however, supports the trial court's findings on these issues." Specifically, the evidence showed that: (1) both parents cared for the child and were the child's sole caregivers; (2) the child suffered multiple serious injuries—fractures to both legs, one shoulder and skull fractures—inflicted on different occasions while in the parent's care; and (3) the medical expert opined that the child would have exhibited considerable discomfort and pain that a reasonable caregiver would not have ignored and would have sought prompt medical treatment.

Both parents denied harming the child, denied knowledge of the other parent harming the child and denied any awareness of most of his injuries before he arrived at the hospital. In contrast, the medical expert testified that the parents' "explanations" for the possible causes of child's injuries and their proffered reasons for delay in seeking medical treatment were "implausible." The appellate court held that the trial court reasonably could have resolved this controverted evidence by not crediting the parent's explanations. The court found the evidence legally and factually sufficient to support the trial court's (D) finding. *In re B.R.; In re I.R.*, Nos. 01-13-00023-CV, 01-13-00024-CV (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.) (mem. op.).

3. Child Removed from Hospital

In a suit involving two of mother's and father's seven children, the older child in the case was removed based on "continuing violence and alcohol abuse" in mother's and father's home and substantiated findings of "physical abuse and neglectful supervision of [the child]." Three months after the older child's removal and during the pending Department case, the younger child was born. The Department was named temporary managing conservator of the younger child prior to the child's release from the hospital and the child was placed in a foster home. Mother's and father's parental rights were terminated as to both children pursuant to findings under TFC § 161.001(1)(D), (O), and a finding that termination is in the children's best interest.

On appeal, the court considered mother's and father's challenge to the sufficiency of the evidence supporting the trial court's (D) finding. Citing well-established case law, the court reiterated that "endangerment may be established by the parent's actions before the child's birth, while the

parent had custody of older children." The court further relied on precedent which held that "[a]busive or violent conduct by a parent can produce an environment that endangers the physical or emotional well-being of a child and can, therefore, support a finding under section 161.001(1)(D)."

The court considered that the "record in this case is replete with instances where [mother and father] acted violently" and that there were numerous reports of mother's and father's "domestic violence, alcohol use, and physical abuse" against the older children. Further, the court considered mother's and father's statements to others that there was violence in the family home, as well as the children's statements that the violence was "pretty aggressive" and there were "lots of occasions where the children could have been physically injured."

Based on this evidence, the appellate court found that "the trial court could have formed a firm belief or conviction that there was a pattern of domestic violence, alcohol abuse, and physical violence against the children in the family home" and that "such a pattern can produce an environment that endangers the physical or emotional well-being of a child that will support a finding under section 161.001(1)(D)." The order of termination was affirmed as to both children. *In re R.B.*; *In re A.B.*, Nos. 07-13-00101-CV, 07-13-00102-CV (Tex. App.—Amarillo Aug. 12, 2013, no pet.) (mem. op.); *but see In re N.M.*, No. 07-13-00325-CV (Tex. App.—Amarillo Feb. 21, 2014, no pet.) (mem. op.) (evidence legally and factually insufficient to support (D) finding where "[the child] was removed from [mother] in the hospital when she was three days old and was placed with foster parents chosen by the Department. [The child's] 'conditions or surroundings' were dictated by the Department at all times relevant to the underlying proceeding.").

C. TFC § 161.001(1)(E)

1. Domestic Violence, Suicidal Ideations, Gang Affiliation, and Failure to Complete Services

The Department became involved after father threw one of the children out of a car because he did not want to take the child to run errands with him. The child sustained injuries and had to be taken to the hospital. In addition to this event, the referral received by the Department indicated that there was a history of domestic violence and drug use in the home. The trial court appointed the Department the children's temporary managing conservator and ordered mother and father to participate in the Department's service plan. Father was found guilty of injury to a child for throwing the child out of the car.

Mother's and father's parental rights were terminated under TFC §§ 161.001(1)(D), (E), and (O). TFC § 161.001(1)(E) provides for termination if a parent engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangered the physical or emotional well-being of the child.

The appellate court found that the jury could have considered, in part, the following evidence to support termination under (E): (1) a pattern of domestic violence between mother and father while the children were present and failing to "shield" the children from the violence; (2) mother committed acts of violence, including attacking her uncle with a knife; (3) mother threatened to commit suicide during the case; (4) father was either a member of, or associated with, a gang that threatened mother; (5) mother had accused gang members of raping her; (6) father's gang affiliation was a threat to the children; and (7) neither mother nor father completed their court-ordered services. The court affirmed the jury's verdict of termination. *In re A.M. and C.M.*, No. 13-12-00767-CV (Tex. App.—Corpus Christi May 9, 2013, no pet.) (mem. op.).

2. Emotional Abuse

The Department received a referral alleging sexual abuse of the child by her step-father. The child was staying with biological father when she made an outcry that it "burned when she went to go pee pee" and that step-father "touched her between her legs and used his two fingers." The child told the Department caseworker that step-father touched her private area with "two hands."

Mother told the Department caseworker that she did not believe the child was telling the truth, even though she also stated the child had previously reported that she had pain in her private area. Mother had put "rash cream" on the child's private area, but did not take her to a doctor. The Department caseworker also spoke with the principal at the child's school, who reported that mother told him she believed step-father over the child. Mother admitted that she told both the Department caseworker and the school principal that she did not believe the child.

During a supervised visit with the children following their removal, mother and the children's grandmother tried to get the child to recant her allegations of sexual abuse by telling the child that mother and step-father "would both go to jail." The child "became upset and started crying."

A doctor examined the child following removal. The child told the doctor that step-father put his hand inside her front private area. The doctor testified that her physical examination of the child was consistent with the child's outcry. The doctor also examined the child's younger sibling, and that child's behavior caused the doctor to be concerned that she also was a victim of sexual abuse.

Step-father was investigated and subsequently convicted of aggravated sexual assault and two counts of indecency with a child for his abuse of the child and her sibling. Mother told the detective assigned to the criminal investigation that "she refuses to believe that [the abuse] happened."

Testimony from two psychologists at trial demonstrated that mother had a history of past sexual abuse, and "continue[d] to get involved with persons who engage in sexual abuse". One psychologist testified "that it appeared that [mother] was aware that [step-father] sexually abused the children because [the child] reported that [mother] saw [step-father] touching [the child's sibling] and said 'get out of my baby.'"

The appellate court considered the fact that mother "refused to believe the allegations of sexual abuse against" step-father, called the child a liar, and made the child cry while attempting to get the child to recant her abuse allegation. The court also noted that the Department caseworker testified that mother's behavior was emotionally abusive, and there was testimony at trial which indicated mother was aware that step-father took inappropriate photos of the child.

The court determined that a reasonable factfinder could have determined that mother endangered the children, pursuant to TFC § 161.001(1)(E). The court held that mother "was not supportive of [the child] as a sexual abuse victim and did not believe that sexual abuse of [the child or her sibling] occurred . . . [Mother] was emotionally abusive in trying to get [the child] to recant the allegation of abuse." The court accordingly affirmed the trial court's termination of mother's parental rights under subsection (E). *In re C.M., J.G., and A.G.*, No. 10-13-00080-CV (Tex. App.—Waco Aug. 29, 2013, no pet.) (mem. op.).

3. Failure to Visit Children Constitutes Endangering Conduct

The child was removed from mother's care due to her drug use during pregnancy and her continued drug use during the Department's investigation. Throughout the case, mother continued to test positive for drugs or miss drug tests. At trial, mother's parental rights were terminated.

On appeal, mother contended that the evidence was legally and factually insufficient to support the trial court's finding under TFC § 161.001(1)(E), that she had engaged in conduct, or knowingly placed the children with persons who engaged in conduct that endangered the physical or emotional well-being of the children. The appellate court disagreed, considering *inter alia*, that "it was the Department's policy not to allow visitation when a parent has a positive drug test" and that mother "did not participate in visitation with her children from April 2010 through May 2011 because of her failure to submit to drug testing or because of positive drug test results."

Based on mother's lack of participation in visitation and her drug use, the court concluded that mother created an "unstable home life [that] subjected the children to a life of uncertainty and instability", supporting the trial court's (E) determination. *In re J.M. and Z.M.*, No. 12-11-00319-CV (Tex. App.—Tyler Oct. 16, 2013, pet. denied) (mem. op.); *see also In re O.R.F.*, 417 S.W.3d 24 (Tex. App.—Texarkana 2013, pet. denied) (court considered that mother "did not visit the child for an extended period" in its (E) analysis); *In re M.C.D. and J.N.D.*, No. 02-13-00061-CV (Tex. App.—Fort Worth July 18, 2013, pet. denied) (mem. op.) (in its (E) analysis, court considered that mother "attended only three visits with the children"); *In re M.M.*, No. 13-13-00543-CV (Tex. App.—Corpus Christi Mar. 6, 2014, no pet.) (mem. op.) (under (E), court considered mother failed to visit child for three years and "admitted she did not even know what [child] looked like anymore").

4. Parent's Mental Illness

After the child's birth, mother began acting irrationally. The manager of mother's apartment complex reported that mother would dig holes, put "graves" outside of other tenants' apartments, take other tenants' clothing, walk late at night and knock on other tenants' doors, put knives in the windows, and some tenants reported feeling threatened and unsafe. Due to mother's erratic behavior, a mental health warrant was issued. Mother was placed in a psychiatric hospital, and the child was placed with family. Approximately ten days later, the child was returned to mother, who agreed to participate in Family Based Safety Services, which included participating in counseling and taking her prescribed medication.

For nine months, mother did not take her prescribed medication, and her mental condition continued to

deteriorate. Mother had repeated contact with law enforcement. On one occasion, mother and the child were found "in a back closet of a house that was being renovated." The child was removed and placed in foster care. Another time, mother was found inside a laundry room of another house, dirty and covered in mosquito bites. Mother believed that someone bought the house for her, that there were helicopters chasing her, and that someone was "putting voodoo" on her. Mother was next found in the carport of another house, carrying a mop, bucket, and broom, and she became combative when confronted by police. Mother was later discovered living in an unused part of a church. Following each of these incidents, mother was arrested and cited for criminal trespass. Mother was also issued a criminal trespass warning after she was discovered hiding in the office of her physician, to whom she had been writing love letters.

The Department investigator testified that mother exhibited delusional and paranoid behavior, including reporting that helicopters were chasing her and the child, that a neighbor, whom she claimed to be her twin sister, was casting spells on her, and that "God told her the spells were going to go away."

A psychologist diagnosed mother with anxiety disorder, depressive disorder, delusional disorder, borderline intelligence functioning, problems with primary group support and employment, and a low general functioning level. Mother's psychologist was concerned about mother's delusions and testified that mother "repressed and denied her psychological issues, thereby making it improbable that she would pursue effective treatment."

A psychiatrist diagnosed mother with psychosis, schizophrenia, or bipolar disorder. Mother initially refused to take medication, as she did not believe she needed it. Although she later agreed to take her medication, she did not return for her next two appointments. As a result, the psychiatrist did not believe mother was taking her medication.

On appeal, mother challenged the legal and factual sufficiency of the evidence supporting the jury's finding that she violated TFC § 161.001(1)(E). The court held that the jury could have concluded mother failed to recognize her own mental health issues, refused to take her prescribed medication, was mentally unstable. The court also pointed out that mother had "persistent delusions about her physician, a twin sister, 'spirits,' and being chased by people and helicopters, thereby putting herself and her daughter in danger when she sought shelter in another person's home." The court concluded that "[f]rom this evidence, the jury could have determined that [mother's] history of delusional behavior, lack of insight into her mental condition, and failure to properly seek treatment and take medication subjected [the child] to a life of uncertainty and instability that endanger[ed] her physical and emotional well being." *In re L.K.*, No. 12-13-00201-CV (Tex. App.—Tyler Dec. 4, 2013, no pet.) (mem. op.).

D. TFC § 161.001(D) and (E) — Limited Mental Capacity

Mother had an IQ of 62, which "falls into the lower extreme range of general intelligence." In challenging the termination of her parental rights under (D) and (E), mother argued on appeal that "her low IQ rendered her incapable of knowing and recognizing any danger" to the child. The evidence at trial demonstrated that mother and father allowed the child to remain in unsanitary conditions just two weeks after the child's birth. "The [hotel] room was in complete disarray, clean clothes were mixed in with dirty clothes, and animal feces were visible on the floor. Moreover, the room smelled of smoke, mold, urine, and feces."

In its analysis, the court considered that mother and father recognized that the child's living conditions were "not fit for a newborn"; however, "neither parent took any affirmative steps to try and remedy the deplorable conditions." It also considered that, "both parents acknowledged they were possibly putting [the child] in a dangerous situation by co-sleeping. . . . Mother admitted co-sleeping was dangerous, but she did it anyway." Finally, the court looked to evidence that mother and father "hesitated in considering [the child's] medical needs. Father and Mother initially expressed a negative reaction when told [the child] needed to wear a helmet because of a lump in his skull. They said 'a boy does not need a helmet.'" The court rejected mother's argument and held that "limited mental capacity does not, as a matter of law, negate a parent's ability to knowingly neglect their child." The court concluded that the evidence was sufficient to support termination under (D) and (E). *In re A.T.*, 406 S.W.3d 365 (Tex. App.—Dallas 2013, pet. denied).

E. TFC § 161.001(1)(L)

TFC § 161.001(1)(L) provides for termination of parental rights of a parent who has been convicted or placed on community supervision for the serious injury of a child under specified sections of the Texas Penal Code, including section 21.11 (indecency with a child). The trial court terminated father's parental rights to the child under this subsection.

The record contained a judgment documenting father's conviction and five-year sentence for indecency with a child. Father argued that the record contained no evidence that the offense caused serious injury to the child victim. At trial, father stated that the victim of the offense was the nine-year-old daughter of a woman he dated. Evidence admitted at trial included the stipulations father signed in connection with his guilty plea, the offense report, and statements by the victim and her mother. The offense was reported after the victim removed her blouse at her daycare. The investigating officer noted that the victim became "withdrawn and quiet" when questioned, and that because she was "under some type of stress", he would not proceed further with her statement.

Because "serious injury" is not defined in the Family Code, the court adopted the definition of "serious injury" recently used by the Houston Fourteenth Court, and agreed "that 'serious' means 'having important or dangerous possible consequences,' while 'injury' means 'hurt, damage, or loss sustained.'" The court reasoned: "[a]ssuming the record must show that the victim of molestation suffered serious injury, in this case, the victim's actions at her daycare as a consequence of the offense and her reaction while being questioned are sufficient evidence of serious injury", and concluded that the evidence was legally and factually sufficient to support the finding that father violated TFC § 161.001(1)(L). *In re M.L.R.*, No. 04-13-00299-CV (Tex. App.—San Antonio Aug. 21, 2013, pet. denied) (mem. op.).

F. TFC § 161.001(1)(M)

Mother challenged the termination of her parental rights under TFC § 161.001(1)(M). TFC § 161.001(1)(M) allows for the termination of parental rights if the parent had her "parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state." The record demonstrates that mother's parental rights were terminated as to an older child under TFC §§ 161.001(1)(D) and (E). A certified copy of that final termination order was admitted into evidence. However, mother argued that "the Department failed to introduce evidence through a proper witness about the specific instances that led to the purported findings [of (D) and (E)]. She contended that the Department must again present the underlying facts utilized in the earlier trial to support the prior court's decree of termination for use in this trial."

In rejecting mother's argument, the appellate court explained: "It is well established . . . that when a prior decree of termination as to another child is properly admitted into evidence, the Department need not reestablish that the parent's conduct with respect to that child was in violation of Sections 161.001(1)(D) or (E). . . . The Department need only show that the parent's rights were terminated as to another child based on findings that the parent violated Sections (D) and (E)." *In re M.L.H.-M*, No. 12-13-00316-CV (Tex. App.—Tyler Jan. 31, 2014, no pet.) (mem. op.).

G. TFC § 161.001(1)(N)

1. Inability to Provide Safe Environment

a. Long-Term Incarceration

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

When determining whether the evidence was sufficient to support the finding that father "demonstrated an inability to provide the child with a safe environment", the court considered evidence that father was incarcerated in 2008 for possession of a controlled substance, remained incarcerated "throughout the entire proceedings," and that "his sentence will expire in 2020." The court also noted that father had been incarcerated "during [the younger child's] entire life and most of [the older child's] life" and had "no relationship with the children," who were born in 2007 and 2009. In acknowledging that incarceration alone is not sufficient to show constructive abandonment, the court also acknowledged that it is a factor that may be considered. In upholding father's termination under (N), the appellate court held that father's "participation in criminal activity, the latest of which sent him to prison for twelve years, is a consideration when determining whether [father] is unable to provide [the children] a safe living environment." *In re L.L.M. and E.M.*, No. 04-13-00351-CV (Tex. App.—San Antonio Nov. 6, 2013, no pet.) (mem. op.).

b. Failure to Participate in Services and Instability

Father argued that the evidence was insufficient to terminate his parental rights under TFC § 161.001(1)(N). At trial, the Department's caseworker testified that she explained the terms of father's service plan to him. She also met with him five times over the course of the case. Although the caseworker termed father as a "little lower functioning", he understood the terms of his service plan.

The evidence established that father: (1) did not complete any of his services; (2) only visited the child three times during the course of the case; (3) stopped visiting the child a year before trial; (4) failed to maintain stable housing and employment because he was in and out of prison; (5) moved several times; and (6) had a history of drug abuse and frequently lived with his drug abusing mother.

The appellate court explained that a factfinder can "consider several factors in finding evidence demonstrated a parent's inability to provide the child with a safe environment, including the parent's participation or lack thereof in services, lack of steady housing and employment, and missed opportunities for counseling and a psychological evaluation." The court found the evidence sufficient to support the trial court's finding of termination under (N). *In re B.C.*, No. 07-13-00078-CV (Tex. App.—Amarillo Aug. 1, 2013, no pet.) (mem. op.); *see also In re B.M., M.L., and A.A.C.*, No. 14-13-00599-CV (Tex. App.—Houston [14th Dist.] Dec. 10, 2013, no pet.) (mem. op.) (court considered mother's failure to complete service plan as evidence of her inability to provide children with a safe environment under (N)).

H. TFC § 161.001(1)(O)

1. Risk of Abuse or Neglect

Mother appealed, challenging the sufficiency of the evidence supporting termination under TFC § 161.001(1)(O). Mother contended that termination under TFC § 161.001(1)(O) was "improper because [the child] was removed because of risk of abuse based on her conduct toward his sibling, but not for actual abuse or neglect."

The evidence demonstrates that authorities were called after mother was seen punching and dragging the subject child's four-year old sister down the street. The subject child, who was eight-months old at the time, was not present during this incident. The Department received a referral of physical abuse of the child's sibling and she was sent to live with her father. During the investigation, the Department observed that there was nothing to suggest that the eight-month old child had been physically abused. The child appeared clean, healthy, and developmentally on target. However, "mother's history of abusing her other children, her fragile mental state, another criminal case and incarceration" persuaded the Department that the child "should not be left in [mother's] care." After its investigation, the Department placed the child with foster parents.

The Department took possession of the child under TFC § 262.104. The petition was supported by an affidavit recounting the circumstances necessitating the child's removal. After the adversary hearing, the trial court appointed the Department temporary managing conservator of the child and ordered mother to comply with the service plan.

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

The appellate court agreed with mother and held that her abuse of the older child was not evidence that she abused or neglected the child and "for a trial court to terminate parental rights under section 161.001(1)(O), it must find that the child who is the subject of the suit was removed as a result of the abuse or neglect of that specific child". The appellate court reversed the termination of mother's parental rights and rendered judgment denying the Department's termination petition.

The Texas Supreme Court granted the Department's petition for review. In reviewing contrasting interpretations from various appellate courts, the Supreme Court stated "[w]e agree that subsection O requires proof of abuse or neglect, but we disagree that those terms can never be read to include risk." Relying on the definitions contained in TFC §§ 261.001(1) and (4), the Court explained that "both definitions give examples of abusive and neglectful conduct, and both definitions explicitly include risk". Additionally, TFC §§ 261.001(1) and (4) both include language that permits the consideration of

harm to another child in determining whether abuse or neglect has occurred.

Although the Court noted that while "chapter 261's 'abuse' and 'neglect' definitions do not govern in chapter 262, they surely inform the terms' meanings." Consistent with chapter 262's removal standards, the Court held that abuse or neglect of the child "necessarily includes the risks or threats of the environment in which the child is placed" and that "part of that calculus includes the harm suffered or the danger faced by other children under the parent's care". The Court further held that "if a parent has neglected, sexually abused, or otherwise endangered her child's physical health or safety, such that initial and continued removal are appropriate, the child has been 'removed[ed] from the parent under Chapter 262 for the abuse or neglect of the child.'"

In this case, the Department's evidence in support of the removal included its removal affidavit showing that the Department received a referral of physical abuse of the child's sibling. The Court considered the evidence within the affidavit showing that: (1) a witness had seen mother punching the child's sister and dragging her by her hair; (2) the sister had sustained injuries; (3) mother denied the abuse, but was arrested and charged with intentional bodily injury to a child; (4) mother had been involved in a prior Department case involving the physical abuse of an older son; (5) mother left the child in the care of her boyfriend, who had extensive criminal history, and had physically abused her; and (6) mother was incarcerated and unable to care for the child. In determining whether the child was removed for abuse or neglect under (O), the Court reasoned that, "this affidavit, even if not evidence for all purposes, shows what the trial court relied on in determining whether the removal was justified."

The Court also explained that the trial court's temporary order "found sufficient evidence to satisfy a person of ordinary prudence and caution that the child faced an immediate danger to his physical health or safety, that the urgent need to protect him required his immediate removal, and that he faced a substantial risk of a continuing danger if he were returned home—findings unchallenged by [mother]." Accordingly, the Supreme Court concluded that, "this evidence and these findings establish that [the child] was removed from [mother] under chapter 262 for abuse or neglect." *In re E.C.R.*, 402 S.W.3d 239 (Tex. 2013); *see also In re K.N.D.*, 424 S.W.3d 8 (Tex. 2014) (in considering child's removal for abuse or neglect, reviewing court may examine parent's history with other children as factor of risks or threats of environment, stating: "part of [the] calculus includes the harm suffered or the danger faced by other children under the parent's care.").

2. Removal from Non-Custodial Parent

Father challenged the sufficiency of the evidence supporting the termination of his parental rights under TFC § 161.001(1)(O). The Department removed the child from the care of his parents and his maternal grandmother, who had previously been granted joint custody of the child. At the time of removal, the child was residing with his mother and grandmother, both of whom had criminal histories involving drugs and alcohol. Both of them also tested positive for methamphetamine and amphetamine during the initial investigation. The father also had a history of drugs, and refused to submit to a hair follicle test at the time of removal. Because the use of drugs constituted an "immediate safety issue" for the child, the child was removed for neglectful supervision "due to the ongoing drug use." Father's parental rights were terminated and he appealed.

The appellate court determined that the Department had produced clear and convincing evidence that the child was removed from the father's care due to abuse or neglect under TFC § 161.001(1)(O). The court reasoned that "even though [the child] was not removed from the father's home and was not removed as a result of allegations of abuse or neglect made specifically against the father, the father was still required to comply with subsection (O)." The court concluded that "[t]he parent who fails to comply with a court order as required by subsection (O) need not be the same person whose abuse or neglect triggered the child's removal." *In re G.L.O.*, No. 11-13-00211-CV (Tex. App.—Eastland Jan. 9, 2014, pet. denied) (mem. op.); *see also In re A.D.C. and J.D.C.*, No. 02-13-00149-CV (Tex. App.—Fort Worth Oct. 3, 2013, no pet.) (mem. op.) (parent from whom children are not physically removed must comply with court-ordered services; subsection (O) may operate as ground for termination for such parent so long as other requirements of subsection (O) are fulfilled).

3. Removal for Abuse or Neglect Does Not Require Proof of Endangerment

Mother challenged the legal and factual sufficiency of the evidence supporting termination of her parental rights under TFC § 161.001(1)(O), contending that her failure to complete her family service plan cannot support a finding under (O) absent evidence that she engaged in conduct that endangered the physical or emotional well-being of the children. The court disagreed with mother, holding: "While the State must show the removal of the children

occurred due to abuse or neglect to justify termination under section 161.001(1)(O), subsection (O) does not require the State to prove the children were actually endangered." *In re T.S. and T.S.*, No. 09-13-00463-CV (Tex. App.—Beaumont Apr. 10, 2014, no pet. h.) (mem. op.).

4. "Return to Parent" Does not Require Child's Actual Return

On appeal, mother challenged the sufficiency of the evidence supporting the trial court's TFC § 161.001(1)(O) finding, alleging the family service plan "did not 'establish the actions necessary for [her] to obtain return of the child[ren].'" Mother contended that because the family service plan indicated that the Department's goal was "[Alternative] Family: Relative/Fictive Kin, Adoption," there was nothing she could do to achieve the return of the children.

In rejecting mother's argument, the court considered the express findings contained in the trial court's temporary and status hearing orders, the contents of mother's service plan, and the mother's trial testimony that she understood that she "had to do [her] services in order to get [the] kids back."

The appellate court concluded that "the [service plan] specifically established the actions necessary for [mother] to obtain return of her children, even if as a possessory conservator. And [mother] understood that her performance of the actions listed in the [service plan] were necessary to obtain the return of her children." Consequently, the appellate court affirmed the termination of mother's parental rights under TFC § 161.001(1)(O). *In re A.A., D.A., and J.A.*, No. 01-13-00542-CV (Tex. App.—Houston [1st Dist.] Dec. 12, 2013, pet. denied) (mem. op.).

I. TFC § 161.001(1)(Q)

1. Two-year Time Frame Calculated From Date Original Petition Filed

TFC § 161.001(1)(Q) provides a trial court may terminate a parent's rights if the parent has "knowingly engaged in criminal conduct that has resulted in the parent's: (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition."

On appeal, father challenged the sufficiency of the evidence supporting the termination of his parental rights under TFC § 161.001(1)(Q) claiming that "the State failed to prove the subsection Q ground on which his parental rights were terminated because the 'Department's own evidence . . . showed that the conviction did not occur until April 1, 2013, approximately one year and three-and-a-half months from the date of the filing of the petition in this matter, and just eight days before the final hearing terminating his rights." He alleged that "the evidence was insufficient to show he was both convicted and confined or imprisoned and unable to care for the child for not less than two years from the date of the filing of the petition." The court construed his argument to be "that the two-year period referred to in subsection Q is limited to the precise two-year period beginning with the filing date of the Department's petition, so that for subsection Q to be applicable, his conviction must have occurred before the Department filed its petition." The court rejected father's argument, and explained: "the language of subsection Q [does not] contain the requirement that the parent's conviction occur before the filing of the petition. With regard to the two-year period, it simply requires proof of the parent's confinement or imprisonment and inability to care for the child 'for not less than two years from the date of filing the petition.' That the father in this case was convicted after the Department filed its petition does not render the evidence insufficient." *In re C.C.L.*, No. 07-13-00167-CV (Tex. App.—Amarillo Oct. 11, 2013, no pet.) (mem. op.).

2. Parole Decisions are Speculative

Incarcerated mother appealed the termination of her parental rights to four children based on the trial court's finding that, among other grounds, mother violated TFC § 161.001(1)(Q). At trial, evidence was presented that mother was serving an eight-year sentence for possession of methamphetamine and, absent release on parole, would not be released until the latter part of 2019. Mother testified that she expected to be released on parole in September 2013, but acknowledged that she might not be released on parole.

Citing well-established case law, the appellate court held that "the mere introduction of evidence regarding possible parole dates does not prevent a factfinder from forming a firm conviction or believe that the parent will remain incarcerated for the two-year period at issue." The court concluded that because "the evidence admitted during the trial about when [mother] will be released conflicted", the trial court could have reasonably formed a firm conviction that mother, "due to her incarceration, would not be able to care for the children during the two-year period at issue." *In re C.G., B.G., R.S. Jr., and D.S; In re J.F.S.*, Nos. 09-13-00289-CV, 09-13-00290-CV (Tex. App.—Beaumont Dec. 12, 2013, pet. denied) (mem. op.).

3. Ability to Care Must Be on Parent's Behalf

The court considered father's challenge to the sufficiency of the evidence supporting the trial court's (Q) determination. Father conceded that "he knowingly engaged in criminal conduct resulting in his incarceration for at least two years from the date of the filing of the petition." He contended, however, that the evidence was "insufficient to show that he was unable to care for [the child]." At trial, father's mother and aunt both testified that they "were willing to care for [the child]" if the child "wanted" to live with them. Father argued that he thereby established that he was able to care for the child by "placing her with his mother or aunt."

The appellate court rejected father's argument and upheld father's termination under (Q) because father's mother and aunt had both qualified their testimony, stating that they would only be willing to care for the child if she wanted to live with them. The court further explained that father "adduced no evidence to demonstrate how [his aunt, his mother], or anyone else would care for [the child] if—as was the case here—[the child] did not want to live with either [of them]." Accordingly, the court held that "the evidence does not establish that either [father's mother or aunt] agreed to assume [father]'s parental responsibility to care for [the child] on [father]'s behalf while he was incarcerated." *In re R.N.W.*, No. 01-13-00036-CV (Tex. App.—Houston [1st Dist.] July 5, 2013, no pet.) (mem. op.); *see also In re T.L.C. and C.A.C.*, No. 11-13-00171-CV (Tex. App.—Eastland Nov. 27, 2013, no pet.) (mem. op.) (Under (Q), "[d]espite mother's contention that she had provided for the care of the children by permitting the father to care for them during her incarceration, nothing in the record suggests that the father was caring for the children on the mother's behalf."); *E.L.M. v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00779-CV (Tex. App.—Austin May 14, 2013, no pet.) (mem. op.) ("The fact that a surrogate cares for the child in the parent's absence is not evidence that the parent can provide the necessary care unless the caregiver is supplying the care *on behalf of*—not just in place of—the incarcerated parent."); *In re D.Z.R.-M.*, No. 14-13-01084-CV (Tex. App.—Houston [14th Dist.] Apr. 8, 2014, no pet.) (mem. op.) (incarcerated father "did not address how he would provide or arrange to provide care for the child" and aunt testified to her plans to provide care for or adopt child; "if the [a]unt were providing care . . . she would be doing so on her own behalf, rather than agreeing to assume the [f]ather's obligation to care for the [c]hild while the [f]ather is incarcerated").

J. TFC §161.001(1)(R)

On appeal, mother challenged the sufficiency of the evidence supporting the termination of her parental rights under TFC § 161.001(1)(R). TFC § 161.001(1)(R) allows for termination of a parent who has "been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by Section 261.001." Under TFC §§ 261.001(8)(A) and (B)(iii), a child is born addicted to a controlled substance if that child is born to a mother who used a controlled substance during her pregnancy and exhibits the demonstrable presence of a controlled substance in the child's bodily fluids after his birth.

Mother argued that "the Department failed to present expert testimony to establish the amount of the substance in the child's system and to establish that the substance in the child's system was a controlled substance, was the result of mother's drug use and was not the result of mother ingesting a drug for which she had a legal prescription."

In overruling mother's complaint, the court held: (1) "mother does not cite, nor have we found, any legal authority to support mother's claim that the Department was required to present expert testimony establishing that the child was born addicted to a controlled substance"; and (2) "that proof of the level of the controlled substance in the child's system is not required."

In finding the evidence sufficient to support the finding that the child was born addicted to a controlled substance, the court considered, in part, that "mother admitted that she smoked methamphetamine during all nine months of her pregnancy with the child. She testified that she was aware that the child testified positive for methamphetamine at birth, and she attributed that positive test to her methamphetamine use. Medical records relating to the child's birth introduced at trial establish that both mother and child tested positive for methamphetamine at the child's birth." *In re D.D.G.*, 423 S.W.3d 468 (Tex. App.—Fort Worth 2014, no pet.).

K. TFC § 161.001(1)(T)

TFC § 161.001(1)(T) authorizes a court to order termination of parental rights if that parent . . . has been convicted of: (i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains

elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code. Father, who was convicted of murdering the children's mother, appealed the termination of his parental rights under TFC § 161.001(1)(T)(i) alleging that because his murder conviction was being appealed, it was not a final conviction and the evidence was therefore legally and factually insufficient to establish that he was "finally convicted" of the murder of the other parent under sections 19.02 or 19.03 of the penal code.

The appellate court disagreed with father's assertion and stated that nothing in section TFC § 161.001 "requires that a conviction constituting a ground for termination be a final judgment." The court also relied on precedent from the Austin court of appeals holding that "strict time requirements for prosecuting termination cases to finality, add contextual weight to the view that the legislature intended non-final convictions to be admissible in termination cases." The court rejected father's contentions. The court held that "convictions alleged as grounds for termination under subsection 161.001(1)(T)(i) need not be final with all appeals exhausted to constitute evidence of a conviction supporting termination under subsection (1)(T)(i)." *In re L.B. and A.B.*, No. 05-13-01615-CV (Tex. App.—Dallas Mar. 20, 2014, no pet. h.) (mem. op.).

NOTE: *See also Rogers v. Dep't of Family and Protective Servs.*, 175 S.W.3d 370 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd w.o.j.) (court rejected father's contention "that his criminal conviction cannot be used as evidence because it was on appeal at the time of trial" and held that father's contention "is not an accurate reflection of [TFC § 161.001(1)(L)(ix)], which makes no reference to post-conviction proceedings"); *Rian v. Tex. Dep't of Family and Protective Servs.*, No. 03-08-00155-CV (Tex. App.—Austin July 31, 2009, pet. denied) (mem. op.) (TFC § 161.001(1)(Q) allows "termination after conviction with no express requirement of finality of conviction" and "the legislature intended to permit termination under section 161.001 based on conviction without regard to whether appeals were exhausted").

L. TFC § 161.002

1. Admission of Paternity Precludes Termination under 161.002

After hearing testimony and reviewing the evidence, the trial court found by clear and convincing evidence, that father's parental rights be terminated pursuant to TFC § 161.002. The court found that the child was under one year of age when the petition for termination of the parent-child relationship was filed and that father had not registered with the paternity registry. The trial court also found by clear and convincing evidence that father had engaged in conduct under TFC §§ 161.001(1)(D), (E), and (N).

Citing to relevant precedent, the court reiterated that TFC § 161.002(b)(2) does not authorize an order terminating the parental rights of an alleged father when his identity and location are known to the Department at the time of the final hearing and order. The court noted that the evidence showed that "father appeared at trial, unequivocally testified that he was the child's biological father, and requested that his parental rights not be terminated". The court held that, "father triggered his right to require the Department to prove that he engaged in one of the types of conduct listed in the Texas Family Code section 161.001(1) before his parental rights could be terminated". Accordingly, termination of father's parental rights under 161.002 was reversed. However, termination of his parental rights under (E) was affirmed. *In re A.R.F.*, No. 02-13-00086-CV (Tex. App.—Fort Worth July 25, 2013, no pet.) (mem. op.).

2. Alleged Father Not Entitled to Notice of Termination Suit

Mother executed an affidavit of relinquishment two days after the child was born and an adoption agency filed a petition to terminate her parental rights five days later. The biological father did not register with the paternity registry. Thirty-five days after the child was born, the trial court terminated biological father's parental rights, under TFC § 161.002, as an unknown father without notice to him. The child's adoption was finalized several months later. Over four months after learning of the child's birth, and a month after the child had been adopted, biological father filed a bill of review attacking the termination order. The adoptive parents intervened.

Father moved for summary judgment asserting that TFC § 161.002 was unconstitutional as applied to him. Specifically, he argued that due process required he be served with notice of the termination proceeding because: (1) he was not an "unknown" father as he was known to mother; and (2) mother concealed the pregnancy from him and concealed his identity from the adoption agency, preventing him from receiving notice of the suit and having an opportunity to develop a meaningful relationship with the child before his rights were terminated. The adoption agency and adoptive parents also moved for summary judgment arguing that the

paternity registry adequately protected father's rights by placing the right to notice within his control, but he failed to take the minimal step of registering.

The summary judgment evidence showed that: (1) father and mother had a sexual relationship and engaged in unprotected sex; (2) both suspected mother was pregnant, although a home test failed to confirm it; (3) after breaking up, father continued to suspect mother might be pregnant; (4) after learning she was pregnant, mother did not inform father; (5) mother told the private adoption agency that she did not know the identity of the child's father; and (6) father did not register with the paternity registry.

The court rejected father's contention that because he was an alleged father, he was entitled to notice under the relevant statutory scheme and that the paternity registry was not intended to apply to fathers who are known but have been prevented from learning of the pregnancy and birth by the mother. The court concluded that the "language of sections 161.002(b)(3) and (c-1) plainly provides that an alleged father's rights may be terminated without notice and without identifying or locating the alleged father if (1) the child is under the age of one [when the petition is filed] and (2) the alleged father did not register with the paternity registry. Nothing in this provision distinguishes between alleged fathers who are known to the mother and those unknown to the mother."

The court also rejected father's argument that TFC § 161.002 is unconstitutional as applied to him. The appellate court first disagreed that as a "known" father, he had a constitutional due process right to notice of the termination proceeding. The court explained that under TFC §§ 160.402(a)(1) and (2), a man who believes he may have fathered a child may register with the paternity registry before the child is born or not later than thirty-one days after the child's birth. Under TFC § 160.403, if a man timely registers with the paternity registry, he is entitled to notice of any proceeding for adoption or termination in a manner prescribed for service of process. Thus, "whether to register [with the paternity registry] is within the complete control of the alleged father."

The court reasoned that the undisputed facts belied father's complaint that the registry procedure did not protect his rights because he did not know about the pregnancy or birth. The court stated that despite having information that gave him reason to believe mother might be pregnant with his child, father "failed to take any steps to register his intent to claim paternity to the child he *may have fathered*." Thus, the court concluded that the statutory scheme, at least under these facts, "permits an alleged father to protect himself by invoking statutory procedures to ensure he received notice. [Father] failed to do so, and that failure does not now render the statutory procedure unconstitutional." Although he had the mechanism of the paternity registry within his control that would have entitled him to notice of the termination proceeding, he failed to register.

Similarly, the court rejected father's argument that his constitutional rights were violated because the termination proceeding was filed and completed before he had time to develop a constitutionally protected meaningful relationship with the child. The court reasoned that father "did not take diligent affirmative action that manifested a full commitment to parenting responsibilities within a short time after he discovered or reasonably should have discovered [mother] was pregnant with his child." Consequently, the appellate court concluded that TFC § 161.002 adequately protected father, given the information available to him and his failure to register and act promptly during mother's pregnancy or after he learned of the child's birth. Thus, TFC § 161.002 did not unconstitutionally prevent him from developing a meaningful relationship with the child prior to the termination of his rights. The court held that the adoption agency and adoptive parents established as a matter of law that father lacked a meritorious defense and thus was not entitled to a bill of review. *In re Baby Girl S.*, 407 S.W.3d 904 (Tex. App.—Dallas 2013, no pet.).

M. TFC § 161.003 — Expert Testimony Not Required to Prove Inability to Care

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

The trial court heard only the testimony of the Department caseworker, the child's court-appointed special advocate, and mother. In conducting its legal and factual sufficiency review of the evidence, the appellate court concluded that the testimony of these witnesses supported a finding that "mother is not capable of providing for the physical,

emotional, and mental needs of [the child] or of making decisions that are in the best interest of [the child]." Further, the court noted that "[t]he caseworker testified that the mother had a mental or emotional illness or a mental deficiency that rendered her unable to provide for the needs of [the child], and the caseworker believed that such deficiency and inability would continue until [the child's] eighteenth birthday." Based on the foregoing, the court affirmed the termination of mother's parental rights. *In re J.M.S.*, No. 11-13-00160-CV (Tex. App.—Eastland Nov. 27, 2013, no pet.) (mem. op.).

N. TFC § 161.004 — Material and Substantial Change of Any Party Sufficient

The Department filed a petition to terminate father's parental rights in 2010. At a final hearing in 2012, the children were returned to mother. Although father was not appointed possessory conservator of the children, and was denied all access to the children, the termination suit against him was dismissed.

After the case was dismissed, the Department received a second referral alleging that mother was giving one of the children drugs. During the Department's investigation, mother admitted to using methamphetamine. The record reflected that after the Department's first involvement, father was never present in the home.

On appeal, father argued that there was no material change in circumstances since the Department's original action to terminate his parental rights. For purposes of the opinion, the court assumed that TFC § 161.004 applied. TFC § 161.004(a)(2) allows the Department to move for termination after a previous order denying termination if "the circumstances of the child, parent, sole managing conservator, possessory conservator, or other party affected by the order denying termination have materially and substantially changed since the date that the order was rendered."

The court wrote that under the language of the statute, a material and substantial change of any affected party is sufficient for the purposes of proceeding with termination. Mother relapsed into drug use after the children's return; the court deemed this "more than sufficient" to demonstrate a material and substantial change. The court further noted that father moved back into the home after the trial court's final order, which had denied him any access to the children. The court found that either event would provide the required "material and substantial change" under TFC § 161.004. *In re J.D.H., E.K.H., Z.H.H.*, No. 07-13-00293-CV (Tex. App.—Amarillo Feb, 20, 2014, pet. filed) (mem. op.).

VI. BEST INTEREST

A. Best Interest Considered Separately for Each Parent

Father challenged the sufficiency of the evidence to support the trial court's finding that termination was in the child's best interest. The appellate court considered evidence that father: (1) was incarcerated at the time of trial after his probation for drug possession was revoked due to continued drug use; (2) did not perform services to regain custody before his incarceration, including counseling, parenting classes, psychological testing, and visiting the child for a year while "strung out" on drugs; (3) had been jobless and homeless; and (4) did not contest that he was found to have committed acts warranting termination for knowingly endangering his child. The evidence also showed that the Department's permanency goal for the child was reunification of the child with mother.

The appellate court stated that father's contention that the Department's goal was reuniting the child with his mother and therefore terminating his parental rights is not in the child's best interest does not "hold much sway." The court concluded: "That one parent may have been afforded another chance to be a parent does not mean that both must. [Father's] own conduct and circumstances are determinative." *In re K.R.M.*, No. 07-13-00429-CV (Tex. App.—Amarillo Mar. 17, 2014, no pet.) (mem. op.).

B. Desires of the Child

1. Child's Fear of Father

On appeal, father argued that the evidence was insufficient to support the trial court's finding that termination of his parental rights was in the child's best interest. The appellate court disagreed. The trial court heard evidence from the child's foster mother, who described an incident during which the child "ran scared from the backyard and hid in his bedroom when he thought that a man who resembled [father] and who came into the backyard to perform lawn care, was there to take him from the house." For some time, the child would not go into the backyard until his foster parents went back there with him to show him that no one was back there to take him away. In its best interest analysis under the "desires of the children", the court noted that that although "it would appear that [the child] has not clearly expressed a desire in this matter, likely due to his tender age . . . this episode is somewhat

relevant to [the child]'s desire to remain with his adoptive family rather than live with [father]; it certainly demonstrates that [the child] is fearful of living in or returning to [father's] care." *In re J.J.*, No. 07-13-00117-CV (Tex. App.—Amarillo Aug. 29, 2013, no pet.) (mem. op.).

2. Children Asking for and Crying for Mother

Mother challenged the sufficiency of the evidence supporting the trial court's determination that termination of her parental rights is in the child's best interest. In its best-interest analysis of the child's desires, the court considered evidence that Child D cried for his mother and Child S "sometimes asks about her mother." The evidence also showed that Child S was content under maternal grandmother's care and Child D would wake up calling out for her eighteen-year-old brother. In rejecting mother's challenge, the appellate court held that "the children's cries and occasional inquires about their mother, however do not necessarily express a desire to return to their mother's care". *In re M.R.G.L. et al.*, No. 13-13-00392-CV (Tex. App.—Corpus Christi Jan. 9, 2014, no pet.) (mem. op.).

C. Mental Instability

Mother had an extensive Department history including having her parental rights terminated to four other children. During the investigations for the oldest three children, which began in 2004, mother was hospitalized in a psychiatric ward, incarcerated for a variety of criminal charges, failed to take prescribed medication, exhibited explosive outbursts, and stated that she spoke with dead people.

In September 2010, mother's fourth child was removed immediately after birth due to mother's drug use during pregnancy and mental health issues. Mother submitted to a psychological evaluation, which revealed that mother "had chronic mental health issues made more pronounced by stress and drug dependency issues." The evaluation indicated that mother "presented as a person who is confused and who has acute psychological distress. . . . Compounding her issues is that not only are her symptoms acute but they are chronic and longstanding in nature. It should be noted the prognosis is poor for significant change to occur in a short time frame." Mother was diagnosed with severe bipolar disorder, chronic post-traumatic stress disorder, cannabis dependence, dependent personality disorder, and borderline personality disorder. Mother admitted to suffering hallucinations and delusions, as well as dependency problems with marijuana and cocaine in the past.

The subject children were born in August 2011, and were removed ten days after their birth due to mother testing positive for marijuana. Mother told the Department caseworker that she had not taken any medication for her mental health conditions since February 2011, and did not feel she needed any.

Mother participated in counseling services pursuant to her service plan. Mother's behavior during group counseling was described as "unpredictable" and "bizarre", "demonstrating a lot of mental health issues and problems going on with her treatment." During treatment, mother would sometimes "just be shut down emotionally" or would become "loud, cursing at staff" and her counselor.

Mother received another psychiatric evaluation and was diagnosed with psychosis and post-traumatic stress disorder, with a recommendation that she take psychiatric medication, which mother then refused to do. Mother's group counselor testified that throughout the case, mother refused to take any medication for her mental health conditions. Mother's individual counselor also emphasized the importance of staying on mental health medication, but mother "would tell him that she did not feel like she needed to be on medication and that she felt it was not necessary for her mental state."

The Department caseworker testified that the children should not be returned to mother because mother's mental health issues had not been resolved, and mother needed more time to successfully stay on medication. At the time of trial, mother claimed she was taking her medication, and stated her mental health diagnosis was "stress, anxiety, and depression."

The court held that the trial court could have formed a belief that termination of mother's parental rights was in the children's best interest based, in part, on her seven year history of failing to take prescribed medication, and self-medicating with illegal drugs. The court concluded that "the trial court could have found that mother's refusal throughout all of her CPS cases to acknowledge her mental health problems and to consistently take her medication and remain stable for any of her children would expose the [children] to emotional and physical danger in the future if the children were returned to her." Therefore, the evidence was legally and factually sufficient to support the trial court's ruling that termination of mother's parental rights was in the children's best interest. *In re C.D.S.-C. and B.L.S.-C.*, No 02-12-00484-CV (Tex. App.—Fort Worth May 2, 2013, no pet.) (mem. op.); *see also In re*

C.T., a/k/a B.B.T., No. 13-13-00499-CV (Tex. App.—Corpus Christi Feb. 20, 2014, no pet.) (mem. op.) (best interest finding supported by mother's many mental health diagnoses, substance abuse, refusal to acknowledge mental health problems, and failure to take medication as prescribed).

D. Improvements in Placement

In 2006, the child was removed from his mother's care. The appellate court affirmed the termination of mother's parental right to him but reversed the termination of father's parental rights after concluding that the evidence was factually insufficient to support the jury's best interest finding. In 2013, the trial court held the new trial and terminated father's parental rights to the child again. Father appealed, arguing that the evidence was insufficient to support the trial court's best interest finding.

Depression and anger management had been longstanding problems for the child. He also suffered from dyslexia and attention deficit-hyperactivity disorder and required special education accommodations. The child repeated the first grade and had trouble making friends. One of the child's caseworkers testified that during the Department's case, the child started experiencing significant emotional and mental issues and was hospitalized three times due to his out-of-control and difficult-to-manage behaviors.

In 2009, the child was diagnosed with major depressive disorder, recurrent, severe, without psychosis, and oppositional defiant disorder. He was then moved from inpatient treatment to a residential treatment center due to his serious difficulty managing his emotions and behaviors on a daily basis. The child spent around eighteen months in the residential treatment center.

With medication modifications that included Risperdal, Prozac, Intuniv, and Thorazine, the child's anger steadily dissipated and he was able to interact appropriately with his peers and to identify alternative coping skills to express his irritability and agitation without aggressiveness or bullying. In January 2012, the child was placed in the home of his foster parent, who had previously adopted the child's younger sister and who coached basketball and volleyball at the child's school.

By the time of the second trial, the child had not seen his father for approximately two years. During the two years without seeing his father, the child had graduated from the residential treatment center, learned to trust people, stopped having meltdowns, and improved his grades. He was taking only one medication to treat his depression, continued seeing a counselor, and had been living with his foster mother for a year. The child testified that his foster mother helped him, that he loved her, and that she treated him well. He liked living with his foster mother and wanted to keep living there because "he had lots of friends there and people who care about him there." The child stated that he would like for his foster mother to adopt him like she had adopted his sister and that he would take her last name.

Father argued that the child craved a continued relationship with him. In rejecting father's argument, the court noted that the "while [the child] may indeed 'crave a continued relationship with his father,'[the child] also testified that he wanted [his foster mother] to adopt him as she had adopted his younger sister . . . and that he understood that this meant father's rights to him would have to be terminated".

Father also argued that the evidence regarding the child's mental and emotional issues and his relationship with father mandate that the factors pertaining to the child's emotional and physical needs and the danger to him now and in the future weigh in his favor as well. The appellate court rejected father's argument, stating, "the record reflects that [the child] has done well both emotionally and academically without father's presence or involvement". The court added, "our concerns in the preceding appeal about whether [the child] would be able emotionally to handle father's absence from his life until he turns eighteen have been mitigated by [the child]'s noted interpersonal and academic success in the two years of father's absence since the first termination trial". The court concluded that the evidence supporting the trial court's determination that termination of father's parental rights was in the child's best interest was legally and factually sufficient. *In re J.P.*, No. 02-13-00095-CV (Tex. App.—Fort Worth July 18, 2013, no pet.) (mem. op.); *see also In re C.C., M.C., B.C. and C.C.*, No. 07-12-00500-CV (Tex. App.—Amarillo May 8, 2013, no pet.) (mem. op.) (holding testimony regarding improvement of children since removal and since cessation of visitation supports best interest finding).

E. Failure to Complete Services Indicates Continued Danger to the Children

The children were removed by the Department after mother took one of them to the hospital with multiple rib fractures and injuries to her internal organs. The injured child was two years old at the time. A service plan was created for mother. Although mother did not sign the service plan, the trial court signed an order which made the

plan an order of the court and contained a finding that mother had reviewed and understood the plan. Mother did not complete several elements of the plan, including domestic violence courses, parenting classes, a psychological evaluation, and counseling.

On appeal, mother did not challenge the trial court's predicate ground findings under TFC §§ 161.001(1)(D) or (O). Rather, she only challenged the trial court's finding that termination is in the children's best interest. Thus, mother conceded that she failed to complete court-ordered services necessary to obtain a return of the children. The court found that the classes and counseling mother failed to attend were directly related to the children's removal. Accordingly, mother's failure to complete those services indicated that the children would continue to be in danger if returned to her care. Consequently, the court found the evidence sufficient to support the trial court's best interest finding. *In re B.A. and J.A.*, No. 04-13-00246-CV (Tex. App.—San Antonio Aug. 28, 2013, no pet.) (mem. op.).

VII. MODIFICATION

A. TFC § 156.101—Material and Substantial Change

After a final decree of divorce, father was appointed a joint managing conservator of the child and was ordered to pay support. A year later, mother filed a modification petition, seeking to alter father's access to the child and to increase father's monthly support obligation. Mother's pleading "broadly alleged that '[t]he circumstances of the child, conservator, or other party affected by the previous order to be modified have materially and substantially changed since the rendition of the order to be modified.'"

While not clear whether father filed an answer, it is certain that father did not appear for the trial. After the conclusion of the hearing, the trial court ordered that father not have access to the child until he proved he had a stable residence by either a lease or mortgage, and raised his child support obligation.

On appeal, father argued that there was "no evidence to support the trial court's order—in the SAPCR—modifying the divorce decree." TFC § 156.101(1)(A) provides that the trial court may modify conservatorship of the child if the modification was in the child's best interest, and the circumstances of the child, a conservator, or other party affected by the existing conservatorship order materially and substantially changed since the rendition of the final order. The court noted that "[t]o demonstrate a material and substantial change of circumstances, [mother] was required to show what conditions existed at the time of the entry of the divorce decree as compared to the circumstances existing at the time of the hearing on the motion to modify."

The appellate court noted that at the "prove-up hearing, [mother] did not present any evidence to support her broad allegations in the SAPCR. She did not offer evidence to show the circumstances of [the child] or any person affected by the existing order had materially and substantially changed." Rather, she only testified that she had been a resident of Dallas for at least six months, that there had been no family violence in the preceding two years, and that the modification was in the child's best interest. This was insufficient to establish a material change in circumstances. The trial court's judgment was reversed and the case remanded for further proceedings. *In re A.T.A.L.*, No. 05-11-01666-CV (Tex. App.—Dallas May 8, 2013, no pet.) (mem. op.).

VIII. POST-TRIAL ISSUES

A. Court of Appeals Not Required to Detail Evidence in Affirming Termination Order

This parental termination case which began in 2008 had the following appellate history: (1) two trials resulting in termination of parental rights; (2) two opinions from the court of appeals reversing and remanding the case for new trial due to factual insufficiency of the evidence; and (3) ultimately, an en banc decision in the court of appeals affirming termination. Two justices dissented from the en banc decision, arguing the court misapplied the factual sufficiency standard of review and that, under a correct analysis in which the entire record is accounted for, the evidence remained factually insufficient to terminate father's rights under subsection (E).

On petition for review, father argued that the court of appeals conducted an improper factual sufficiency review because, though its opinion analyzed the evidence favorable to the Department, it failed to review relevant, probative evidence favorable to Father, and erred when it "failed to detail the conflicting evidence." The Texas Supreme Court granted Father's petition for review to decide whether, in affirming the termination, the court of appeals adhered to the proper standard for conducting a factual sufficiency review.

Citing its well-established precedent, the Court stated that in conducting a proper factual sufficiency review in a termination case, if, in reviewing the entire record, the disputed evidence that a reasonable factfinder could not

have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. Despite the heightened standard of review, "the court of appeals must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of witnesses." Thus, the Court reiterated its well-established rule that "if a court of appeals is reversing the jury's finding based on insufficient evidence, the reviewing court must detail the evidence relevant to the issue of parental termination and clearly state why the evidence is insufficient to support a termination finding by clear and convincing evidence", and explained that this requirement is designed to ensure the reviewing court appropriately respects the jury's fact-finding function.

The Court stated that although it has repeatedly applied this standard—requiring courts of appeals to detail the evidence—in cases reversing a jury verdict of termination on insufficient evidence, it has never required appellate courts to do so when affirming a judgment of termination. In fact, the Court has expressly held that courts of appeals are not required to detail the evidence in affirming a jury verdict on factual sufficiency review in cases tried under a preponderance of the evidence standard of proof, reasoning that when the court of appeals affirms, the risk that the court has usurped the role of the jury disappears.

The Court has established one exception to the general rule that appellate courts need not "detail the evidence" when affirming a jury finding—an award of exemplary damages. Distinguishing between a review of exemplary damages and parental terminations, the Court declined to require courts of appeals to detail the evidence in affirming jury findings in termination of parental rights cases.

The Court explained that although both exemplary damages and parental termination must be proved by clear and convincing evidence, "the similarities essentially end there." The purpose of an award of exemplary damages is to punish and deter, but concerns over the broad discretion given juries deciding exemplary damages led to procedural safeguards including the exception requiring a court of appeals to detail all relevant evidence in conducting a factual sufficiency review whether it reverses or affirms.

The Court further reasoned that in contrast to exemplary damages, the purpose of termination of parental rights is not to punish parents or deter their bad conduct, but rather to protect the interests of the child. Unlike the broad jury discretion in awarding exemplary damages, the Family Code provides a detailed statutory framework to guide the jury in making its termination findings. Thus, the Court stated that "termination proceedings require juries to make specific findings of fact, and the Family Code provides the contours to limit unnecessary discretion." In addition, because an award of exemplary damages implicates only one fundamental concern, the defendant's due process rights to her property, with no competing fundamental interest to balance this right in the trial court, the Court requires courts of appeals to detail the evidence of their review on appeal. But in parental termination cases, "the parents' fundamental interest in maintaining custody and control of their children is balanced against the State's fundamental interest in protecting the welfare of the child."

For these reasons, the Court concluded that "the State's competing fundamental interest, the Legislature's statutory protection of the parent's fundamental interest by narrowing the grounds for termination, and our protection of the parent's fundamental interest by requiring an exacting review of the entire record together provide ample protection of the parent's fundamental interest". The Court thereby declined to mandate that courts of appeals detail the evidence when affirming a jury verdict of termination.

In affirming the court of appeals judgment, the Court held "if the reviewing court is to reverse the factfinder, it must detail the evidence supporting its decision. Here, by considering the record in its entirety, the court of appeals executed an appropriate factual sufficiency review. Because the court ultimately affirmed the jury's termination findings, it was not required to detail the evidence." *In re A.B. and H.B.*, No. 13-0749, ___ S.W.3d___ (Tex. May 16, 2014).

B. *De Novo* Review

1. Waiver of *De Novo* Review

On appeal, father argued that the trial court abused its discretion by entering a protective order based on the associate judge's finding of family violence without first conducting a *de novo* hearing. After the associate judge entered a finding of domestic violence and protective order against father, he timely requested a *de novo* hearing. However, before the hearing occurred, mother and father entered into a Rule 11 agreement in which mother agreed to the removal of the protective order. The *de novo* hearing was removed from the docket by agreement. The trial court ultimately declined to follow the Rule 11

Agreement, but father did not take any action to reset his *de novo* hearing on the docket.

Mother argued that father's inaction resulted in the waiver of any right to a *de novo* hearing. The appellate court agreed. Although father did not waive his right to a *de novo* hearing in writing, the court concluded that father's consent to the Rule 11 agreement and subsequent agreement to remove the *de novo* hearing from the docket indicated he no longer desired to pursue a *de novo* hearing. The purpose of TFC § 201.015(f) and *de novo* hearings is to provide for "prompt resolution" of issues. The court concluded that "by agreeing to remove the hearing from the docket after the parties entered into a Rule 11 agreement, Father indicated to the trial court his desire to no longer pursue a de novo review, as there was no longer any issue for the trial court to review that needed 'prompt resolution.'" *In re A.M.*, 418 S.W.3d 830 (Tex. App.—Dallas 2013, no pet.).

2. TFC § 201.015(c)

At a *de novo* termination hearing, the district court admitted an exhibit containing the reporter's record from the termination hearing that was held before the associate judge. Father's parental rights were terminated. On appeal, father argued that the trial court's admission of the reporter's record from the earlier trial before the associate judge "violated his right to due process because he had not received proper notice of the Department's intent to introduce it."

TFC § 201.015(c) permits a referring court in a *de novo* hearing to review the record from the earlier hearing held by the associate judge. The court of appeals disagreed with father, stating that "[n]ot only does [TFC § 201.015(c)] permit a referring court in a de novo hearing to review the record from the earlier hearing held by the associate judge, but the record from the earlier hearing was admitted into evidence as an exhibit in this case." The court further reasoned that the exhibit offered no surprise to father, as "father and his attorney were both present at the earlier hearing; the father had an opportunity to cross-examine witnesses and to present evidence at that hearing." The court concluded "that the trial court was authorized by Section 201.015(c) to consider the record from the hearing held by the associate judge, that the trial court did not abuse its discretion in admitting the record from that hearing into evidence as an exhibit even though the father's attorney had not been provided with a copy prior to the de novo hearing…" *In re M.R.*, No. 11-13-00029-CV (Tex. App.—Eastland July 25, 2013, no pet.) (mem.op.).