

# **TERMINATION CASE LAW UPDATE**

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**I. Jurisdiction**

**A. Lack of Personal Jurisdiction**

The Department filed an original petition to terminate Father’s parental rights on March 28, 2014. On January 28, 2015, the Department filed a motion for substituted service of citation, which was granted on that same date. A “Citation By Publication By Courthouse Door” was signed by the district clerk on January 29, 2015, and posted on the courthouse door on February 3, 2015 “for a period of seven days.” A bench trial was conducted on February 23, 2015 and the trial court signed the termination order the same day.

On appeal, Father asserted that the trial court lacked personal jurisdiction over him at the time of trial because the judgment was entered against him prior to the expiration of the time in which he had to answer the Department’s petition.

TFC § 102.010 provides that “[i]f the court orders that citation by publication shall be completed by posting the citation at the courthouse door for a specified time, service must be completed on, and the answer date is computed from, the expiration date of the posting period.” In this case, the citation and Sheriff’s Return contained therein stated that citation was posted on the courtroom door on February 3, 2015 “for a period of seven days.”

The Court of Appeals noted that pursuant to TFC § 102.010(e), “the answer date is computed from the expiration date of the posting period”. The Court reasoned that because the citation and Sheriff’s Return stated a “posting period” of seven days, Father’s answer was not due until March 9, 2015. Because the trial court conducted the termination hearing on February 23, 2015, the Appellate Court held that the trial court lacked personal jurisdiction over Father as the time period in which he had to file his answer had not yet expired. Accordingly, the Court reversed the trial court’s Order of Termination and remanded the case for further proceedings. *In re J.P. and J.E.B.*, No. 04-15-00145-CV (Tex. App.—San Antonio July 29, 2015, no pet.) (mem. op.).

**II. Pre-Trial Matters**

**A. Due Process: Attendance at Trial**

At the commencement of the November 30, 2015 trial, Father was incarcerated in Pennsylvania. His attorney learned of Father’s incarceration fourteen days prior to the start of trial and had been unsuccessful in his attempts to contact him. Based on these circumstances, at a pre-trial conference, Father’s attorney moved for a continuance in order to facilitate Father’s participation in trial. Father’s attorney also asked that Father be provided the opportunity to participate in the trial by videoconference or similar communication, pointing out that Mother was also incarcerated and was being permitted to participate in the trial by videoconference. The trial court indicated that it would attempt to facilitate Father’s participation, but denied the request for continuance, stating that the trial would not be “slow[ed]” down by the attempt at communication. The attempts to set up videoconferencing for Father were unsuccessful, and Father was not able to participate in the trial. Father’s parental rights were terminated.

On appeal, Father asserted that he was denied due process because he was not permitted to participate at trial in a meaningful manner as a result of the trial court’s denial of his request for a continuance and because of the trial court’s refusal to consider his participation at trial by teleconference.

To assess what process Father was due, the Appellate Court noted that it should weigh the three factors developed by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976): (1) the private interest affected by the proceeding or official action; (2) the countervailing governmental interest supporting use of the challenged proceeding; and (3) the risk of an erroneous deprivation of the private interest due to the procedures used.

In considering the first factor under *Eldridge*, the Court noted that parental rights are “far more precious than any property right” and that a “parent’s interest in maintaining custody of and raising his or her child is paramount”. It explained: “[A] parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one”. The Court also considered the private interests of the child, and determined that “[b]oth the parent and the

child have a substantial interest in the accuracy and justice of a decision”. As such, the Court concluded that “Father’s fundamental liberty interest in maintaining custody and control of [the child], the risk of permanent loss of the parent-child relationship between them, and Father’s and [the child’s] interest in a just and accurate decision—weigh heavily in favor of providing Father with an opportunity to communicate with his attorney and participate in the termination proceedings, even if that required a continuance of trial and participation by teleconference”.

Next, the Court considered the State’s interest in the proceeding, which it stated includes protecting the best interest of the child. However, the Court explained that the State’s interest also includes an interest in an accelerated timetable and a final decision that is not “unduly prolonged” with negative psychological effects on children left in limbo as evidenced, in part, by the mandatory dismissal deadline contained in TFC § 263.401(a).

In this case, the record showed that trial commenced on November 30, 2015. Therefore, the Court concluded that “a short recess or continuance of the trial to permit Father’s attorney to pursue contacting him in prison to confer with him and to prepare for trial would not have placed the case in jeopardy for dismissal”.

The record further showed Mother’s attorney was willing to assist Father’s attorney by providing the direct contact information for the person at the facility who had assisted in setting up Mother’s videoconferencing. Importantly, in reasoning that the State’s interest in economy and efficiency “pale in comparison to the private interest at stake, and to the risk that a parent be erroneously deprived of his or her parental rights and the child may be erroneously deprived of the parent’s companionship”, the Court determined that permitting Father to participate in trial by telephone, as requested by his attorney, would not have placed the case in jeopardy of dismissal pursuant to TFC § 263.401(b). Accordingly, the Court concluded that the “record does not show that granting the motion for continuance or the request for Father to appear by telephone would have greatly harmed the State’s interest in a n efficient and economic resolution of this matter by placing the case at risk for dismissal”.

Lastly, the Court weighed several factors in examining the third prong of its *Eldridge* analysis in concluding

that there was a significant risk of erroneous deprivation of the parent-child relationship between Father and the child. The Court considered that: (1) Father’s counsel at trial was appointed to replace Father’s first-appointed counsel and had never spoken to Father; (2) Father was without counsel during the thirty day period following the signing of the termination orders — in which he was permitted to file a motion for new trial; (3) despite having the opportunity to testify at trial, Father did not have the opportunity to be present for the four-day trial and to hear the testimony of the nine witnesses the Department presented; and (4) there was nothing in the record to show Father was notified of the change in counsel in response to the Department’s contention on appeal that Father had not kept his counsel informed of his whereabouts.

Accordingly, the Court held that the trial court should have considered Father’s participation by telephone and given his counsel time to facilitate his participation at trial and as such, Father was denied procedural due process. *In re D.W.*, No. 01-15-01045-CV (Tex. App.—Houston [1st Dist.] May 17, 2016, no pet.).

#### **B. Right to Counsel—No Opportunity for Trial Court to Admonish Parents**

The Department filed its petition in April 2014. Appellants retained counsel, who represented them during the pendency of the case until February 5, 2015. On that date, the trial court granted their attorney’s motion to withdraw. Despite knowing that trial was scheduled for April 13, 2015, Appellants did not retain another attorney and did not attend trial. Their parental rights were terminated.

On appeal, Appellants claimed that the trial court abused its discretion in granting their attorney’s motion to withdraw. As part of this issue, they argued that they were “not notified of their right to request court appointed counsel.” TFC § 263.0061(a) provides that “At the status hearing under Subchapter C and at each permanency hearing under Subchapter D held after the date the court renders a temporary order appointing the department as temporary managing conservator of a child, the court shall inform each parent not represented by an attorney of: (1) the right to be represented by an attorney; and (2) if a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney.”

The Court of Appeals rejected this argument, reasoning that “[A]ppellants appeared with retained counsel throughout the pendency of the case until their attorney withdrew” in February 2015, but that the “only permanency hearing after that was on April 9, 2015, and [A]ppellants did not personally appear for that hearing.” Thus, the Court concluded that the trial court did not violate section 263.0061(a) because it “did not have an opportunity to inform them of their right to be represented by an attorney or to be appointed counsel if they were indigent.” *E.T. and T.T. v. Tex. Dep’t of Family and Protective Servs.*, No. 03-15-00274-CV (Tex. App.—Austin Sept. 29, 2015, no pet.) (mem. op.).

### C. Denial of Bench Warrant

Six days prior to trial, Father filed an application for a bench warrant to secure his presence at trial, asserting that his presence was “necessary and vital to his defense”. On the day of trial, the trial court denied the application for a bench warrant, but postponed the trial setting two weeks “to give [Father] and his attorney ‘plenty of opportunity to submit [Father’s] testimony by way of affidavit’”.

At trial, Father’s attorney offered six exhibits, all of which were admitted without objection. These exhibits consisted of: (1) three affidavits by Father which had not yet been signed; (2) two handwritten documents “in which [he] explained his position and presented evidence, including a certificate of completion for an anger conflict resolution course and a certificate of completion for a men’s life-skills course”; and (3) a recent picture of Father. Father’s attorney informed the court that he had prepared the affidavits based on narratives obtained from Father, but had not yet received the signed copies at the time of trial; nevertheless, the trial court permitted the affidavits to be admitted based upon his attorney’s representations.

In appealing the termination of his parental rights, Father claimed that the trial court abused its discretion and violated his due process rights when it denied his application for a bench warrant. In its review, the Appellate Court noted well-settled case law which establishes that procedural due process requires “at a minimum, notice and an opportunity to be heard at a meaningful time and in a meaningful manner” and that among the factors to consider in determining due process in a particular proceeding is “the risk of an erroneous deprivation of that interest due to the procedures used”.

The Court further stated that “the risk of erroneously depriving a parent of his interest in the care, custody, and control of his child could be affected by the refusal to allow the parent to appear in person at trial.” The Court also cited *In re Z.L.T.*, 124 S.W.3d 163 (Tex. 2003), which establishes that although a “litigant cannot be denied access to the courts simply because he is incarcerated”, “an inmate does not have an absolute right to appear in person in every court proceeding, including a suit affecting the inmate’s parental rights.” Among the factors that a court may consider in balancing an “inmate’s right of access to the courts” “against the protection of the correctional system’s integrity” is “whether the inmate can and will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone, or some other means.”

Here, the Court noted that Father “was provided with notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” The Court held that Father “did not meet his burden of establishing the necessity of a bench warrant” and that “although [he] was not able to appear in person, the trial court provided a meaningful method whereby [Father] could make his position known to the trial court.” Further, the Court found that the “risk of an erroneous deprivation of [Father’s] interest was minimized by the procedures used as a substitution for his personal appearance.” The Court concluded that the trial court did not abuse its discretion in overruling Father’s request for bench warrant and did not violate his right to due process. *In re K.D.*, No. 11-14-00326-CV (Tex. App.—Eastland May 15, 2015, no pet.) (mem. op.).

### D. Monitored Return: Oral Rendition Sufficient

The Department became involved with Mother and the children in March 2013. In December 2013, the trial court granted a 180-day extension pursuant to TFC § 263.401(b), resetting the dismissal date for October 6, 2014. In September 2014, the parties entered into a Mediated Settlement Agreement (MSA) providing for a three-phase possession plan, ending with Mother having unsupervised possession of the children beginning in November 2014. At a permanency hearing on October 2, 2014, the trial court determined it was in the children’s best interest to adopt the MSA and ordered a monitored return in accordance with the MSA. The trial court set the next permanency hearing for December 4,

2014, scheduled a final hearing for March 5, 2015, and reset the dismissal date for March 31, 2015. On October 16, 2014, the trial court signed an order with respect to the October 2, 2014 hearing. The monitored return disrupted in December 2014. Mother moved to dismiss the case, arguing the statutory requirements of TFC § 263.403 prevented the trial court from retaining the suit on its docket past the October 6, 2014 dismissal date. The trial court denied her motion, and the final hearing proceeded to trial in March 2015, whereupon Mother's parental rights were terminated.

The Court of Appeals recited that TFC § 263.401 provides that a Department's lawsuit requesting termination of parental rights must be dismissed on the first Monday after the first anniversary of the date the court rendered the first temporary ordering naming the Department temporary managing conservator unless the court has commenced trial or granted a one-time extension under subsection (b). "Notwithstanding § 263.401, however, [pursuant to § 263.403] the court may retain jurisdiction of a case if it finds that the retention is in the best interest of the children, orders a Department-monitored return of the child to the parent, and continues the Department as temporary managing conservator of the child."

Mother argued that the trial court's October 2 oral pronouncement was ineffective to retain jurisdiction over the matter pursuant to TFC § 263.403 because the trial court did not use "extension language" or make specific findings required by the section. The Court disagreed, noting that nothing in TFC § 263.403 required that a monitored return order had to be in writing. The Court held that the oral rendition at the October 2 hearing was sufficient to satisfy TFC § 263.403 even in the absence of a specific statement that the trial court was retaining the case on the docket, as the new dismissal date clearly reflected the trial court was retaining the case.

The Court also rejected Mother's argument that the trial court's failure to make specific findings regarding the necessity for retaining the case nullified the trial court's monitored return order, and also her claim that any pronouncement failing to comply with every statutory requirement is insufficient to retain the suit on the trial court's docket. The Court ruled that "[w]hile certain findings are required by section 263.403 . . . there is nothing in section 263.403 suggesting the failure to make such findings would preclude retention of the case

on the docket." The Court ruled that the trial court's oral rendition at the October 2, 2014 hearing was sufficient to maintain the case on its docket pursuant to TFC § 263.403, and was timely rendered before the October 6 dismissal date. *In re A.H.J., A.H., and A.H.*, No. 05-15-00501-CV (Tex. App.—Dallas Oct. 8, 2015, pet. denied) (mem. op.).

### **III. Trial Practice**

#### **A. Parents Entitled to Present Rebuttal Evidence**

In a previous proceeding, the Department sought to terminate the parents' rights to two children. After trial, the trial court terminated the parents' rights to one child, but denied termination of their rights to the other because that child had not been in the conservatorship of the Department for nine months as required by TFC § 161.001(b)(1)(O).

The Department later filed a supplemental petition to terminate the parents' rights to the child, in which it pled TFC § 161.004 as a ground. At the second trial to terminate the parents' rights to the child, the parents objected to the testimony of the Department's first witness, an investigation supervisor, on the basis that the Department had not laid a proper predicate under TFC § 161.004 by showing that circumstances had "materially and substantially changed" since the prior order denying termination in order to present evidence from before the previous trial. In an effort to show a material and substantial change in circumstances as per TFC § 161.004, the Department elicited testimony from the child's caseworker that since the prior trial: (1) Father's visits had been stopped by court order due to his altercation with the foster parent; and (2) the child had grown from six months to over a year in age. After the parties questioned the caseworker regarding changed circumstances under TFC § 161.004, the parents renewed their objection to any evidence relating to prior actions, and the trial court took the matter under advisement. The Court of Appeals noted that the entire proceeding took thirty minutes and was transcribed in a fifteen-page reporter's record. The Court also pointed out, "No evidence was presented regarding any actions of the parents or the best interest of the child. Nor was the trial court asked to take judicial notice of the evidence presented at the prior trial."

Without holding another hearing, the trial court entered an order terminating the parents' rights which found that TFC § 161.004 applied, termination was warranted under TFC § 161.001(b)(1)(O), and termination was in the child's best interest.

On appeal, the parents argued that the trial court erred in rendering the termination order without allowing them to present any evidence. The Court agreed. It held, "There is no question that the parents should have been permitted to present evidence on their behalf in response to the State's efforts to terminate their parental rights. Accordingly, the trial court erred when it rendered judgment without conducting a trial on the merits after it took the Section 161.004 matter under advisement." Further, the Court concluded, "Even if Section 161.004 applied, the Department was required to present evidence at the subsequent trial to support its grounds for termination." Consequently, it reversed the termination order and remanded the case to the trial court. *In re S.F.*, No 11-15-00055-CV (Tex. App.—Eastland Sept. 10, 2015, no pet.) (mem. op.).

#### **B. Non-Parent Does not Have Burden of Proof**

At trial, the Department did not seek termination of Father's parental rights, but rather asked that a non-parent be named the child's sole managing conservator, Father be named a possessory conservator, and the Department be dismissed. The trial court granted the Department's relief as requested. Father appealed, complaining that "the trial court erred by naming [the non-parent] the sole managing conservator of [the child] because she had no affirmative pleadings on file and did not present any evidence." The Court of Appeals noted that Father did not complain of a lack of notice that the Department wanted to have the non-parent named as managing conservator, nor did he argue that the Department's pleadings were ineffective. Instead, Father argued that it was the non-parent's "burden to prove that she should be named the managing conservator" and "that because the Department did not represent [her] in the proceedings and [she] presented no evidence on her own behalf, [she] did not meet her burden of proof to be named [the child's] sole managing conservator."

The Court disagreed, and stated that "[Father] does not present any authority that in a proceeding involving the Department, the relative or other person with whom the

child is placed is required to file pleadings or to present evidence on their own behalf in order for the trial court to name them the managing conservator of the child, and we decline to impose such a requirement."

The Court further emphasized that the "Department's pleadings asked, in relevant part, that [the non-parent] be named the managing conservator of the children in accordance with the Department's stated permanency plan. Thus, the burden of proof was on the Department, as petitioner, to prove that [Father] should not be named the managing conservator and that [the non-parent] should be." In affirming the judgment, the Court held that "the trial court had statutory authority under the applicable family code provisions, when read as a consistent and logical whole, to find that [Father] was not at the time of trial an appropriate managing conservator and also to name [the non-parent] as [the child's] managing conservator without the necessity of [her] presenting evidence or otherwise participating in the trial." *In re R.A.*, No. 10-14-00352-CV (Tex. App.—Waco June 11, 2015, no pet.) (mem. op.).

#### **IV. Evidence**

##### **A. Admissibility of Child Hearsay Statements**

On appeal, Mother and Father complained that the trial court abused its discretion in admitting hearsay statements of the child to the therapist, arguing that the statements were not statements of abuse. TFC § 104.006 provides that a statement made by a child twelve years old or younger that describes abuse against the child is admissible if the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability, and: (1) the child testifies or is available to testify in some manner; or (2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the child's welfare.

The child was referred for therapy services after her removal because she was "emotionally disturbed, throwing up after eating and having nightmares and feeling cold." The child told her therapist that she: (1) had been spanked, slapped in the face, and thrown against the wall; (2) saw Mother and Father constantly fight and yell; (3) was not always fed or bathed and her clothes were not always washed; (4) felt the need to care for her younger brother; and (5) saw Mother and Father "smoke", which caused them to act strange and either be

mean and aggressive toward the children or ignore them altogether. The therapist testified that she found the child's statements to be credible because they were expressed in a manner consistent with the therapist's expectations, the child used age-appropriate vocabulary, had appropriate eye contact and body language, and her statements remained consistent throughout the case. Additionally, the therapist opined that the statements were not the kind that a child of her age would make up.

In addition, the therapist testified about the impairment in the child's psychological development, specifically: (1) the child's diagnosis of adjustment disorder with mixed disturbance of emotions and conduct; (2) the child's symptoms of anxiety, such as headaches, stomachaches and muscle tension that are typically the result of prolonged exposure to domestic violence; (3) the child's "parentification"; and (4) the child's emotional difficulty due to the parents' actions or inactions.

The Appellate Court looked to the "non-exclusive" definition of "abuse" under TFC § 261.001(1)(B) in determining that the child's statements constituted statements of abuse. The Court noted that the list under TFC § 261.001(1)(B) includes "causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's ... development or psychological development." As such, the Court found that "the trial court's determination that the statements made by [the child] constituted abuse as set forth in TFC § 104.006 was not outside the zone of disagreement."

The Court also applied case law relating to outcries of sexual abuse under section 38.072 of the Code of Criminal Procedure as a guide to determine reliability under TFC § 104.006, and held that it was within the zone of reasonable agreement for the trial court to find that the child's statements were sufficiently reliable. Specifically, the Court found that with regard to reliability, the focus of the inquiry must remain on the outcry statement, not on the actual abuse, and that a statement can be reliable even if it contains vague or inconsistent details. *In re E.M. and J.M.*, No. 10-14-00313-CV (Tex. App.—Waco May 28, 2015, pet. denied).

**B. Res Judicata Inapplicable Where Suits Severed**

The Department filed its original petition seeking termination of Mother's parental rights to her children, H.M. and D.L.W., in November 2013. In April 2014, the cases for H.M. and D.L.W. were severed. In October 2014, the final hearing with respect to H.M. was held, and Mother was granted possessory conservatorship of that child. In May 2015, Mother's parental rights to D.L.W. were terminated pursuant to TFC § 161.001(b)(1)(D), (E), (O), (P), and a determination that termination of her parental rights is in the child's best interest. On appeal, Mother argued that the doctrine of *res judicata* should have limited the best interest evidence considered at the trial for termination of her rights to D.L.W. to facts occurring between the conservatorship trial for H.M. and the final hearing for D.L.W.

The Appellate Court recited that "a party claiming the affirmative defense of *res judicata* must prove: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of the parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action."

The Court noted that the suits for H.M. and D.L.W. were severed before the final order of conservatorship for H.M. was entered. The Court stated that therefore, the "conservatorship order awarding [Mother] possessory conservatorship of H.M. is not a final judgment involving the same claims or issues." The Court went on to say that "[w]hat is in the best interest of H.M. is not, *ipso facto*, in the best interest of D.L.W. The mere fact that some of the evidence presented in both proceedings could have been the same does not establish that the termination proceeding as to D.L.W. was 'based on the same claims as were or could have been raised' in the proceeding pertaining to H.M." The Court accordingly found that Mother had failed to establish a claim of *res judicata*, and overruled her issue. *In re D.L.W.*, No. 07-15-00243-CV (Tex. App.—Amarillo Dec. 4, 2015, no pet.) (mem. op.).

**C. Rule of Optional Completeness — Error in the Admission of the Entire Report**

On appeal of an order terminating their parental rights, Mother and Father argued that the trial court erred in the admission of the Department's entire investigative report pursuant to TRE 107 after the parents sought to admit only the report's first page. The first page concerned the initial intake, and contained quotes from a caller who had informed the Department of the children's circumstances. Particularly, the Mother and Father wanted the jury to see the statements that "[t]he children appear to be 'in good shape'" and that there were "no concerns of abuse."

TRE 107 provides that "when part of an act, declaration, conversation, writing, or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing, or recorded statement which is necessary to make it fully understood or to explain the same may also be given into evidence."

The Court of Appeals concluded that "the trial court could have reasonably deduced that the first page of the report was rather misleading, and an incomplete description of the circumstances to which the children were being subjected. Thus, some portions of the additional twenty-six pages were admissible to explain whether the children showed signs of physical abuse or some other adverse consequences when the Department first encountered them in 2013."

Nevertheless, the Court found the report also included other information, such as the childhood and criminal histories of Mother and Father, which were unrelated to the potential abuse suffered by the children when the Department first made contact. The Court determined this information "was not necessary to correct misimpressions created by admission of the first page and should have been excluded." Therefore, the trial court erred in admitting the entire report without first redacting the irrelevant portions. Despite this, the Court found that the error was harmless, as substantially similar evidence was admitted through other sources, including Mother's and Father's testimony. Their issue was accordingly overruled. *In re C.C., M.C., L.O., and H.P.*, 476 S.W.3d 632 (Tex. App.—Amarillo2015, no pet.).

**D. No Spousal Privilege Regarding Child Abuse or Neglect**

TRE 504(a)(2) provides that "A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to the person's spouse while they were married." TFC § 261.202 provides, "In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client."

On appeal, both Father and Mother complained of the trial court's admission of an audio/video recording of a conversation they had at the jail while Father was incarcerated. They contended the recording was erroneously admitted over their objections and that its contents were subject to the spousal privilege under TRE 504. The Department countered that the recording was properly admitted pursuant to TFC § 261.202.

The Appellate Court looked to the content and the circumstances of the communication between Mother and Father to determine whether it was privileged. It noted that while the content of the recording made it apparent that Father and Mother believed their communication was private, the conversation was, in fact, recorded. However, nothing in the record indicated that either party to the conversation was aware that it was being recorded. The Court found that the Department failed to introduce any evidence that either party signed a statement that telephone calls might be monitored by the jail, or that either otherwise knew the conversation was recorded. The evidence demonstrated that the only people depicted in the recording, other than Father and Mother, were the children and people who were "walking past." The recorded conversation took place in a large room with multiple monitors. There were, however, partitions between the seating areas where the telephones are located, ostensibly for the privacy of the speaker. Based on this evidence, the Court concluded that the conversation between Mother and Father was private and there was no evidence that both intended its disclosure to any other person, and it was therefore covered by the spousal privilege. The Court was then tasked with determining whether TFC § 261.202 removes that privilege in this case.

The Court concluded that the trial in the instant case was a "proceeding" as envisioned by TFC § 261.202. Further, the termination proceeding involved the abuse

or neglect of a child. The Court reasoned that Family Code Chapter 261, entitled “Investigation of Report of Child Abuse or Neglect,” contains definitions of both “abuse” and “neglect”. The Court also stated that the definitions given there, however, are not exclusive, but rather, are broad and inclusive, and cited TEX. GOV’T CODE § 311.005(13) (“includes” is term “of enlargement and not of limitation or exclusive enumeration”) and *In re E.C.R.*, 402 S.W.3d 239, 246 (Tex. 2013) (the terms “abuse” and “neglect” utilized in section 261.001 “are defined broadly and nonexclusively”). The Court held that “[g]iven these broad parameters, there can be no question that this was a proceeding involving the abuse or neglect of a child. Mother and Father were therefore not entitled to invoke the spousal communication privilege, and the trial court did not err in admitting the audio/video recording.” *In re L.E.S.*, 471 S.W.3d 915 (Tex. App.—Texarkana 2015, no pet.).

**V. Termination Grounds**

**A. TFC §§ 161.001(b)(1)(D) and (E)**

Subsections (D) and (E) provide that the court may order termination of parental rights if it finds by clear and convincing evidence that a parent has:

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child.

The Department received a referral alleging the neglectful supervision, physical neglect, and medical neglect of the two children. Through its investigation, the Department learned that Mother was incarcerated and the children—had been staying with an unrelated community member. The evidence demonstrated that although Mother had initially left the children with their paternal grandmother, the children ended up going to two additional homes, eventually ending up in the home of a stranger.

Mother challenged the sufficiency of the evidence to support the termination of her parental rights under TFC § 161.001(b)(1)(D) and (E).

On appeal, Mother first argued that the children’s lack of physical injury demonstrated an absence of endangering conduct. The Court of Appeals disagreed, explaining that “it is well settled that ‘the child does not need to suffer actual physical injury to constitute endangerment’”. The Court noted that “[t]he condition of both girls upon arrival at the foster home supports a finding of endangerment.” Both girls suffered from untreated eczema, and one suffered from bottle rot. Additionally the older child was not communicating, refused to eat solid food for the first week, and disliked socializing with other children. Similarly, the younger child had been previously diagnosed with Fetal Alcohol Syndrome, but had not received any treatment for her condition. The Court concluded that the “[a]lthough there was no evidence the children were victims of physical abuse, the physical and developmental condition of both girls is evidence of Mother’s neglect and thus demonstrates that Mother engaged in conduct that endangered [both children’s] physical or emotional well-being.”

Mother further argued that she did not knowingly place or knowingly allow the placement of her children in an unsuitable environment because she left the children with the grandmother when she became incarcerated. Essentially, Mother asserted that it was the grandmother’s fault that the children ended up in the home of a stranger.

The Court considered the fact that Mother knew the grandmother lived out of state and would eventually need to return home. The Court found that, although Mother claimed she did not know she would remain incarcerated for as long as she was, the fact that Mother did not attempt to find long-term care, especially when she realized she would remain in jail longer, was evidence of neglect.

The Court added that, “even if Mother was not directly responsible for her children ending up in the care of a stranger, she allowed it to continue. Mother did not know and had never met the woman caring for her children; however, she felt comfortable signing a document making this woman their temporary caregiver.” The Court pointed out that “a child is endangered when the environment or the parent’s conduct *creates a potential for danger which the parent is aware of but disregards.*” The Court also determined that Mother did not know the type of environment the children would be subjected to when she agreed to sign

custody to the final placement. The Court concluded that “[t]here is always a potential for danger when it comes to stranger”. The Court held that “Mother’s knowingly placing her children with a complete stranger endangered the well-being of her children and therefore supports termination under subsections (D) and (E).”

Finally, Mother also argued that her past criminal conduct, described by the Appellate Court as “expansive”, was not evidence of past endangering conduct because the crimes were not crimes of moral turpitude. The Court rejected this contention and explained that “the law contains no requirement that a parent’s past criminal conduct needs to meet a certain level of severity in order to effectively weigh in favor of termination. Instead, it is necessary to look at the totality of the circumstances surrounding the parent’s criminal history, both before and after her parental rights were threatened, in order to determine how to weigh these facts alongside other evidence of parental conduct.” The Court noted that the frequency of Mother’s arrests demonstrated that she was engaging in criminal conduct with the understanding that it could result in incarceration. The Court also reiterated that Mother’s criminal conduct before the birth of the children could be considered in determining she endangered her children. The Court determined the evidence was legally and factually sufficient to support termination of Mother’s parental rights under subsections (D) and (E). *In re R.S. and A.S.*, No. 02-15-00137-CV (Tex. App.—Fort Worth Oct. 1, 2015, no pet.) (mem. op.).

**B. TFC § 161.001(b)(1)(E)**

**i. *Failure to Protect Non-Biological Child Before Birth of Subject Child Supports (E)***

On appeal, Mother challenged the sufficiency of the evidence to support the trial court’s finding under TFC § 161.001(b)(1)(E).

A year before the child was born, Father’s infant child, Half-Brother, was removed from Father after hospital tests revealed that while in Father’s care, he had sustained thirty-three fractured bones that were believed to be caused by physical abuse. The treating physician opined that “anyone who saw [Half-Brother] being moved in any way would be able to see that he was in pain and needed medical attention.” Mother was living in the home with Father, Half-Brother, and Half-

Brother’s mother at the time the injuries to Half-Brother occurred.

At trial, Mother testified that Father had a temper and was violent, but not “explosive.” She related at least three incidents where Father was “too aggressive” with Half-Brother “including holding him up and shaking him”, and that Father became angry if Half-Brother would not stop crying. Mother also testified that Half-Brother “would scream as if in pain” when Father and Half-Brother’s mother would change him. The Court of Appeals noted, however, that Mother did not do anything to help Half-Brother, and Mother believed there was no reason to intervene.

The child in this case came into care after the Department received a report on the date of his birth alleging concerns because of the injuries sustained by Half-Brother a year earlier, and Mother refused to leave Father stating that she believed he was innocent of his pending criminal charges related to Half-Brother’s injuries. At the time of trial, Mother was still living with Father and admitted that he continued to abuse drugs.

In finding the evidence sufficient to support (E), the Court of Appeals concluded that “the jury could have determined that [Mother] continued to have a relationship with [Father], failed to help or protect [Half-Brother] from his parents while living with them, and demonstrated an inability to put [the child’s] needs before her own.” *In re J.S.*, No. 12-15-00053-CV (Tex. App.—Tyler Aug. 12, 2015, no pet.) (mem. op.).

**ii. *Leaving Children with Caretaker Known to be Unsafe***

On appeal, Mother argued that the evidence was insufficient to show that she endangered the children. She claimed her own conduct was supportive instead of endangering, and any abuse the children suffered at Father’s hands occurred outside her presence.

Here, there was a history of Department investigations involving allegations Father physically abused or neglected the children. Mother was aware of instances of the children suffering injuries while in Father’s care. While she attributed some of it to roughhousing, she admitted that some of the injuries were due to Father’s harsh discipline. Mother would leave the home on the weekends for a “break” from the children.

In addition, one of the children made an outcry that Father sexually abused her. Mother claimed she knew nothing about the abuse until after the outcry, but there was conflicting testimony that Mother had suspected sexual abuse much earlier. At one point, Mother even returned home early to discover all four children were naked, with one of them alone with Father in bed.

The Appellate Court held that there was sufficient evidence to establish endangerment because “Mother consistently left the children in Father’s sole care each weekend so she could have her own time despite a pattern of injuries and incidents showing the children were not safe in Father’s care” and there were suspicions of sexual abuse. *In re L.D.F.*, No. 04-15-00399-CV (Tex. App.—San Antonio Dec. 9, 2015, no pet.) (mem. op.).

### iii. *Scienter not Required*

In a termination of parental rights case, the jury heard evidence that on multiple occasions, Mother heard voices that told her to strangle the child. In March 2009, Mother began strangling the child, and did not stop until the child said, “Momma, no. Pray.” Mother admitted attempting to strangle the child due to auditory hallucinations. Mother reported diagnoses of bipolar disorder and schizophrenia, and also that she occasionally stopped taking medication for these illnesses because she did not think it was helping her. Mother admitted she was not taking the medication when she attempted to kill her daughter. Even when Mother was taking the medication regularly, she did not appear to understand the detrimental effect the attempted strangulation had on the child.

On appeal, Mother challenged the legal and factual sufficiency of the evidence supporting the jury’s finding that she violated TFC § 161.001(b)(1)(E). Mother argued that the evidence did not demonstrate that she engaged in a voluntary, deliberate and conscious course of action that endangered the child. She admitted she attempted to strangle the child, but argued her conduct was not voluntary because she suffers from schizophrenia and bipolar disorder. Mother’s argument was premised on her assertion that her “mental illness prevented her from committing those acts knowingly, deliberately and consciously”.

The Appellate Court began its analysis by reiterating that “[s]cienter . . . is not required for appellant’s own acts

under § 161.001(b)(1)(E); scienter is required only under subsection (D) when a parent places her child with others who engage in endangering acts”.

In support of her argument, Mother cited to *In re E.N.C.*, 384 S.W.3d 796, 805 (Tex. 2012), for the proposition that the Department bears the burden of establishing that the endangering conduct was part of a voluntary course of conduct that endangered the child’s well-being. The Appellate Court noted that the statement referenced by Mother from *E.N.C.* was made in relation to the Supreme Court’s consideration of a prior conviction as a factor in its analysis of whether the appellant engaged in conduct that endangered the child. *Id.* Specifically, the Appellate Court found that in *E.N.C.*, the Supreme Court held that, “the Department bears the burden of showing how the *offense* was part of a voluntary course of conduct endangering the children’s well-being[.]” *Id.* (emphasis added). In rejecting Mother’s argument, the Appellate Court specifically found that the Supreme Court did not add a requirement of scienter into the Department’s burden under subsection (E). Ultimately, the Court concluded that the evidence was sufficient to support termination of the Mother’s parental rights under TFC § 161.001(b)(1)(E). *In re J.N.G.*, No. 14-15-00389-CV (Tex. App.—Houston [14th Dist.] Sept. 24, 2015, no pet.) (mem. op.).

### iv. *Drugs in Child’s Body Demonstrates Actual Injury*

Mother challenged only the factual sufficiency of the evidence to support the trial court’s finding under TFC § 161.001(b)(1)(E). The evidence presented at trial showed that the child was originally removed from Mother when both Mother and the child tested positive for methamphetamine, although Mother denied using methamphetamine around the child. Additionally, Mother had a long history of methamphetamine abuse dating to her teens, had drug-related arrests and convictions, failed to complete treatment services and continued to abuse substances, and testified at trial that she was a “drug addict”.

In finding the evidence factually sufficient to show that Mother’s chronic drug use constituted endangering conduct, the Court of Appeals concluded that “the drug’s presence in [the child’s] body demonstrates actual injury to the child, not merely a threat to his physical well-being.” Moreover, the Court noted that the trial court “could have found incredible” Mother’s denial that she

abused methamphetamine around the child, and could have concluded that the positive drug test demonstrated the child had been exposed to the drug from use in the home. *In re S.H.*, No. 07-15-00177-CV (Tex. App.—Amarillo Sept. 16, 2015, no pet.) (mem. op.).

**v. *Medical Neglect of Autistic Child***

On appeal, Mother challenged the sufficiency of the evidence to support the trial court’s finding under TFC § 161.001(b)(1)(E).

The evidence presented at trial showed that despite expressing verbal concern to the child’s pediatrician and others, “for over two years Mother did nothing to seek medical treatment for [the child] about his [speech] problem”, including failing to have his hearing evaluated by an audiologist as continually recommended by his pediatrician. When the child came into care at age four, he was nonverbal, and “‘profoundly delayed for his age’, socially, emotionally, and developmentally”, and exhibited behaviors “so outside the norm as to be readily apparent to lay people.” Shortly after removal, a psychologist diagnosed the child with autism spectrum disorder with accompanying language impairment and emphasized the importance of ongoing treatment to continue to refine the diagnosis. The testimony showed that Mother denied or minimized the child’s medical issues.

The Court noted that termination is not justified when the evidence reflects only that “a parent’s failure to provide a more desirable degree of care and support is due solely to misfortune or lack of intelligence or training and not to indifference or malice.” The Court pointed out that in this case, however, “there was evidence Mother’s failure to seek treatment for [the child] was more than just ignorance regarding his condition.” After the child was diagnosed and began receiving therapies during the case, Mother “continued to neglect his medical needs” when she attended only three of at least sixty-four therapy sessions for the child despite witness testimony regarding the importance of Mother’s attendance to learn about the child’s diagnosis and how to carry out therapy skills and techniques. The Court concluded that there was evidence Mother endangered the child by neglecting his medical needs and affirmed the termination of Mother’s parental rights under subsection (E). *In re K.S.*, No. 05-15-01294-CV

(Tex. App.—Dallas Apr. 21, 2016, pet. denied) (mem. op.).

**vi. *Frequent Incarcerations and Knowledge of Drug Use***

Father challenged the legal and factual sufficiency of the evidence to support termination of his parental rights under TFC § 161.001(b)(1)(E).

The evidence showed the child was removed at the time of her birth because Mother and the child tested positive for cocaine, Mother admitted she was addicted to drugs and used marijuana while pregnant, and Father was incarcerated in county jail. During the first year of the child’s life, Father spent over one hundred days in jail, and was incarcerated on the day of trial. Father had been incarcerated several times for violating community supervision and for committing new offenses. Only days before trial, Father entered a plea agreement under which he was sentenced to four years’ incarceration for felony assault/family violence.

Although Father claimed he did not use drugs with Mother and was not aware of her drug abuse or addiction, he testified he had diagnosed himself with a cocaine addiction two years before trial, had completed a seven-day inpatient drug treatment program, and had used cocaine at least once, five or six months before trial. The Court of Appeals stated that the evidence also showed Father refused or failed to appear each time the Department asked him to submit to drug testing, and supported a reasonable inference this occurred at least twice. The Court recognized that such a refusal allowed a reasonable inference by the trial court that Father knew he would test positive for drug use.

The Court determined that evidence of Father’s drug abuse, frequent incarcerations, and pending four-year prison sentence supported a finding that he engaged in a course of conduct that endangered the child’s physical or emotional well-being.

Further, the Court held “the trial court could also have reasonably concluded (1) that because [Father] had a chronic drug addiction and had experience with drugs, he knew [Mother] was also addicted, (2) that [Father] knew that neither he nor [Mother] were in a position to provide a stable home and support [the child] as a result of their drug addictions and his frequent incarcerations, and (3) that but for the Department’s intervention, and as a result of his frequent incarcerations and pending four-

year prison sentence, [the child] would have been in [Mother's] possession after her birth." The Court held that based on these reasonable conclusions, "the trial court could also reasonably have concluded that [Father] knowingly placed [the child] with someone ([Mother]) who would endanger her physical or emotional well-being."

Accordingly, the Court held the evidence legally and factually sufficient to support the trial court's finding, by clear and convincing evidence, that Father violated TFC § 161.001(b)(1)(E). *In re J.B.*, No. 06-15-00040-CV (Tex. App.—Texarkana Jan. 22, 2016, no pet.) (mem. op.).

**C. TFC § 161.001(b)(1)(F)**

Father challenged the termination of his parental rights pursuant to TFC § 161.001(b)(1)(F). Under TFC § 161.001(b)(1)(F), parental rights may be terminated if the court determines the parent "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."

Mother's first amended petition to terminate Father's parental rights was filed on May 1, 2015. It was undisputed at trial that Father "had income and the ability to pay in the relevant time frame but provided no support at all. [Father] failed to pay child support, provided no Christmas or birthday gifts, cards or phone calls." Father testified he had been employed since 2012, and that he worked 60 hours per week in the summer, as well as that he had acquired seniority and was no longer working on weekends. He admitted that he had not made support payments during the period of 2014 and up to the trial, stating it was because he had acquired an unusual number of other expenses, mostly related to the birth of a new child and medical expenses for his wife and himself.

The Appellate Court noted that the relevant time period for termination under subsection (F) would be a twelve month period beginning no earlier than November 1, 2013. The Court also pointed out that "one-year period means twelve consecutive months, and there must be proof of the parent's ability to pay support during each month of the twelve month period."

The Court ruled that based on the evidence that Father was working full time, "the trial court could have inferred that [Father] had the ability to pay some support

... but he chose to pay other bills he considered more pressing." The Court determined the evidence was sufficient and affirmed (F) finding. *In re Z.W.M.*, No. 07-15-00316-CV, (Tex. App.—Amarillo Feb. 9, 2016, no pet.) (mem. op.).

**D. TFC § 161.001(b)(1)(L)**

Father challenged the legal and factual sufficiency of the evidence to support termination of his parental rights to his children under TFC § 161.001(b)(1)(L)(ix). Subsection 161.001(b)(1)(L) authorizes the trial court to terminate parental rights if it finds by clear and convincing evidence that the parent has been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code:

...

(ix) Section 22.04 (injury to a child, elderly individual, or disabled individual).

The Court of Appeals stated that because the Family Code does not define "serious injury", it would give the term its ordinary meaning, as have prior decisions. According to the Court, "'Serious' means 'having important or dangerous possible consequences,' while 'injury' means 'hurt, damage, or loss sustained.'" The Court also stated that serious injury under this provision "does not require bodily injury", citing the Texas Supreme Court's decision in *In re L.S.R.*, 92 S.W.3d 529 (Tex. 2002) for the proposition that a psychological or emotional injury is relevant when determining whether the child sustained serious injury.

The Court determined that the evidence at trial conclusively demonstrated that Father had been placed on deferred adjudication community supervision for injury to a child due to his 2008 assault on one of Mother's children. The court detailed that the record included a certified copy of Father's indictment for injury to a child and a protective order entered in connection with the charge, as well as a certified copy of the 2008 order of deferred adjudication showing Father was placed on deferred adjudication community supervision for two years after he pleaded guilty to injury to the child.

The Court held there was sufficient evidence to support the trial court's conclusion that the acts for which Father was convicted caused "serious injury" to the child. Two law enforcement incident reports admitted during trial described Father's 2008 assault of Mother and the then-nine-year-old child. The incident reports showed that "[Father] punched [the child] so hard that he fell to the ground and that [Father] slammed [the child] into a wall multiple times, causing him to cry. [The child] watched [Father] slam his mother into a table and a wall while his mother was holding [the child's] sister." The officer noted that the child's "arm was red and swollen." The reports also showed that after the incident, the child "had bruises on his arm and back and scratches on his back and was in so much pain that [Mother] took him to the pediatrician, where he was diagnosed with a contusion on his left arm, a sore neck and shoulder from a sudden jolt, and a sore neck from a sharp blow." Further, the child told the officer that "[Father] hurt him, his mother, and his sister and he did not want [Father] back in the house."

Consequently, in affirming the order of termination, the Court held that the evidence was legally and factually sufficient to support the trial court's finding under subsection (L)(ix). *In re W.J.B. and In re A.L.F., D.P.F.-A., E.E.F., B.E.H., Jr., and R.F.B.*, Nos. 01-15-00802-CV, 01-15-00803-CV (Tex. App.—Houston [1st Dist.] Mar. 31, 2016, no pet.) (mem. op.).

#### **E. TFC § 161.001(b)(1)(O)**

##### **i. Excuses Insufficient**

Father's testimony at trial revealed that he: (1) was aware of the family service plan and its requirements; and (2) failed to comply with the family service plan's requirement that he attend weekly visitation sessions with the child, because he attended only four sessions in a seventeen month span. On appeal, Father challenged the sufficiency of the evidence supporting the trial court's TFC §161.001(b)(1)(O) finding arguing that he was unable to visit the child more frequently due to the distance between his residence and the child's placement because his work schedule would not accommodate more frequent visitation. The Appellate Court began its analysis by stating that the "record contains no evidence of full or adequate compliance" and noting that Father "provided only excuses for failure to adhere to the required visitation."

The Court stated that Father's excuses for failing to comply with a court order and partial compliance do not factor into the analysis of the issue of compliance with or satisfaction of court-ordered services. Rather, the Court concluded that Father's excuses for failing to adhere to the required visitation under the family service plan relate only to examination of the trial court's best interest determination. Therefore, the Court held that the evidence was conclusive that Father failed to comply with the court-ordered family service plan. *In re A.M.M.*, No. 04-15-00638-CV (Tex. App.—San Antonio Apr. 6, 2016, no pet.) (mem. op.).

##### **ii. (O) Does Not Require a Target Date for Compliance**

Mother appealed the termination of her parental rights under TFC § 161.001(b)(1)(O).

Mother claimed that termination of her rights under subsection (O) was improper because she was not provided with a "specific time table[] for her to comply with the demands of [the Department]" and "[t]he only specific date for compliance by [the Department] was in the Family Service Plan filed July 14, 2014 with a target goal date of July 15, 2015." She argued that at the time of trial, she "still had 57 days in which to comply" with the court's order, and that the order "gave her no deadlines to comply with".

The Court of Appeals disagreed, first stating that Mother had failed to provide any authority to support her contention that the Department is precluded from seeking termination prior to a "target date" for compliance or "that the Department was required to provide deadlines for [Mother's] completion of the goals." In addition, the Court noted that the service plan did not contain a "target date set for [Mother's] compliance", but rather a date set for the Department's goal of family reunification. Finally, the TFC § 263.401 dismissal deadline for the case was June 1, 2015, leading the Court to conclude that Mother's "argument that she had fifty-seven more days to comply with the court's order has no merit." Mother's issue was overruled. *In re B.S.*, No. 13-15-00281-CV (Tex. App.—Corpus Christi Nov. 12, 2015, no pet.) (mem. op.); *see also In re M.S.*, No. 01-15-00451-CV (Tex. App.—Houston [1st Dist.] Sept. 29, 2015, no pet.) (mem. op.) (Court rejected Mother's argument that "target date" on the service plan is the "actual deadline for her completion of the plan").

### iii. *Prior Removal for Abuse*

On appeal, Mother argued there was insufficient evidence to show that the child was removed due to abuse or neglect under TFC § 161.001(b)(1)(O). According to Mother, the Department “‘failed to present evidence as to any abuse or neglect’ necessitating the 2013 removal because the relatives that were appointed conservators of [the child] in 2010 ‘placed [the child] in the care of the Department because they could no longer care for him.’”

The child was originally removed from Mother in January 2010 after the Department received multiple reports that Mother was neglecting and physically abusing the child, and carrying marijuana in her diaper bag. In November 2010, the trial court signed an Agreed Final Order appointing Aunt and Uncle permanent managing conservators of the child and providing Mother supervised visitation. The child was removed from Aunt and Uncle in January 2013 due to issues of neglectful supervision, sexual abuse, and statements that they no longer wanted to provide for his care. The trial court signed an order terminating Mother’s parental rights in April 2015.

In rejecting Mother’s argument, the Court of Appeals pointed out that although the child was removed from Aunt and Uncle who were appointed as managing conservators, the child “was originally removed from Mother’s care pursuant to Chapter 262.” Thus, the child’s “original removal from Mother’s care based upon neglect was a precipitating event from which the modification proceeding terminating Mother’s parental rights began and from which [the child] was placed with relatives.” Additionally, the Court noted that on appeal Mother did not challenge the trial court’s finding that the 2013 removal was necessary because of Mother’s continued neglect. The Court accordingly determined that the evidence was sufficient to demonstrate that the child was removed for abuse or neglect within the meaning of Chapter 262. *In re J.H.*, No. 09-15-00171-CV (Tex. App.—Beaumont Aug. 31, 2015, no pet.) (mem. op.).

### iv. *Removal of the Children from Non-Parent*

In October 2013, pursuant to TFC § 262.201, the Department submitted an affidavit to support its request for emergency orders to obtain possession of two children, ages twelve and eleven. The affidavit explained that the Department’s investigation revealed: (1) in May 2013, Father brought the children from Chicago, where they resided with Mother; (2) the Father failed to return the children at the conclusion of the visit, keeping them without Mother’s consent; (3) while living with Father and Step-Mother, the children had been beaten and subjected to other physical abuse by Step-Mother; and (4) Step-Mother had a history with the Department regarding neglect of her own children.

On appeal, Mother asserted that the record failed to show that the children were removed from her as a result of abuse or neglect. Specifically, she argued “[t]he allegations made in support of removal were based solely on allegations of abuse committed by [step-mother] and by [their] father’s neglect in failing to stop the abuse”.

In rejecting Mother’s challenge, the Appellate Court noted that the Supreme Court of Texas “has signaled that courts may rely not only on the Department’s affidavit supporting initial removal but also on the trial court’s unchallenged findings in the temporary orders”. Here, the court explained that the unchallenged findings found in the temporary order, supporting the children’s initial removal, states “there is a continuing danger to the health or safety of the children if returned to the parent”. It likewise also found that the order supporting the continued removal of the children from Mother and Father contained the following unchallenged findings: (1) the children faced an immediate danger to their physical health or safety; (2) the urgent need to protect them required their immediate removal; and (3) they faced a substantial risk of a continuing danger if they were returned home.

In affirming the judgment, the Court therefore held that the temporary orders authorizing the children’s initial removal and their continuing removal expressly applied to Mother. It further held that the temporary orders also required Mother to comply with the Department’s service plan. The Court added, “Read in context, the trial court’s finding in the temporary orders applied to Mother”. As such, the Court concluded that “the

affidavit and the unchallenged findings establish that [the children] were removed from Mother under chapter 262 for abuse or neglect”. *In re A.L.W. and A.N.W.*, No. 01-14-00805-CV (Tex. App.—Houston [1st Dist.] July 14, 2015, no pet.) (mem. op.).

**F. TFC § 161.001(b)(1)(Q)**

**i. *Mere Conviction of Strict-Liability Offense Does Not Prove Scienter Element***

TFC § 161.001(b)(1)(Q) authorizes termination 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.”

In challenging the sufficiency of the evidence supporting the termination of his parental rights under TFC § 161.001(b)(1)(Q), Father contended that the Department failed to present clear and convincing evidence that he *knowingly* engaged in the conduct that resulted in his conviction. The Court of Appeals determined that “the record is devoid of meaningful evidence establishing the details of [Father’s] conviction and sentence.” At trial, the Department caseworker testified that Father: (1) “had been convicted of driving while intoxicated (DWI), third or more,” and “was incarcerated at that time as a result”; (2) “received a three-year sentence” and “his expected release date is October 15, 2016”; and (3) was sentenced on April 26, 2014, and the Department filed its case in August 2014.

The Court stated that under subsection (Q), “the Department must present evidence that [Father] knowingly engaged in the conduct that resulted in his conviction.” It reasoned that Father’s conviction of “DWI, third or more,” was for an offense found in Penal Code Chapter 49—under which section 49.11(a) provides, “[P]roof of a culpable mental state is not required for a conviction under this chapter.” Thus, it held “the Department could not establish that [Father] knowingly engaged in the conduct that resulted in his conviction of the offense of DWI, third or more, by merely introducing evidence of the conviction. Instead, the Department was required to present proof of the facts surrounding the conviction to show that [Father] knowingly engaged in the conduct resulting in that conviction.”

The Court stated, “[h]ere, the record merely discloses that [Father] was sentenced to three years’ imprisonment in April 2014 for a conviction of DWI, third or more”, and the Department’s sole witness only summarized Father’s sentence, release date, and parole history based on information she observed on the Department of Criminal Justice website. The Court pointed out that “[t]he Department introduced no offense reports, officer testimony, dashboard camera recordings, witness testimony, or other evidence of any kind concerning the facts surrounding the offense or the conduct leading to [Father’s] charge and conviction.” As a result, it determined there was no evidence upon which the trial court could have reasonably concluded that Father knowingly engaged in the conduct resulting in his conviction of the strict-liability offense of DWI, third or more, as required by subsection (Q). Consequently, the Court held the evidence was legally insufficient to support the termination finding under subsection (Q), and reversed the judgment terminating Father’s parental rights and rendered judgment denying termination. *In re A.R.*, No. 06-15-00056-CV (Tex. App.—Texarkana Nov. 9, 2015, no pet.).

**ii. *Scienter Established***

Father challenged the sufficiency of the evidence to terminate his parental rights under subsection (Q). Specifically, Father argued that the Department failed to prove that he “knowingly” engaged in criminal conduct.

At trial, Father testified he was incarcerated because of a car accident, in which he claimed he swerved while trying to retrieve the child’s bottle from the floorboard, “accidentally” killing someone. Father admitted that he pled guilty to intoxication manslaughter. The Appellate Court noted that case law establishes that “mere conviction for the strict-liability offense of intoxication manslaughter” is legally insufficient to support the “knowing” element. However, in this case, Father had admitted that he had told his probation officer that he smoked marijuana daily. He had confessed to the officer at the scene that he had used a small amount of marijuana and had taken a muscle relaxant on the day in question. The arrest affidavit indicated that Father displayed signs of intoxication, noted several clues of intoxication on various standardized field sobriety tests, and Father had given a false identity to law enforcement several times. The Court found that this was sufficient to prove that Father had knowingly driven while

intoxicated and as a result was convicted and imprisoned. The termination of his parental rights was accordingly affirmed. *In re A.R., L.R. and R.Q. Jr.*, No. 09-15-00473-CV (Tex. App.—Beaumont April 14, 2016, no pet.) (mem. op.).

### iii. *Inability to Provide Safe Environment*

In June 2012, Father was convicted and sentenced to four years' imprisonment for felony assault family violence. In December 2012, the Department filed its petition for termination of parental rights. The trial court found that the Department met its burden of establishing that Father's criminal conduct resulted in his being incarcerated for not less than two years from the date of the filing of the petition.

The Appellate Court, citing *In re Caballero*, 53 S.W.3d 391 (Tex. App.—Amarillo 2001, pet. denied), stated "when the party seeking termination has established that the incarcerated parent will remain in confinement for the requisite period, the parent must then produce some evidence as to how he would provide or arrange to provide care for the child during his incarceration". If the parent meets this "burden of production", the Court reiterated that the Department then has the "burden of persuasion" to show that the parent's provision or arrangement would not satisfy the parent's duty to the child. The Court continued: "The question is not, however, whether Father was able to provide the children's physical necessities but whether Father met his burden of production by providing *some evidence* of how he would care for the children or how he would arrange to provide care for his children while he remained incarcerated".

Here, in considering whether there was some evidence of how Father, himself, would provide care for his children, the Court examined "the evidence regarding the availability of financial and emotional support from [Father]". Regarding financial support, the Court noted that the Department's caseworker testified that since 2013, Father had not provided any monetary support for the children during the time the children were in the Department's care. It also considered Father's testimony that he would occasionally receive money from a friend or family but otherwise did not receive any funds or have any other source of income. As to emotional support, Father claimed he provided for the children's emotional needs through the cards he made and sent to

all of his children on most major holidays and on every birthday. At trial, Father testified that he sent cards telling his children that he loved them, missed them, and could not wait to hold them.

In determining that Father did not produce evidence of how he would care for the children, the Court stated: "although Father sent letters and cards to his children with his sentiments of love and concern, we cannot conclude that this is some evidence to show how [Father] would be able to provide for the children during his incarceration". As such, it concluded that the trial court "could have found that [Father] failed to meet his burden of production regarding how he would be able to care—financially and emotionally—for the children during his incarceration".

The Court next considered the evidence of Father's ability to arrange for the care of his children, including: (1) Father testified that he submitted his sister as a placement option; however, Father's sister told the CASA volunteer that "she would be willing to care for [all] the children, but only if [Mother's] and [Father's] rights were terminated"; (2) the CASA volunteer testified she was told the paternal grandmother "had some health issues"; (3) although Father provided "a couple names of relatives" for possible placement, when the caseworker called the relatives, she received no response; (4) a home study conducted on Father's brother and sister-in-law revealed the brother had medical issues and placement was not recommended; and (5) the caseworker testified that the trial court "at that time did not see it was appropriate to place the children with [Father's] family".

Based on this evidence, the Court determined that there was no evidence in the record to support a conclusion that any of the parties Father submitted as potential placements agreed to assume his obligation to care for the children on his behalf. As such, the Court concluded that the trial court "could have found that [Father] failed to submit any evidence that he could have arranged to provide care for his children". Therefore, "because [Father] did not meet his burden of production, the burden never shifted back to the Department". Accordingly, the Court found the evidence supporting subsection (Q) legally and factually sufficient. *In re S.R.*, No. 13-15-00114-CV (Tex. App.—Corpus Christi June 11, 2015, no pet.) (mem. op.).

**iv. Ability to Care During Imprisonment**

On appeal, Father challenged the trial court's conclusion under TFC § 161.001(b)(1)(Q). After stating that clear and convincing evidence supported the trial court's finding that Father "knowingly engaged in criminal conduct resulting in his conviction and confinement for at least the [requisite] two-year period" the Court of Appeals noted case law establishing that the "burden shifted to Father to produce some evidence showing he made arrangements for the care of the children during his imprisonment".

In examining whether Father met his burden, the Court noted that there was "no evidence Father made any arrangements to care for the children during his confinement", but that he left the children with Mother, whose "rights were terminated in this proceeding after the trial court concluded she failed to properly care for the children." In addition, the Court stated that "[a]lthough Father testified that his mother and other family members could care for the children, his family did not offer supporting testimony." The Court concluded that "Father's testimony alone does not render the evidence insufficient to support a finding of inability to care for the children" and that he did not meet his burden to show that he made arrangements for care of the children during his imprisonment. *In re A.G. and A.G.*, No. 05-15-01298-CV (Tex. App.—Dallas Mar. 1, 2016, no pet.) (mem. op.); *see also In re A.R., L.R. and R.Q. Jr.*, No. 09-15-00473-CV (Tex. App.—Beaumont April 14, 2016, no pet.) (mem. op.).

**G. TFC § 161.001(b)(1)(R)**

On appeal, Mother argued the evidence was legally and factually insufficient to support the trial court's (R) finding, contending "there were no observable signs of marijuana, or withdrawal from marijuana in the child at birth."

TFC § 161.001(b)(1)(R) provides that the court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent 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.

In addition, TFC § 161.001(a) defines "born addicted to alcohol or a controlled substance" to mean a child who is

born to a mother who during the pregnancy used alcohol or a controlled substance, as defined by chapter 481 of the health and safety code, other than a controlled substance legally obtained by prescription, and who after birth, as the result of mother's use of the controlled substance or alcohol, experiences observable withdrawal from the alcohol or controlled substance, exhibits observable or harmful effects in the child's physical appearance or functioning, or exhibits the demonstrable presence of alcohol or a controlled substance in the child's bodily fluid.

The child came into care after both Mother and the child tested positive for marijuana at the child's birth, and Mother admitted using marijuana in California where Mother claimed marijuana can be legally obtained and used under certain circumstances.

At the termination trial, the Department admitted several exhibits including Mother's drug test results and medical records. During Mother's trial testimony, she admitted smoking marijuana during her pregnancy and that she and the child tested positive for marijuana at the child's birth.

In reviewing the sufficiency of the evidence to support (R), the Court of Appeals noted that both Mother and the child tested positive for marijuana at birth, and that marijuana is an illegal controlled substance under chapter 481 of the Health and Safety Code. Additionally, Mother admitted using marijuana while pregnant and medical tests conducted on the child at birth revealed marijuana in the meconium fluid. Mother's urinalysis also revealed a positive test for marijuana. In rejecting Mother's argument that the child suffered no signs of withdrawal, the Court pointed out that the Family Code does not require proof of signs of withdrawal. Rather, it is sufficient to show that the demonstrable presence of a controlled substance was observable in the child's bodily fluids.

Mother further argued that the evidence was insufficient because the Department presented no expert testimony that she was the cause of the child being born addicted to a controlled substance. The Court noted that Mother did not cite, nor did the Court find, any legal authority supporting her argument that the Department was required to present expert testimony as to causation. In finding the evidence legally and factually sufficient to support (R), the Court concluded that a reasonable factfinder could believe that a child's testing positive for a controlled substance at birth could be caused by its

mother's use of the controlled substance during pregnancy. Thus, Mother's admission of marijuana use during pregnancy, and the admission of the medical records showing marijuana in the child's bodily fluids, constituted sufficient evidence under the Family Code that Mother was the cause of the child being born addicted to a controlled substance. *In re L.G.R.*, No. 14-16-00047-CV (Tex. App.—Houston [14th] June 7, 2016, no pet. h).

**VI. Best Interest**

**A. Best Interest and Relinquishments of Parental Rights**

**i. TFC §161.211(c) Bars Appellate Review of Best Interest Finding**

TFC § 161.211(c) provides that “[a] direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit.”

Mother signed an irrevocable affidavit of voluntary relinquishment, and her rights were terminated pursuant to TFC § 161.001(b)(1)(K). Two weeks after the termination trial, Mother filed a motion for new trial claiming that her agreement to relinquish her parental rights was not voluntary. Mother's motion for new trial was subsequently denied.

On appeal, Mother alleged that the trial court erred in determining her affidavit was voluntarily executed and that the evidence at trial was insufficient to support the best interest requirement under TFC § 161.001(b)(2).

After determining that Mother voluntarily executed her affidavit of relinquishment, the Court of Appeals determined that TFC § 161.211(c) barred Mother's best interest argument. The Court held that “[t]he order terminating Mother's parental rights is based on her relinquishment affidavit. Accordingly, Mother cannot make any arguments on appeal except arguments relating to fraud, duress, or coercion in the execution of the affidavit. Mother's [best interest] issue does not relate to fraud, duress, or coercion in the execution of her affidavit. Accordingly, § 161.211(c) defeats her second issue on appeal.” *In re J.H. and J.H.*, 486 S.W. 3d 190 (Tex. App.—Dallas 2016, no pet.) ; *see also In*

*re R.W. and R.W.*, No. 11-15-00234-CV (Tex. App.—Eastland Mar. 22, 2016, no pet.) (mem. op.) (citing to *J.H.* to determine that Father's best interest argument is barred under § 161.211(c)).

**ii. Affidavit of Relinquishment Is Sufficient Evidence of Best Interest**

Mother's parental rights were terminated pursuant to TFC § 161.001(b)(1)(K). On appeal, Mother contended that the evidence at trial was insufficient to demonstrate that termination was in the child's best interest.

The Court of Appeals noted that the Mother declared in her affidavit of relinquishment that termination was in the child's best interest. The Court quoted the finding in *Brown v. McLennan Co. Children's Protective Servs.*, 627 S.W.2d 390 (Tex. 1982) stating “it was the intent of the Legislature to make such an affidavit of relinquishment sufficient evidence on which the trial court can make a finding that termination is in the best interest of the children.” The Court accordingly found that the evidence adduced at trial was sufficient to satisfy the best interest requirement, as the evidence included Mother's validly executed affidavit of relinquishment. *In re A.L.H.*, 468 S.W.3d 738, (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see also In re J.R.Y. and J.R.Y.*, No. 07-15-00393-CV (Tex. App.—Amarillo Mar. 29, 2016, no pet.) (mem. op.); *In re A.P.*, No. 02-15-00176-CV (Tex. App.—Fort Worth Nov. 19, 2015, no pet.) (mem. op.).

**iii. Affidavit of Relinquishment Alone is Insufficient to Support Best Interest Finding**

Mother's parental rights were terminated pursuant to TFC § 161.001(b)(1)(K). On appeal, Mother argued that the evidence produced at trial was insufficient to demonstrate that termination of her parental rights was in the child's best interest.

The Court of Appeals noted that several other appellate courts had relied on *Brown v. McLennan Co. Children's Protective Servs.*, 627 S.W.2d 390 (Tex. 1982) in holding that an affidavit of relinquishment standing alone is sufficient evidence to support a best interest finding. The Court rejected this application, however, noting that *Brown* did not address the sufficiency of the evidence in a termination of parental rights case. The

Court went on to agree with the San Antonio Court of Appeals in holding that “while the execution of an affidavit of relinquishment ‘is relevant to the best interest inquiry[,] . . . such a relinquishment is not *ipso facto* evidence that termination is in the child’s best interest. To hold otherwise would subsume the requirement of proving best interest by clear and convincing evidence into the requirement of proving an act or omission listed in section 161.001 by clear and convincing evidence.’” The Court concluded by holding that “proving the validity of the affidavit of relinquishment is merely one step towards termination of a party’s parental rights. In a parental-rights termination case, the Department is also required to prove by clear and convincing evidence that termination is in the child’s best interest.” The Court determined the evidence at trial was factually insufficient to support the trial court’s best interest finding, and remanded for a new trial on the issue of best interest. *In re K.D.*, 471 S.W.3d 147(Tex. App.—Texarkana 2015, no pet.).

**iv. MSA Supports the Best Interest Finding**

At trial, the Department presented evidence of a mediated settlement agreement (MSA) in which Father agreed to have his rights terminated under subsection (O) for failure to complete his service plan. The MSA also stated that all parties, including Father, agreed that the MSA was in the best interest of the children. Father testified that he: (1) had been represented by counsel at mediation; (2) had the opportunity to ask questions and request clarification; (3) agreed to all the provisions of the MSA; (4) understood everything he was consenting to in the MSA; and (5) believed that the MSA was in the best interest of the children.

On appeal, Father contended that the evidence was legally and factually insufficient to support the trial court’s finding that termination of his parental rights was in the children’s best interest.

In affirming the best interest finding, the Court of Appeals held that: (1) Father’s agreement and his testimony that the MSA’s terms were in the best interest of the children “was an act clearly indicating that the existing parent-child relationship was improper”; (2) the factfinder could have inferred from Father’s agreement that termination was in the children’s best interest that his parenting skills were lacking; and (3) the testimony of the caseworker that the Department did a home study

prior to placing the children allowed for the factfinder to infer that the placement’s parenting skills were adequate. *In re J.R.W. and J.L.W.*, No. 05-15-00493-CV (Tex. App.—Dallas Aug. 27, 2015, pet. denied) (mem. op.); *see also In re N.B., D.B., and J.B.*, No. 05-15-00671-CV (Tex. App.—Dallas Oct. 23, 2015, pet. denied) (mem. op.) (because trial court relied on MSA when it found Father’s rights should be terminated under subsection (O), and Father did not address MSA, Court affirmed judgment for lack of adequate briefing on appeal); *but see In re E.W.*, No. 06-15-00018-CV (Tex. App.—Texarkana June 26, 2015, no pet.) (an agreement “not to challenge” termination under subsection (O)—that by its terms was not subject to revocation—does not relieve Department from burden of proving elements for termination).

**v. MSA Insufficient Evidence of Best Interest**

Mother executed a valid MSA and affidavit of voluntary relinquishment. At trial, she alleged the MSA and affidavit were procured through fraud, and most evidence produced at trial dealt with that issue. The trial court determined that there was no fraud present, and terminated Mother’s parental rights pursuant to TFC § 161.001(b)(1)(K).

On appeal, the Court of Appeals determined that the trial court was correct in determining there was no fraud in the procuring of Mother’s agreement to the MSA or the affidavit of relinquishment. However, the Court then went on to inquire whether “the Department must still prove by clear and convincing evidence that termination of Mother’s parental rights is in [the child’s] best interest even though Mother agreed that it was, or do the Affidavit and the MSA eliminate that element”.

The Court noted that the Texas Supreme Court had held in *In re Lee*, 411 S.W.3d 455 (Tex. 2013) that a trial court is barred from conducting a best interest determination when there is a validly executed MSA pursuant to TFC § 153.0071(e). The Court pointed out that in a custody case as in *Lee*, the “policy interests in reducing the child’s exposure to conflict are advanced by structuring a future relationship between the child and both parents without the necessity of a contested hearing. Mediation in that instance simultaneously reduces conflict and secures the future parent-child relationship.” The Court then contrasted typical child-custody cases to termination of parental rights cases,

wherein the Department’s goal is to forever sever the parent-child relationship. The Court noted that when parties to a termination case submit to mediation under TFC §153.0071, the constitutional safeguards built in to a trial are eliminated. The Court further noted that in a termination case, the State is both the tribunal and a moving party, and therefore has a significant advantage over a parent. The Court held that “[t]o hold that a mediated settlement agreement conclusively resolves the best-interest issue so that the Department no longer has to prove that element by clear and convincing evidence and that the trial court cannot deny termination in the absence of such proof would essentially eliminate the judicial oversight necessary to protect the fundamental liberty interests of both the parent and child from potential government overreach.”

The Court next turned to sections 153.0071(c) and (e). Subsection (c) states, “On the written agreement of the parties or on the court’s own motion, the court may refer a suit affecting the parent-child relationship to mediation. Subsection (e) states, “If a mediated settlement agreement meets the requirements of subsection (d), a party is entitled to judgment on the mediated settlement agreement”. The Court noted that the words “suit affecting the parent-child relationship” is noticeably absent from subsection (e), but was present in subsection (c). The Court accordingly determined that these subsections could be interpreted to mean that although a termination case may properly be referred to mediation, only those suits for conservatorship, possession, and access could result in an MSA eliminating the trial court’s best interest review.

Ultimately, the Court held that “[i]n the absence of any clear Legislative intent to the contrary, we find that Section 153.0071(e) does not foreclose judicial review of the best-interest element of proof in a parental-rights termination case brought by the Department. Likewise, we hold that Section 153.0071(e) does not foreclose an appellate court from reviewing the legal and factual sufficiency of a trial court’s finding that termination is in the child’s best interest.” The Court determined that it was therefore not bound by the MSA and affidavit and the Department was required to prove the best interest element by clear and convincing evidence.

The Court found that the evidence produced at trial was factually insufficient to support the termination of Mother’s parental rights and remanded the matter to the trial court for a new trial as to whether termination of

Mother’s parental rights was in the child’s best interest. *In re K.D.*, 471 S.W.3d 147, (Tex. App.—Texarkana 2015, no pet.); *See also In re Morris*, No. 14-16-00227-CV (Tex. App.—Houston [14th Dist.] June 22, 2016, orig. proceeding) (TFC § 153.0071(e) “does not apply to suits for termination of the parent-child relationship under Chapter 161 of the Family Code” and “a mediated settlement agreement therefore does not preclude a trial court from determining under section 161.001(2) whether the plaintiff has proved by clear and convincing evidence that termination would be in the child’s best interest”).

**B. Best Interest — Holley Factors**

**i. *Children’s Desires to Stay with Mother Did Not Outweigh Other Evidence Supporting Determination***

Mother argued that the evidence was legally and factually insufficient to support the trial court’s finding that termination was in the children’s best interest. The Court of Appeals disagreed, and affirmed the order of termination.

The children were seven, eight, and ten at the time of trial. The evidence showed that the children missed Mother, and based on her telling them during visits that they were going home, they would expect to be going home. But when Mother did not keep her promises, and the children saw they were not going home, the children’s behavior would deteriorate. The oldest child expressed his desire not to return to Mother’s custody because he was tired of frequently moving. In considering the desires of the children, as per the factors established in *Holley v. Adams*, the Court held that “the desire of the children to stay with their mother does not outweigh the other evidence that their home life was chaotic, and that their emotional and physical well-being was threatened by [Mother’s] abusive relationships and her inability to follow-through with promises made to the children.” *In re A.R.M.*, No. 04-15-00314-CV (Tex. App.—San Antonio Nov. 4, 2015, no pet.) (mem.op.).

**ii. *Child’s Fear of Father Relevant in Determining Her Desires***

The evidence presented at the termination trial showed that the child was removed from Father at age two or three after an investigation revealed that she was being physically abused by Father and Father’s girlfriend, who were both ultimately arrested for the charge of injury to a child. The child had sustained documented injuries in Father’s care including bruises, scratches, and bald spots on the child’s head.

On appeal, Father challenged the legal and factual sufficiency of the trial court’s finding that termination of his parental rights was in the child’s best interest.

In analyzing the first *Holley* factor, the desires of the child, the Court of Appeals pointed out the evidence that indicated the child feared Father. Aunt testified that after keeping the child for several days before the child was removed, the child stated “no daddy, no daddy, no daddy” when Aunt told her they were going to see Father the next day. Upon returning the child to Father, the child clung to Aunt saying “no daddy, no daddy” and “take me with you.” When Father placed the child in her car seat, the child refused to allow him to buckle the seat and Aunt stated the child “worked herself up so much that she throw [sic] up.”

Following removal, Aunt, who served as the child’s placement, testified that the child never asked for Father, and expressed as recently as two days before trial that she did not wish to see Father. During bedtime prayers, the child once stated “no more hitting me. Okay? No more hitting me, Mommy. No more hitting me Daddy? Okay.” Aunt stated she could feel the child’s fear of Father and knew this was “why she did not want to go back to him.”

The Court concluded that “[t]he trial court could have determined that [the child’s] fear of returning to Father was relevant in determining [the child’s] desires as to placement for purposes of best interest.” *In re A.K.*, 487 S.W. 3d 679 (Tex. App.—San Antonio 2016, no pet.).

**iii. *Emotional and Physical Needs and Danger—Failure to Complete Services***

In conducting its best interest analysis, the Court of Appeals considered the second and third *Holley* factors regarding the emotional and physical needs of the child now and in the future, and the emotional and physical danger to the child now and in the future. In addition to the evidence of the physical abuse by Mother’s boyfriend against the child, Mother’s leaving the child with relatives for prolonged periods of time, and her history of drug use, there was also evidence Mother failed to complete her services. The Court noted that Mother failed to complete the services required in order to militate against removal, and determined this weighed in favor of termination under the second and third *Holley* factors. The Court ruled that Mother’s failure to complete her services “indicates that Mother has no real concern for any type of relationship with her child.” The Court determined that these facts weighed in favor of the trial court’s best interest finding under the second and third *Holley* factors. *In re K.N.M.M.*, No. 07-15-00080-CV (Tex. App.—Amarillo July 13, 2015, no pet.) (mem. op.).

**iv. *Programs Available—Completion of a Service Plan Does Not Guarantee Reunification***

In a termination of parental rights case, a parent’s successful completion of a family service plan does not guarantee reunification with their child. *In re A.F.*, No. 04-16-00008-CV (Tex. App.—San Antonio July 6, 2016, no pet. h.) (mem. op.).

**v. *The Stability of the Home or Proposed Placement—The Same Home Does Not Equal A Stable Home***

In her challenge of the jury’s best interest determination, Mother asserted that the stability of her home was not properly considered because she maintained the same residence for many years.

The Court of Appeals noted in its analysis of the seventh *Holley* factor—the stability of the home or proposed placement—that “the State has a compelling interest in establishing a stable permanent home for a child.”

While recognizing that Mother and Father owned a home together for a number of years, the Court pointed out that the evidence showed that Mother’s ongoing drug use, domestic violence, and mental health issues prevented her from maintaining a safe and stable home. Moreover, there were frequent periods when Mother was absent from the home because Mother and Father separated or due to Department interventions that prohibited Mother from staying at the family residence. The evidence also reflected that the home Mother and Father shared was at risk of imminent foreclosure and that Mother faced revocation of her probation due to driving under the influence. The Court determined that this evidence was sufficient to support the seventh *Holley* factor, and termination of Mother’s parental rights was affirmed. *J.R. v. Tex. Dep’t of Family and Protective Servs.*, No. 03-15-00108-CV (Tex. App.—Austin July 30, 2015, pet. denied) (mem. op.).

**VII. ICWA**

**A. What Constitutes an “Indian Child” for Purposes of ICWA?**

The Indian Child Welfare Act of 1978 (ICWA), applies to an involuntary child custody proceeding pending in a state court when “the court knows or has reason to know that an Indian child is involved”. 25 U.S.C.S. § 1912(A). Under the ICWA, an Indian tribe is entitled to notice of a custody proceeding involving an Indian child. *See* 25 U.S.C. § 1912(a). It is the duty of the trial court and the Department to send notice in any involuntary proceeding “where the court knows or has reason to know that an Indian child is involved.” 25 C.F.R. § 23.11(a).

Mother appealed the termination of her parental rights alleging that the trial court erred in failing to comply with the ICWA asserting that there was no evidence of compliance with the notice provisions of the ICWA. The Department countered that there was no evidence presented that the child subject of this suit was an Indian child within the meaning of the ICWA. Thus, the question before the Court of Appeals was whether the trial court correctly determined that the child was not an Indian child pursuant to the ICWA.

Section 1903 provides:

- (4) “Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an

Indian tribe and is the biological child of a member of an Indian tribe;

....

(8) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

25 U.S.C. § 1903 (4), (8).

In determining whether the child in this case was an Indian child within the meaning of the ICWA, the Court looked first to the documentation available to the Department prior to the trial date of July 14, 2015.

In so doing, the Court noted that the record included a multitude of progress reports filed by the Department caseworkers. From February 2012 to January 2015, each of these reports indicated that the child’s mother denied that the child was an Indian child. On January 28, 2015, the caseworker’s report, for the first time, indicated the following:

According to great-grandmother, she has two relatives that were full blooded Native Americans. One was from the Cherokee Nation and the other from the Choctaw Nation. The [great-grandmother] reported that there is no registered member in her family under the Choctaw Nation. The [great-grandmother] reported she is registered in the Cherokee tribe; however, this particular tribe is not recognized by Congress. The tribe is from Arkansas and it is a “no name” Cherokee tribe because it is not yet recognized. The [great-grandmother] reported none of her children or grandchildren were registered for any tribe.

On June 29, 2015, Mother’s attorney asserted, for the first time, in a motion for continuance that the child’s brother, who was not the subject of this suit, “is a child of Native American Heritage; that neither the Bureau of Indian Affairs nor the tribe to which the child claims as

heritage [has] been notified, and none of the requirements set forth in the Indian Child Welfare Act have been followed, and this court therefore has no jurisdiction to hear this matter until the requirements of the Indian Child Welfare Act have been adhered to by the Petitioner.”

The Court noted that the record did not include a similar designation by Mother’s attorney regarding the child at issue in this appeal.

On the day of trial, July 14, 2015, and prior to the start of testimony, Mother’s attorney requested a continuance based the trial court’s failure to comply with the notice requirement under the ICWA. The Department responded as follows:

. . . the issue involving the Indian Child Welfare Act was looked into and researched. ICWA only applies when there is a case involving a federally recognized tribe, and a family member who is biologically connected to the tribe who is a registered member of that federally recognized tribe. Grandmother in this instance was unable to establish membership of the Choctaw Nation. Her children and grandchildren, therefore, would not be eligible.

Additionally, there had been discussions previously with mom and with the grandmother about this issue, and they do not qualify.

The Court noted that beginning in January 2015, the Department’s status reports indicated that the child’s great-grandmother was possibly from Choctaw Nation descent. Importantly, however, the ICWA’s requirements for notification and determination of Indian status apply only when “the court knows or has reason to know that an Indian child is involved.” 25 U.S.C. § 1912(a).

The Court noted that “[t]he information regarding any ties between [the child] and an Indian tribe was provided by [the child’s] great-grandmother. According to his great-grandmother, no member of his family was registered under the Choctaw Nation. She did report, however, that she was a member of a Cherokee tribe. The very same information that [the child’s] great-

grandmother relayed indicating a potential link between [the child] and an Indian tribe also provided that the Cherokee tribe in question was not recognized by Congress.” The Court noted that there was no testimony or evidence to the contrary.

Because the ICWA only applies to recognized tribes, the Court concluded that “a review of the entire record supports that there was insufficient evidence that the child was an Indian child, as defined by the ICWA”. Accordingly, the Court held that the trial court properly determined the ICWA’s notice requirement “where the court knows or has reason to know that an Indian child is involved” was inapplicable. As such, no notice was required. *In re T.R.*, No. 04-15-00639-CV, (Tex. App.—San Antonio Apr. 4, 2016, no pet.).

## **B. ICWA Notice Requirement Triggered**

Following separate jury trials, the trial court terminated the parental rights of Mother and Father. On appeal, neither raised an issue that the ICWA’s notice requirements applied. In its review of the record, however, the Court of Appeals noted that the child was removed in January 2014. During a family group conference in April 2014, Mother told a Department caseworker that her father had “Indian heritage”, and Father stated that his father was Cherokee and Comanche. In a permanency plan and progress report filed in July 2014, the box indicating the child’s Native American heritage was checked, and the report explained the child’s “possible American Indian child status reported by [Mother]; [Father], and is yet to be determined. Neither parent [has] provided a tribe name or proof of affiliation.” The permanency plan and progress reports to the trial court from August 2014 and February 2015 repeated this language. The record did not reflect that the child’s Native American status was determined prior to trial, and the order of termination made no reference to the issue.

The Court of Appeals, *sua sponte*, stated that “Under the ICWA, an Indian tribe is entitled to notice of a custody proceeding involving an Indian child . . . It is the duty of the trial court and the Department to send notice [to the Indian tribe] in any involuntary proceeding ‘where the court knows or has reason to know that an Indian child is involved.’” The Court determined that the information disclosed at the family group conference that was subsequently included in the permanency plans and progress reports was sufficient to trigger the mandatory

ICWA notice provisions, and required that notice be sent to the Indian tribes noted by the parents. The Court abated the appeal and remanded the case to the trial court, ruling that “[p]roper notice that complies with ICWA’s notice requirements shall be provided, and then the trial court shall conduct a hearing to determine whether [the child] is an Indian child under the ICWA.” *In re D.D.*, No. 12-15-00192-CV (Tex. App.—Tyler Feb. 29, 2016, no pet.) (mem. op.).

**C. 25 U.S.C.A. § 1912(f) Requires Testimony of a Qualified Expert Witness**

When the Indian child was two and a half years old, the Oglala Sioux tribe removed her from Mother and placed her with a paternal aunt, who became the child’s permanent legal guardian. Twelve years later, in July 2014, the Department became involved with the child, who was now fourteen years old, and filed a petition seeking termination of Mother’s parental rights. Mother’s parental rights were terminated and she appealed, challenging the legal and factual sufficiency of the evidence to support the finding required by 25 U.S.C.A. § 1912(f) of the Indian Child Welfare Act (ICWA).

25 U.S.C.A. § 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, including testimony of qualified expert witnesses, 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.” Mother argued that there was no evidence to support the required finding under 25 U.S.C.A. § 1912(f) because the Department failed to offer testimony of a qualified expert witness. The Court of Appeals agreed that “the challenged finding cannot stand unless it is supported by the testimony of a qualified expert witness.”

In determining the qualifications of an expert, the Court relied on the Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian Child Custody Proceedings found at 80 Fed. Reg. 10157. The Guidelines provide that:

(a) A qualified expert witness should have specific knowledge of the Indian tribe’s culture and customs;

(b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

- (1) A member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices;
- (2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child’s tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child’s tribe;
- (3) A layperson who is recognized by the Indian child’s tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child’s tribe; and
- (4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child’s tribe.

The Department argued that it was not required to present expert testimony under Section 1912(f) regarding the child’s “continued custody” by Mother because the child had not been in Mother’s custody in over twelve years, thereby rendering Section 1912(f) inapplicable. The Department relied on *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), in which the United States Supreme Court held that Section 1912(f) did not apply where the Indian biological father had never had custody of the Indian child.

The El Paso Court disagreed, and held that the Department was required to comply with Section 1912(f). It stated that *Baby Girl*: (1) “acknowledged that ‘continued custody’ could mean custody which had ‘resumed after interruption’”; (2) held that the phrase “means ‘custody that a parent already has (or at least had at some point in the past)’”; and (3) “concluded that Section 1912(f) does not apply in cases where the Indian parent never had custody of the Indian child.” The

Court found the instant case factually distinguishable from *Baby Girl* “because this is not a situation where the Indian parent never had custody of the child” given that Mother had custody of the child “at some point in the past.” It declined to extend *Baby Girl* to “a scenario where an Indian parent previously had custody of the child.” The Court reasoned that to do so is inconsistent with the opinion in *Baby Girl* and contrary to the stated purposes of ICWA—which it found “articulates a federal policy that, where possible, an Indian child should remain in the Indian community.”

The Court agreed with Mother that the evidence was legally insufficient to support the required finding under Section 1912(f) because the finding was not supported by the testimony of a qualified expert witness. The Court concluded that the caseworker who testified was not shown to possess the required knowledge or expertise. The Court noted that there was no evidence that the caseworker was a member of the Oglala Sioux tribe or any other tribe, or that she was recognized by any tribe as having substantial experience in the delivery of child and family services to Indians. The Court further considered that there was no evidence that the caseworker had knowledge of the prevailing social and cultural standards and childrearing practices within the Oglala Sioux tribe. Importantly, the Court found that even if the caseworker was a qualified expert, she did not testify that continued custody of the child by Mother would likely result in serious harm to the child. Accordingly, the Court reversed the termination order and rendered judgment denying termination of Mother’s parental rights. *In re V.L.R.*, No. 08-15-00250-CV (Tex. App.—El Paso Nov. 18, 2015, no pet.).

#### **D. Beyond a Reasonable Doubt Standard in an ICWA Case Limited to 25 U.S.C.A. § 1912(f)**

In a case in which the ICWA applied, Father appealed from a judgment that terminated his parental rights to his children. The trial court’s judgment recited that the trial court found by clear and convincing evidence that termination of his parental rights was in the children’s best interest and that Father had committed the predicate acts set forth in TFC §§ 161.001(b)(1)(D), (E), (F), (P), and (O). Father argued that 25 U.S.C.A. § 1912(f) of the ICWA requires that the burden of proof for the trial court’s findings regarding the predicate acts pursuant to TFC § 161.001(b)(1) and the best interest determination is beyond a reasonable doubt rather than the clear and

convincing standard used in traditional termination proceedings. The Department argued that the findings required by ICWA are separate and distinct from TFC § 161.001(b)(1), and that the two statutes are not in conflict. The Court of Appeals agreed with the Department.

Relying on the analysis in *In re K.S.*, 448 S.W.3d 521, 533 (Tex. App.—Tyler 2014, pet. denied), the Court agreed that “25 U.S.C.A. § 1912(f) does not preempt section 161.001 of the Family Code and that it is not error for a court to consider both in determining whether the parent-child relationship should be terminated.” The Court agreed that the concurrent application of the ICWA and the Family Code provides additional protection to parents of Indian children by requiring proof of state and federal grounds before the parent-child relationship may be terminated. It also agreed that “it is appropriate to use the clear and convincing evidence standard in analyzing the sufficiency of the evidence relating to section 161.001 of the Family Code.” In overruling Father’s complaint, the Court held that “section 1912(f) is not in conflict with section 161.001”, that “section 1912(f)’s requirement of a finding of beyond a reasonable doubt is limited to the finding expressly stated in section 1912(f) 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’”. *In re G.C., M.C., and H.C.*, No. 10-15-00128-CV (Tex. App.—Waco Aug. 13, 2015, no pet.) (mem. op.).

### **VIII. Jury Charge**

#### **A. Broad Form Submission of Termination Question**

At trial, Mother argued that the jury charge should have included an instruction that at least ten of the jurors must agree as to which predicate act was used to support the termination of her parental rights. On appeal, Mother argued that the trial court abused its discretion in refusing to include the instruction. The Appellate Court cited to the Texas Supreme Court’s decision in *Tex. Dep’t of Human Servs. v. E.B.*, 802 S.W.2d 647 (Tex. 1990) in ruling that the trial court did not err in refusing to include such an instruction: “The controlling question in this case was whether the parent-child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under [the predecessor to family code section 161.001]

the jury relied on to answer affirmatively the questions posed.”

In this case, the Court accordingly held that in light of the fact that it is now “settled” by the Supreme Court in *E.B.* that the ten jurors need not agree on the ground for termination, but only on the controlling issue of termination itself, the trial court did not abuse its discretion in refusing to submit Mother’s requested instruction which stated otherwise. *In re E.M. and J.M.*, No. 10-14-00313-CV (Tex. App.—Waco May 28, 2015, pet. denied).

**IX. Post-Trial Matters**

**A. Oral Rendition is Sufficient to Start TFC §102.006(c) Timeline**

Aunt argued that the trial court erred by dismissing her petition for adoption because she filed the petition within ninety days of the date the trial court signed the order of termination as required by TFC §102.006(c). TFC §102.006(c) provides:

(c) The 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.

In this case, the Court of Appeals noted that at the hearing on the motion to dismiss and strike the adoption petition, the amicus attorney recalled that the trial court made an oral finding of termination at the conclusion of the termination hearing. And “significantly, none of the other counsel present at the hearing disagreed with or challenged the amicus attorney’s recollection.” Moreover, in Aunt’s statement-of-facts section of her appellate brief, she asserted that the rendition of termination of parental rights occurred on the date the

termination hearing concluded, which was not contradicted by any appellee.

In rejecting Aunt’s argument that the ninety days runs from the signing of the order, the Court of Appeals found that “[a] trial court’s oral pronouncement of its decision terminating a parent-child relationship constitutes the rendition of a final judgment.” Moreover, “in the case of an oral rendition, the judgment is effective immediately, and the signing and entry of the judgment are only ministerial acts.” Because Aunt did not file her petition within 90 days of the oral rendition, the Court concluded that the trial court did not err by dismissing her petition for adoption. *In re E.G.*, No. 14-14-00967-CV (Tex. App.—Houston [14th Dist.] Mar. 22, 2016, no pet.) (mem. op.).

**B. Associate Judge’s Report and Order is a Final, Appealable Order**

Trial on the merits was held on May 29, 2015, after which the associate judge took the case under advisement. On June 1, 2015, the trial court signed an “Associate Judge’s Report and Order.” This document was one page long, mostly handwritten, and was prefaced by the following typewritten statement:

AFTER HEARING, THE FOLLOWING ORDERS ARE ISSUED BASED ON THE FINDINGS AND RECOMMENDATIONS OF THE ASSOCIATE JUDGE. ALL PARTIES HAVE BEEN NOTIFIED OF THE CONTENTS OF THESE RULING [sic] AND RIGHT OF APPEAL PURSUANT TO CHAPTER 201, TEXAS FAMILY CODE.

This document stated that after review, the “Court issues following Order.” The document also stated that: (1) the Department’s motion to modify is granted; (2) Mother’s rights were terminated on two grounds; (3) Father’s rights were terminated on two grounds; and (4) the Department was named sole managing conservator of the child. The court also included the following notation: “20 Days after sign [sic] Judgment — if no appeal move to Push AND Adopt by 60 Days”. At the end of the document was typewritten language: “Rendered on 6/1/15 and signed on 6/1/15.” The order was signed by the associate judge on that date, and was

also signed as “adopted and ordered” by the presiding district judge on June 4, 2015.

On July 17, 2015, the associate judge signed a formal typewritten order granting the motion to modify and terminating the parents’ rights. This order recites that the trial court’s order was “rendered by Associate Judge’s Report and Order on June 1, 2015, and ministerially signed on July 17, 2015.” Father filed his notice of appeal on July 17, 2015.

The Court of Appeals noted the practice of associate judges who hear child protection cases in Bexar County of rendering and signing handwritten orders that terminate parental rights and award conservatorship soon following the trial on the merits. These “Associate Judge’s Report[s] and Order[s]” are subsequently signed by the presiding district judge as being “so adopted and ordered.” The Court further stated that “[w]eeks and on occasion months later, a more formal and detailed typed ‘Final Order’ is signed” and that “unintended consequences and difficulties posed by this practice were made apparent in several cases decided by this court”.

On appeal, Father argued that the Associate Judge’s Report and Order was merely interlocutory and not a final order and that the appealable order in this case was “the formal, typewritten order that was signed on July 17”. The Court disagreed, reasoning that “the Associate Judge’s Report and Order disposed of all issues and did not leave any issues for future determination” and “there was no further action to be taken.”

The Court concluded that: (1) the Associate Judge’s Report and Order signed June 1, 2015, was “a final, appealable order”; and (2) “[b]ecause no motion extending the trial court’s plenary power was filed, the July 17, 2015 ‘Final Order’ was signed after the trial court lost plenary power, and it is a nullity”. Further, because this was an accelerated appeal and notice of appeal was due within twenty days after the order was signed, the Court found that Father’s July 17, 2015 notice of appeal was untimely. Father’s appeal was dismissed for lack of jurisdiction. *In re E.K.C.*, 486 S.W. 3d 614 (Tex. App.—San Antonio 2016, no pet.).

**X. Appeals**

**A. Appointment of Counsel Through Final Appeal**

On appeal after a jury trial, the Fort Worth Court of Appeals affirmed the termination of Mother’s parental rights. *See In re P.M.*, No. 02-14-00205-CV, 2014 Tex. App. LEXIS 13947 (Tex. App.—Fort Worth Dec. 31, 2014, no pet.) (mem. op.) (op. on reh’g). The attorney then filed a motion to withdraw in the Court of Appeals. The Court of Appeals abated the motion to the trial court to determine whether good cause existed for withdrawal and whether new counsel should be appointed. The trial court, on remand, recommended that the lawyer be allowed to withdraw, but found that Mother remained indigent and still wished to pursue her appellate options. Based on these findings, the Appellate Court granted the motion to withdraw, but made no provision for the appointment of replacement counsel. In the Texas Supreme Court, the attorney of record requested an extension of time to file a petition for review and also urged a motion to withdraw. Mother moved for the appointment of new appellate counsel.

The Supreme Court noted that the family code provides that attorneys appointed to represent parents in termination cases are to continue to serve in that capacity until the earliest of the following: (a) the date the suit affecting the parent-child relationship is dismissed; (b) the date all appeals in relation to any final order terminating parental rights are exhausted or waived; or (c) the date the attorney is relieved of the attorney’s duties or replaced by another attorney after a finding of good cause is rendered by the court on the record. TFC § 107.016(2).

The Court found that neither mere dissatisfaction of counsel or client with each other, nor counsel’s belief that the client has no grounds to seek further review from the court of appeals’ decision, are bases upon which an appointed attorney may be allowed to withdraw. Furthermore, it held that “all appeals” are not “exhausted or waived” until after the filing of a petition for review.

The Supreme Court still found that an *Anders* brief may still be appropriate, but a concurrent motion to withdraw is either premature or should only be granted when the intermediate appellate court provides the opportunity for the appointment for new counsel. The Supreme Court

also found that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief.

Because Mother was still entitled to court-appointed counsel, the case was abated for the trial court to appoint new counsel. *In re P.M.*, 59 Tex. Sup. J. 582 (Tex. Apr. 1, 2016) (per curiam) (not yet released for publication); *see also In re J.R.*, 59 Tex. Sup. J. 586 (Tex. Apr. 1, 2016) (case remanded for the appointment of new counsel after prior appellate counsel allowed to withdraw after filing *Anders* brief); *see also In re K.V.*, No. 07-15-00424-CV, at n.5 (Tex. App.—Amarillo Apr. 14, 2016, no pet. h.) (mem. op.) (“Based upon the recent Texas Supreme Court decision ... it is appropriate to call counsel’s attention to the continuing duty of representation through the exhaustion of proceedings, which may include the filing of a petition for review.”) (citation omitted).