Case Law Update

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Professor Robert O. Dawson Juvenile Law Institute
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EDUCATION:

South Texas College of Law, J.D.
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CURRENT PROFESSIONAL ACTIVITIES:

Member of the Texas State Bar and HBA Appellate, Family Law, and Juvenile Law Sections
Appointed as a Member of the State Bar of Texas Child Abuse and Neglect Committee for 2004-2007, Co-Chair, Legislative Committee.
Editor and Author of the TDFPS Office of General Counsel monthly newsletter and case update.

LAW RELATED PUBLICATIONS AND PRESENTATIONS

Scheduled to present paper at the Texas State Bar 19th Annual Juvenile Law Conference, Robert O. Dawson Juvenile Law Institute, "*CPS Case Law Update*", February 2006.
Author/Presenter, Texas District and County Attorneys Association Annual Criminal & Civil Law Update, Take II, "*TDFPS Case Law Update*", January 2006.
Author, Dallas Bar Association's Juvenile Justice Committee and The Dallas Volunteer Attorney Program and the Family Courts seminar entitled "Changing Times in CPS Cases: Make Sure You're Ready", "CPS *Case Law Update*", October 2005.
Author, Highland Lakes Bar Association CPS Attorney Ad Litem Training, "*Significant Appellate Opinions In Civil Termination Cases 2004-2005*", October 2005.
Author, Advocacy Training Conference – Representing Children In CPS Cases, McAllen, Texas, "*Significant Parental Termination Cases In 2004-2005",* October 2005.
Author/Presenter, 11th Annual Bexar County Children's Court Ad Litem Training Seminar, "*Case Law Update*", September 2005.
Author/Co-Presenter, Texas District and County Attorneys Association Annual Criminal & Civil Law Update, "*TDFPS Case Law Update*", September 2005.
Author/Presenter, Texas State Bar, 31st Annual Family Law Course, "*Significant Parental Termination Cases In 2004-2005*", August 2005.
Presenter/Author, Harris County Attorney Mike Stafford CLE Sponsor, "*Annual Parental Termination Case Law Update*", August 2005.
Author, Texas State Bar 18th Annual Juvenile Law Conference, "*CPS Case Law Update*", February 2005.
Presenter, Texas Department of Family & Protective Services Annual Meeting and MCLE Seminar, "*The Indian Child Welfare Act: Meeting The Burden Of Proof And Expert Witness Testimony*", November 2004.
Presenter/Author, Harris County Attorney Mike Stafford CLE Sponsor, "*Case Law Update of Child Abuse/Neglect Cases*", October 2004.
Co-Presenter/Author, Texas District and County Attorneys Association Annual Criminal & Civil Law Update, "*TDFPS Case Law Update*", September 2004.
Co-Presenter/Primary Author, Texas District & County Attorney Association & the Children's Justice Act Project, 2004 Crimes Against Children Conference, "*Parental Termination Case Law Update",* May 2004.
Presenter/Co-Author, Harris County Attorney Mike Stafford CLE Sponsor, *"Case Update Of Child Abuse & Neglect Cases",* May 2004.
Co-Author, *Grounds For Termination Of Parental Rights*, in STATE BAR OF TEXAS FAMILY LAW SECTION REPORT (Winter 2003/04).
Co-Author, Ninth Annual Bexar County Children's Court Ad Litem Training Seminar, *"TDPRS & Termination: Case Law Update"*, September 2003.
Presenter, Children's Justice Act Conference in Conjunction with the National Conference of Juvenile and Family Court Judges, *Case Law Update*, July 2003.
Presenter/Co-Author, State Bar of Texas Annual Meeting, Domestic Violence and Child Abuse and Neglect Section, *Case Law Update*, June 2003.
Presenter/Co-Author, Harris County Attorney Mike Stafford CLE Sponsor, *"Case Law Update",* May 2003.

Co-Author, *Grounds For Termination Of Parental Rights*, in STATE BAR OF TEXAS FAMILY LAW SECTION REPORT (Fall 2002).

Presenter/Co-Author, Houston Bar Association, Juvenile Law Section, "*Appellate Decisions Impacting Termination Cases"*, September 2002.

Co-Author/Co-Presenter, Texas Children's Justice Act Project and Texas Department of Protective and Regulatory Services, Continuing Legal Education Seminar for T.D.P.R.S. Attorneys and District and County Attorneys, *Case Law Update* and *Post-Judgment And Appellate Issues*, July 2002.

Presenter/Author, Harris County Attorney Mike Stafford CLE Sponsor, *"Case Law Update Impacting Suits For Termination Of Parental Rights"*, June 2002.

Co-Presenter, Houston Bar Association, Family Law Section, *Practice And Procedures In The Family Courts*, Fall 2001.

Co-Presenter, Houston Bar Association, Family Law Section, *Practice And Procedures In The Family Courts*, Fall 2000.

Author, Texas State Bar, The Appellate Advocate, "*Interlocutory Appeals Of A Summary Judgment Based On An Assertion Of Qualified Immunity*", April 1996.

Author, South Texas Law Review, "*Obsolescence, Environmental Endangerment & Possible Federal Intervention Compel Reformation of Texas Groundwater Law"*, Fall 1991.

APPOINTMENTS & HONORS:

Associate Judge 308th District (Family) Court, Harris County

Associate Judge Municipal Court, City of Houston

Briefing Attorney - Fourteenth Court of Appeals

South Texas College of Law, Law Review - Note and Comment Editor, Law Review Scholarship, Best Law Review Article on Real Property.

EMPLOYMENT HISTORY:

Appellate Section, Houston's Fulbright & Jaworski; Litigation Staff Attorney Harris County Probate Court; Assistant Harris County Attorney handling appeals and trials (counsel in *Dewitt v. Harris County* at the Texas Supreme Court).

Table of Contents

Case Law Update

By Hon. Lana Shadwick[1]

I. INTRODUCTION

There has been a huge increase in the number of appeals in parental termination cases in the State of Texas. During June 20, 2002 through December of 2005 there were over 600 opinions issued in Texas appellate courts in these cases. In 1999, the intermediate appellate courts issued forty opinions in termination cases. This case law update covers instructive opinions from termination cases issued between January of 2004 & December 22, 2005. The cases have been organized by statutory termination ground, best interest, pretrial & trial issues, jury charges, post-judgment issues, ineffective assistance of counsel & miscellaneous issues.

II. TEXAS SUPREME COURT

1. *In the Interest of J.P.B.*, 2005 Tex. LEXIS 912; 49 Tex. Sup. J. 208 (Tex. 2005)

Involving: Reversal of termination judgment under 161.001(1)(D) ground as to non-abusing parent, ineffective assistance of counsel issue as it relates to failure to preserve legal sufficiency point and fact that counsel was appointed less than 30 days before trial, authentication and admission of X-ray evidence printed from a computer program, appellate review at intermediate appellate courts and the Texas Supreme Court.

Factual/Procedural History: Appellant parents sought Texas Supreme Court review of judgments from the Fort Worth Court of Appeals that affirmed the termination of the M's parental rights under 161.001(1)(D) and (E) grounds but reversed the trial court's judgment against the F and rendered judgment reinstating his parental rights. The F was employed and the M stayed and cared for the child at home. The child had suffered severe injuries that apparently were inflicted by child abuse. The evidence at trial was that the F sought medical treatment for the child and appeared not to know that the injuries were the result of child abuse. The child constantly cried and had swollen areas on his body. It was discovered that he had 21 fractures. The court found that there was legally sufficient evidence to support a finding under § 161.001(1)(D) that the F knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endangered his well-being. The intermediate appellate court also declined to review the M's unpreserved no evidence claim because she failed to show how her lawyer had unjustifiably failed to preserve the issue. The record also did not support her claim that her lawyer had insufficient time to prepare for her defense and she did not show harm. The trial court did not abuse its discretion in admitting x-ray evidence printed from a computer program where the evidence was sufficiently authenticated by a radiologist who testified that the computer program could not significantly alter an image.

Holding (Per Curium): The court reversed the judgment of the court of appeals as to the F and remanded to the court of appeals for consideration of the F's factual sufficiency point. In the court of appeals, the F challenged only the termination under (D) grounds; he did not challenge the finding of best interest, nor did he challenge the appointment of his parents as PMC. Thus, the only issue considered by the court of appeals and the only issue reviewed at the TSC as to the F was whether there was sufficient evidence to find that he knowingly placed or knowingly allowed J.P.B. to remain in conditions or surroundings which endangered his physical or emotional well-being. The court affirmed the intermediate appellate court's decision as it related to the mother. The TSC concluded that there was legally sufficient evidence to support the termination of the F's parental rights and that the M failed to preserve her legal sufficiency complaint. The Court also concluded that the M had not been denied effective assistance of counsel and the trial court did not abuse its discretion in admitting the x-ray evidence.

Ineffective Assistance: M argued that she was denied her right to effective assistance of counsel because her trial attorney was appointed less than thirty days prior to trial. To successfully assert an ineffective assistance claim, a defendant in a parental termination case must show that his or her counsel's performance was deficient and that this deficiency prejudiced the defense. The record indicates that counsel participated fully in all aspects of her defense, including objecting to the admission of evidence, cross-examining witnesses, and submitting a proposed jury charge. We therefore agree with the court of appeals that M failed to demonstrate that her counsel's performance was deficient. M also failed to demonstrate that her counsel's performance prejudiced her defense; she has not pointed to any specific evidence she could have produced to contradict TDPRS's witnesses if her attorney had been given additional time to prepare.

[1] Lana Shadwick is the editor & an author of the newsletter sent out by the Office of General Counsel, TDFPS. **If you would like to receive termination case law updates & articles, subscribe to the TDFPS Office of General Counsel email newsletter by emailing a request to: general.counsel@dfps.state.tx.us.**

Accordingly, we hold that M failed to prove that her counsel's assistance was ineffective.

Admission of X-Ray Evidence: M argued that the trial court erred in admitting TDPRS's x-ray evidence without proper authentication because the x-rays were printed from a computer program that allowed alteration of the image. The trial court did not err. The requirement of authentication for admissibility may be satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." TEX. R. EVID. 901(a) TDPRS offered the testimony of a radiologist who testified that while the computer program could be used to crop the x-ray or adjust the brightness and contrast of the image, it could not add to or otherwise alter the x-ray. We hold the trial court did not abuse its discretion in admitting the x-ray evidence.

2. *In the Interest of K.A.F.*, 160 S.W.3d 923 (Tex. 2005)

Involving & Editorial Comment: Private termination. Although the State was not a party, the case was interesting because of appellate, constitutional & ineffective assistance arguments. The case involved the issue of whether a motion to modify the judgment operates to extend the deadline for filing a notice of appeal in an appeal governed by the appellate rules of procedure for accelerated appeals. Another issue is whether a motion for new trial can be construed as a notice of appeal. The TSC expressly disapproves of the Waco decision of *In re M.A.H.* Of interest to attorneys who represent the State, Petitioner argued in the alternative that if the attempted appeal was not timely filed, then Petitioner suffered ineffective assistance of counsel. Petitioner also argued that 109.002(a) applying the accelerated appeals rules to termination cases was constitutionally infirm unless the Court provides a mechanism for an out of time appeal. She argued that 109.002(a) should be found unconstitutional where applied to a parent who has had their parental rights terminated & has had ineffective assistance of counsel. The parties' briefs can be accessed on the Texas Supreme Court website.

Factual/Procedural History: Appealed from the Beaumont Court of Appeals. It dismissed the appeal for want of jurisdiction finding that the notice of appeal was not timely filed because it was filed more than 20 days after the judgments was signed & was thus untimely under TRAP 26.1(b) which governs accelerated appeals & applies to parental termination cases. The judgment terminating M's parental rights was signed on 11/3/03. M filed a "*Motion for New Trial; Alternatively, Motion to Modify the Judgment*", on 11/10/02 & it was denied one week later. M filed a notice of appeal on 1/16/04, 74 days after the judgment was signed.

Holding: Dismissal of appeal by intermediate appellate court affirmed. TFC 109.002 provides that an appeal from a parental termination case is an accelerated appeal & the appellate procedural rules for an accelerated appeal apply to these cases. TRAP 26.1(b) provides that in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed. M argued that 26.1(a) should operate to extend the filing deadline to 90 days, even in an accelerated appeal, where a timely motion to modify the judgment is filed. The rules of appellate procedure permitting post-judgment motions do not extend the appellate deadline for filing an accelerated appeal. Moreover, filing a motion for new trial may not be considered a bona fide attempt to invoke the appellate court's jurisdiction. "We hold that in an accelerated appeal, absent a rule 26.3 motion, the deadline for filing a notice of appeal is strictly set at twenty days after the judgment is signed, with no exceptions, and filing a rule 26.1(a) motion for new trial, motion to modify the judgment, motion to reinstate, or request for findings of fact and conclusions of law will not extend that deadline. Allowing such post-order motions to automatically delay the appellate deadline is simply inconsistent with the idea of accelerating the appeal in the first place. Because [M] did not file a motion for extension of time under rule 26.3 and her notice of appeal was not filed within twenty days after the trial court signed the final order termination her parental rights, her notice of appeal was untimely and failed to invoke the jurisdiction of the court of appeals." With regard to M's argument that even if her notice of appeal was untimely, her motion for new trial was sufficient itself to perfect an appeal. The court of appeals did not address this argument. M's cites the Waco decision of *In re M.A.H.* where the court held that the mother's motion for new trial did not extend the due date for her notice of appeal. However, a divided court (dissent by Justice Gray) held that the appellant's motion for new trial could be treated as a "bona fide attempt" to invoke the appellate court's jurisdiction. That holding has been criticized by a number of intermediate appellate courts. TSC expressly held that a motion for new trial is not an instrument that may be considered a bona fide attempt to invoke appellate jurisdiction. M's motion for new trial did not operate to timely perfect her appeal. TSC also found that M waived her two constitutional arguments by failing to raise them in the court of appeals. M had argued that she received ineffective assistance of counsel & should be allowed to pursue an out-of-time appeal. She had also argued that TFC 109.002 that provides that appeals in termination cases should be accelerated & governed by the appellate

rules for accelerated appeals, was unconstitutional as applied. "While [M's] constitutional complaints relate to her appeal and therefore could not have been asserted in the trial court, she was required to raise them in the court of appeals in order to preserve error. Because she did not, her constitutional complaints are waived".

3. ***In the Interest of J.L.,*** 163 S.W.3d 79 (Tex. 2005)

Involving: Appeal by the State of a reversal of a termination by the court of appeals. TRE 201(b), TSC reversed the Corpus Christi Court of Appeals finding that the appellate court erred in taking judicial notice of expert witness testimony from a subsequent but related criminal trial that was outside of the termination trial record. Modified judgment & whether this extended the time for filing a notice of appeal in an accelerated appeal, 161.001(1)(D) & (E).

Factual/Procedural History: Jury terminated M's parental rights to J.L. but did not terminate her rights to her infant child. The State did not appeal the jury's failure to terminate the parental rights to the infant. M filed a motion to vacate judgment & withdrew a notice of appeal that she had filed. The trial court modified the final order within a week & M filed a notice of appeal three days after that. M appealed arguing that the evidence was insufficient to support termination because there was no proof that her husband caused the death of one of her children or that she knew that the conduct of her husband, or that the conditions or surroundings, endangered the children. The criminal charges against H were still pending at the time of the termination trial but were subsequently dismissed. The Corpus Christi Court of Appeals found that it had jurisdiction & overruled the State's argument that the appeal was not timely under the rule that post-judgment motions do not extend the appellate deadline. It also reversed & rendered the termination of M's parental rights addressing in addition to other evidence, a medical examiner's testimony in a subsequent criminal proceeding involving H.

Holding: The TSC reversed & remanded the case to the Corpus Christi Court of Appeals for review of the factual sufficiency of the evidence supporting termination. The TSC first found that it had jurisdiction. Specifically, M's filed a motion for new trial which extended the court's plenary jurisdiction but did not extend the time for filing the notice of appeal. However, the trial court modified its judgment within its plenary jurisdiction & the time for appeal must be determined from the date of the modified judgment. The State had argued that even if the corrected judgment could have restarted the appellate timetable, it did not do so here because the trial court's purpose in making the corrections to the judgment was to give M a second chance to file her notice of appeal. In *Anderson*, this Court held that the appellate timetable did not restart because the record revealed that the modified judgment "could serve no purpose other than to enlarge the time for appeal". The changes in the judgment here are not so transparent. The docket number was revised to reflect a severance, an attorney's name had been misspelled, reflected that the trial court & not just the jury made the requisite termination findings, deleted an erroneous reference to an inapplicable statute, & added language regarded J.L.'s continued right to inherit from M. The Court has previously held that "`any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power' will restart the appellate timetable from the date the modified judgment is signed". The trial court's changes validly created a new judgment from which to calculate the time for appeal.

The TSC found that the court of appeals erred in taking judicial notice of the testimony of an expert witness in a subsequent but related criminal court case. The expert witnesses' testimony concerned disputed facts & opinions that should not have been the subject of judicial notice under TRE 201(b). The expert's opinion at a preliminary hearing in the criminal case conducted two years after the termination trial & while the case was pending on appeal, appeared to contradict the autopsy performed by another doctor & her testimony that the child's death was a homicide caused by blunt force trauma. To bring this new evidence to the court of appeal's attention, M filed a "Motion to Abate Appeal, For Leave to File Out of Time Motion for New Trial, and For Remand to Trial Court to Determine Out-of-Time Motion For New Trial". She argued that the State had changed its position on the cause of the child's death by using a different expert. Rather than rule on M's motion, the appellate court took judicial notice of the doctor's testimony, including it as part of its legal sufficiency analysis. The TSC found that because the doctor's testimony concerned disputed facts & opinions, it should not have been judicially noticed. TRE 201(b) provides that "`[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned". The TSC also detailed the evidence in support of the jury verdict & found legally sufficient evidence to support the termination.

4. *In the Interest of S.A.P.,* 156 S.W.3d 574 (Tex. 2005)

Involving: Texas Supreme Court case, reverse & remand, equitable estoppel against a governmental entity, waiver, applicability of 161.001(1)(D) grounds to case where child taken by CPS from hospital shortly after birth, TFPS form letters ruling parent out as alleged perpetrator.

Editorial Comment: This per curiam opinion contains notable dicta from the Texas Supreme Court on the issue of the applicability of 161.001(D) grounds to cases where the Department takes custody of the child from the hospital soon after birth.

Factual/Procedural History: Waco Court of Appeal reversed jury termination of parental rights. Mother had her rights terminated under 161.001(1)(E) & (M) & best interest; the Father had his rights terminated under 161.001(D) & (O) & best interest. The Waco Court of Appeals reversed holding that the TDFPS was equitably estopped from terminating parent's parental rights because the agency had sent the parents a form letter that ruled them out as alleged perpetrators. Justice Gray wrote a strong dissent.

Holding: The Texas Supreme Court reversed & remanded. *Waiver:* The TSC held that because estoppel was not proved conclusively, the issue was waived & it reversed & remanded without oral argument. The Court noted that the Petersons urged estoppel in post-verdict motions & in summary judgment motions. The Court opined that summary judgment motions are not pleadings & the parties did not plead the affirmative defense of estoppel. The TSC also opined that estoppel was never submitted to the jury; moreover, even if an unplead issue has been tried by consent, it still must be submitted to the jury. *(D) Grounds Where Child Taken From Hospital Right After Birth:* Interestingly, the TSC noted that the jury did not find (D) grounds & wrote that "Indeed, they could hardly do otherwise, as S.A.P. remained in the custody of TDPRS for virtually his entire life." S.A.P. had been taken into custody from the hospital right after he was born. *Equitable Estoppel Against Governmental Entity/Equitable Estoppel Generally & Detrimental Reliance:* TSC held that the agency letters did not conclusively estop TDPRS from seeking termination. The Court wrote "[a]s the court of appeals noted, equitable estoppel generally does not apply to governmental entities . . .The court of appeals cited no case invoking the doctrine to prevent a state agency charged with protecting children from doing so. Indeed, we have difficulty imagining how parents found by a jury to have endangered their children can have the "clean hands" needed to estop such a finding". The Court quoted its opinion in *Chastain* case, "[t]he doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it." TSC held that even if the doctrine might apply in some parental termination case, it couldn't be applied conclusively here. "First, the TDPRS letters arguably relate only to a report of abuse on the day S.A.P. was born; they do not promise TDPRS would never attempt termination for conduct that occurred before or after that date or that related to the respondents' other children. Second, the letters promise only to destroy evidence in the agency's files, not to refrain from using the same evidence from other sources. The respondents assert TDPRS could not rely at trial on anything it had ever reviewed, but the letters make no such promise. Much of the evidence here came from witnesses who testified at trial and from the respondents' own admissions and thus would not have been impacted by expunction. Third, the evidence of detrimental reliance, if any, was far from conclusive. The court of appeals found the respondents relied on the letters by cooperating with TDPRS, but the respondents never claimed the TDPRS letters were the reason they did so. Indeed, their theory at trial & on appeal is that TDPRS did not provide them *enough* services & parental support, a position inconsistent with claiming that their cooperation with the agency was a detrimental change of position. Further, neither the court of appeals nor the respondents explain why their participation in counseling & other family support services was detrimental. It is hard to see how their chances of regaining custody of S.A.P. would have been increased by refusing to do so." *TSC Comments About TDPRS Use Of The Form Letters:* "We recognize the form letters sent by TDPRS have the potential to be misleading if routinely used in circumstances like those here. Given the agency's previous involvement with the parents and the speed with which it acted to remove S.A.P., it is hard to see why it promised to destroy its files almost immediately thereafter. But because estoppel was never submitted to the jury, we hold that the letters alone did not (as the respondents claim) require as a matter of law that the agency return S.A.P. to them and 'wait for them to fail.'"

5. *In The Interest of R.A.H.*, 130 S.W.3d 68 (Tex. 2004)

Involving: 160.609(b) (time limitation were child has acknowledged or adjudicated father).

Factual/Procedural History: R.A.H. was born in 1995. Avila filed a voluntary paternity suit two years later. During a hearing on August 27, 1997, M & Avila agreed to Avila's paternity. The trial court signed a paternity decree on September 26, 1997. Jojola filed a petition contesting paternity on September 26, 2001 & filed paternity test results that

showed that there was a 99.9 percent probability that he was R.A.H.'s father.

Holding: Jojola's suit contesting paternity was timely filed. TFC section 160.609(b) provides that there is a four-year statute of limitations for a man seeking to establish paternity where there is an acknowledged father or an adjudicated father. The suit must be commenced not later than the fourth anniversary of the effective date of the acknowledgment or adjudication. The date referenced in this section is the date the prior adjudication was rendered by announcing it orally in open court, by memorandum filed with the clerk, or is otherwise made known in a public fashion. Here there is no record of the oral rendition at the August 1997 hearing & there is an unsigned docket sheet. The Court found that the paternity contest was timely filed because there was no record showing that there was a rendition of paternity at the hearing.

III. TERMINATION GROUNDS

A. TFC § 161.001(1)(D) & (E) - Conditions & Surroundings & Endangerment Grounds[2]

1. ***In the Interest of J.A.J.***, 14-04-1031-CV, 2005 Tex. App. LEXIS 10331 (Tex. App. Houston [14th Dist.] December 13, 2005, no pet.)

Involving: Reversal and application of (D) ground to corporal punishment issue. Discussion of use of corporal punishment and present public opinion.

Factual/Procedural History: TDPRS received a referral alleging physical abuse of an eight-year-old boy. The child had visible marks around his neck where his GM's husband Perkins had told the child to put strings back around his neck and he pulled the strings after the child had done same and threatened suicide. The child's sister confirmed the story. The child had a dark, linear scab around his neck. The caseworker also observed a six-inch wide bruise across the back of the child's left leg. M admitted she had spanked J.A.J. with a belt. She also admitted that the spanking had left marks and bruises.

Holding: The State argues that M maintained an excessive and unreasonable disciplinary regiment that subject J.A.J. to a dangerous environment. However, subsection (D) of 161.001(1) applies only to the acceptability of a child's living conditions or surroundings. It generally does not apply to the conduct of the parent toward the child. Thus, subsection (D) refers only to the acceptability of the child's living conditions, e.g., where the child is living in a house where there is no electricity, gas or food. Thus, under (D), it must be the environment itself that cause the child's physical or emotional well-being to be endangered, not the parent's conduct. We find the evidence insufficient under (D) grounds.

With regard to the (E) ground, this ground permits termination where the parent has either (1) personally engaged in conduct which endangers the child, or knowingly placed the child with another person who engaged in dangerous conduct. Unlike subsection (D), the source of the danger must be the parent's conduct alone. Normally a course of conduct is required and a single transaction is insufficient. Placing the child in an environment that included Perkins could satisfy endangerment but the State did not prove up any known proclivity of Perkins' for abusing children. The State also did not prove up M's reaction to the abuse, i.e., did she approve, encourage, or intervene and report the abuse? Perkins and GM are now separated and unless they reunite, the "threat" to the child is purely theoretical. There is insufficient evidence that M knew that Perkins was a threat and yet permitted the abuse. Regarding M's conduct, the State argued that M had a pattern of hitting her child and leaving bruises; however, no photos were offered. M admitted that she spanked the child with a belt on the one occasion when he tried to burn down the house and conceded bruises but testified that she spanked the boy only infrequently. She admitted that when she used a belt she would sometimes leave "marks". This is the full extent of the evidence regarding endangerment. Thus, the issue is whether infrequent spankings that leave marks or visible bruises 24 hours after the spanking constitute endangerment as to warrant termination. Corporal punishment as a traditional method of discipline may be declining. "[C]ourts have, with increasing frequency, concluded that spanking with a belt constitutes child abuse and may be considered as a factor in terminating a person's parental rights. …However, it is 'not a court's function to determine whether 'parents measure up to an ideal, but to determine whether the child's welfare has been compromised'. . . .'We must take care not to create a legal standard from our personal notions of how best to discipline a child'". There is no evidence before us of any previous abuse or prior complaints. Thus, we hold that the evidence is legally and factually insufficient to support termination.

[2] *See In The Interest of D.C.G. & D.J.W.* and *In The Interest of J.W.M.* under Mandatory Dismissal & Return & Monitor statutes. *See also In The Interest of E.S.S.* under TFC § 161.001(1)(K).

2. ***In the Interest of R.D.H. & L.N.A.***, No. 12-03-00390-CV, 2005 Tex. App. LEXIS 3303 (Tex. App.--Tyler, April, 29, 2005, no pet.)

Involving: (D) & (E) grounds & the requirement of scienter, prebirth conduct of parent, imprisonment.

Holding: Scienter is not required for a parent's own acts under 161.001(1)(E) endangerment grounds, however, it is required under 161.001(1)(D) when a parent leaves a child in dangerous conditions or surroundings. Citing the 1998 San Antonio case of *In re S.D.*, the Court opined "an environment that routinely subjects a child to the probability that he will be left alone because his parents are once again jailed endangers both the physical and emotional well-being of a child. Conduct that result in such a disability, and that subjects a child to a life of uncertainty and instability, endangers the child's physical or emotional well-being." The Court found that this was pertinent to a determination under (D) grounds. With regard to a parent's conduct prior to the birth of the child, the Court wrote "[s]ubsection (E) requires us to look at the parent's conduct alone, including actions, omissions, or the parent's failure to act. It is inconsequential that the parental conduct occurred before the child's birth. Instead, courts look to what the parent did both before and after the child's birth to determine whether termination is necessary."

3. ***In the Interest of K.N.L., J.H., C.J.L., S.F.L., I.J.L.***, No. 07-03-0530-CV, 2004 Tex. App. LEXIS 9307 (Tex. App.--Amarillo October 19, 2004, no pet.)

Involving: 161.001(1)(E), course of conduct, criminal drug use, proof of detrimental effects on children does not require psychological studies.

Holding: F engaged in a course of conduct that endangered his children's emotional or physical well-being. Indeed, both before & after the births of each of his children, F seemingly chose a life of crime & drug use over his responsibilities as a father. And, contrary to F's assertion, the absence of "psychological studies of the children or any tests . . . [demonstrating] that children [sic] had ever or were ever likely to suffer physical or emotional injury as a result of their relationship, however limited, with their father," gives us no cause for concern. Indeed, it did not take a child psychiatrist to illustrate the detrimental effect F's lifestyle must have had upon his children.

4. ***In the Interest of M.N.G.***, 147 S.W.3d 521 (Tex. App.--Fort Worth 2004, pet. denied)

Involving: Propriety of use of 161.001(1)(E) where M gave birth & State took custody while child still in hospital, parental conduct prior to birth of child, best interest & application of *Holley* factors, young mother wanted foster care for her child until she was ready to parent her child.

Factual/Procedural History: M contends that termination was not proper under 161.001(1)(E) because she never had custody of her child at any time after her birth & she only saw her child during one hour of supervised visitation per week. M also maintained that her prior conduct, occurring before M.N.G.'s birth, did not constitute sufficient evidence to establish an endangering course of conduct.

Holding: Affirmed. To determine whether termination is necessary, courts may look to parental conduct both before & after the child's birth. Thus, scienter is only required under subsection (E) when a parent places the child with others who engage in an endangering course of conduct. As a general rule, conduct that subjects a child to a life of uncertainty & instability endangers the physical & emotional well-being of a child. DFPS & M both presented evidence of M's past conduct regarding her five children. M conceded that she saw a pattern developing wherein she would go from one abusive relationship to another seeking someone to support her & D.H. One of these individuals abused her child by hitting him with a plastic pipe & by depriving him of food. Her home was filthy. M also allowed her abusive partner to come to the shelter even though the safety plan required that she stay away from him. The evidence showed that M consistently endangered her children by exposing them to abusive partners, had a pattern of relying on others to provide shelter & money for her, had difficulty maintaining a stable home & had been unable to remain employed.

With regard to best interest, the *Holley* factors are not exhaustive & some listed factors may be inapplicable & other factors not on the list may also be considered. Undisputed evidence of just one factor may be sufficient. The presence of scant evidence relevant to each *Holley* factor will not support such a finding. Looking at some of the same evidence supporting the endangerment ground, M lacks fundamental parenting skills. M concedes that obtaining full custody of M.N.G. may not be in the child's best interest, but argues that the court should not terminate her parental rights, but leave M.N.G. in foster care until she is eighteen & allow her visitation rights. A DFPS caseworker testified that this solution does not provide M.N.G. with stability & is more appropriate for situations where the child has a medical problem that a natural parent cannot handle alone. M.N.G. has no such medical condition. There is sufficient evidence to support best interest.

5. ***In the Interest of A.M., A Child***, 02-03-370-CV, 2004 Tex. App. LEXIS 6121 (Tex. App.--Fort Worth, July 8, 2004, no pet.)

Involving: 161.001(1)(D), best interest, young mother, mother not protecting child from sexual abuse.

Factual/Procedural History: A.M. was born in October 1990 when M was fourteen years old. A.M. remained in her care until February 2000. In 1994, 1997, & 2000, CPS investigated allegations that her father & two of M's boyfriends had sexually abused A.M. The first investigation was inconclusive but CPS concluded it had reason to believe that the latter two instances had occurred.

Holding: Affirmed. M did not remove A.M. from a sexually abusive situation. A.M. told CPS that she could not live with M because the people M lived with touched her private areas. A.M. revealed to CPS her history of being sexually abused by various family members. M admitted that she had been unable to protect A.M. Evidence is sufficient to support the finding that M knowingly placed or allowed A.M. to remain in conditions or surroundings that endangered her child.

M contends that the evidence is insufficient to support best interest. The record shows A.M. did not feel safe living with M & blamed M for not protecting her. A.M.'s CASA advocate & her caseworker both testified that termination would be in A.M.'s best interest. At the time of trial, A.M. had been with her current foster family for eight months, had improved in school, & had changed from a quiet, withdrawn child to one who was outgoing & happy. Although A.M. wanted to see M at some point, she consistently stated that she wanted to be adopted by her foster parents, even if it meant never seeing her mother again. A.M.'s foster mother testified that she & her husband were open to allowing visits between A.M. & M if A.M. wanted them & they were good for her. Best interest finding supported by the evidence.

6. ***In the Interest of S.F., M.F., & C.F.,*** 141 S.W.3d 774 (Tex. App.--Texarkana, 2004, no pet.)

Involving: Sexual assault of a child, 161.001(1)(D), (E), (L), (Q), incarceration & application to (E) ground.

Factual/Procedural History: F was convicted of three felony offenses of indecency with a child, sexual contact, & one felony offense of sexual assault of a child. F's longest sentence was fifty years. The victim in all four convictions was E.F., the half sister of M.F.

Holding: Affirmed under (E) & best interest. Section 161.001(1)(E) focuses on the parent's conduct. Under that section, proof that the parent's course of conduct endangered the child is sufficient. M.F. resided in the home with F from birth until he was incarcerated. During that time, F committed & was convicted of four felony offenses of sexual abuse of a child. The evidence is that F committed these acts against E.F. A parent who commits sexual abuse of a child engages in conduct that endangers the child's physical & emotional well-being. It is not necessary that the sexual abuse be directed against the parent's own child, or even that the child of the parent be aware of the sexual abuse. The record is not clear whether M.F. was living in the home with E.F. when E.F. was sexually abused; however, it is not required that the abuse occur in the parent's home or in the home where the child lived. Moreover, F is incarcerated & has been for eight years. Although imprisonment alone is not sufficient to justify termination, a finding under (E) is sufficient if the parent engaged in a course of conduct that has the effect of endangering the child. Best interest also met where M of all three children had relinquished her rights, F was in prison when they were removed, the fathers of the other children voluntarily relinquished & there was no suitable relative of F who could adequately take care of M.F. M.F. was also in a foster home & doing well.

7. ***In the Interest of C.Y.***, 04-03-882-CV, 2004 Tex. App. LEXIS 5485 (Tex. App.--San Antonio, June 23, 2004, no pet.)

Involving: Sexual abuse, outcry statements & review on appeal & harmful error, 161.001(1)(E) & (O) (failure to comply with court-ordered service plan).

Factual/Procedural History: F's rights terminated under endangerment & (O) grounds. F argues that the evidence does not support a best interest finding or that he failed to comply with the service plan. He also argues that the trial court erred in considering C.Y.'s outcry statement because it was inadmissible hearsay. The outcry statement contained allegations that F had sexually abused his stepdaughter, C.Y.

Holding: Affirmed. The TDPRS caseworker testified that F had failed to complete his court-ordered service plan & that he had two prior convictions for domestic violence. She also testified that F was charged in two criminal cases, both involving aggravated sexual assault of a child. The other caseworker testified that when he interviewed C.Y., she made an outcry statement asserting that F had committed sexual acts against her & that he had no reason to disbelieve the child. He testified that C.Y. had suffered significant emotional harm & that she had been trying to protect her younger half-sister, H.P. C.Y. & H.P.'s mother testified that she had witnessed F sexually assault H.P. on at least one occasion, & believed he had also abused her other daughter, C.Y.

M verified that the outcry statement contained the child's handwriting & signature. M testified that it was in the best interest of H.P. to terminate F's parental rights.

On appeal, F argues that the trial court erred in not holding a hearing to determine the reliability of C.Y.'s outcry statement. In a nonjury trial, however, we presume the court made the required finding of reliability of an outcry statement upon proper objection. He does not offer a clear & concise argument as to how the statement's admission likely caused in light of the entire record, harmful error & the rendition of an improper judgment.

8. *In the Interest of H.B. & B.P.*, 07-04-10-CV, 2004 Tex. App. LEXIS 5213 (Tex. App.--Amarillo, June 14, 2004, no pet.)

Involving: 161.001(1)(D), leaving child with inappropriate caregiver with low mental functioning who was alleged to have sexually abused children.

Factual/Procedural History: M appeals from termination order but did not contest best interest. The home was filthy & covered with animal feces & urine & the children were dirty. M would leave her children for extended periods of time with an individual who had a mental handicap & who was alleged to have touched little girls inappropriately. M's children were also found only in panties or towels when in his care. M was asked to stop leaving her children with him but the request went unheeded. This individual was later indicted & charged with indecency with children. M denied that she knew he was rumored to have sexually molested children.

Holding: Continually exposing the children to unsanitary living conditions, allowing them to remain physically dirty, allowing them to be cared for over extended periods of time by a "low functioning" mentally handicapped person who lacked training in the area of child care, failing to provide for the children when left with him for extended periods, & ignoring the warnings about their exposure to potential sexual abuse constitutes ample evidence entitling a reasonable factfinder to form a firm belief or conviction that M knowingly placed or knowingly allowed her children to remain in conditions or surroundings which endangered the physical or emotional well-being of H.B. & B.P.

9. *Asjes v. Texas Department Of Protective & Regulatory Services,* 142 S.W.3d 363 (Tex. App.--El Paso 2004, no pet.)

Involving: 161.001(1)(D) & (E), drug use & drug use during pregnancy & endangerment, knowledge of non-using parent of other parent's drug use, incarceration.

Factual/Procedural History: F appeals from termination based on 161.001(1)(D), (E), (N). F did not challenge best interest finding.

Holding: There was sufficient evidence to support termination under (D) & (E) where M used cocaine during pregnancy & M continued to use drugs & to live with others who abused drugs. "This 'lifestyle' created an unstable environment in which M.A.'s physical and emotional needs were neglected". **"***Environmental Endangerment*": "Conduct of a parent or another person in the home can create an environment that endangers the physical and emotional well-being of a child as required for termination under (D)." "An environment which routinely subjects a child to the probability that he will be left alone because his parents or caregivers are incarcerated endangers both the physical and emotional well-being of a child". "*Endangerment by Parental Act or Omission*": "A mother's use of drugs during pregnancy may amount to conduct that endangers the child. Drug addiction & its effect on a parent's life and ability to parent may also establish an endangering course of conduct. While a parent's incarceration, standing alone, will not prove endangerment under (E), it is a factor for consideration on the issue of endangerment".

F had no contact with M.A. for the first five years of his life because of his incarceration. Although he did take the child into his home for approximately six months, he did not make any effort to find the child or to seek custody once M disappeared with him. As a result of M's & her husband's drug abuse, M.A. has had to live in unstable living conditions most of his life & his physical & emotional needs have been consistently neglected. F knew that M & her husband were doing drugs because he had done drugs with them. He also knew that the child was being neglected so he took M.A. into his home. F was unable to provide the child with a safe environment or to protect him from neglect.

B. TFC § 161.001(1)(F) - Failed to Support

1. *In the Interest of R.M.*, 06-05-53-CV, 2005 Tex. App. LEXIS 10090 (Tex. App.--Texarkana December 6, 2005, no pet.)[3]

Involving: Termination grounds involving leaving a child with another and expression of intent not to return, leaving a child with another, and failure to support. Good analysis of these grounds.

[3] *See* TFC § 161.001(1)(A), (B), and (C)

Holding: Case affirmed under failure to support grounds but overruled as to other termination grounds.

Section 161.001(1)(A): allows for termination where the parent has voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return. The record does not support termination under this ground because there was undisputed evidence that F had visited R.M. and had called on at least one occasion. There was also no evidence that F made an affirmative expression of his intent not to return.

Section 161.001(1)(B): allows for involuntary termination where the parent has voluntarily left the child alone or in the possession of another not the parent without expressing an intent not to return, without providing for the adequate support of the child, and remained away for a period of at least three months.

Section 161.001(1)(C): allows for involuntary termination where the parent has voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months. A common element in each provision is that the parent must have failed to provide adequate support of the child. We hold that termination cannot be supported under either of these provisions because the evidence is legally insufficient to prove F failed to provide adequate support. The Texas Supreme Court in *Holick v. Smith* held that a parent is only required to make arrangements for adequate support of the child, not personally send support. F did not personally deliver R.M. to the great aunt and uncle and he did not initiate the arrangement by which they would care for the child. However, F has been aware of the arrangement at all times and agreed to it. He testified that he liked them and appreciated what they had done for the child. In 2000, F had agreed to allow them to become JMCs of R.M. It should not be significant whether a parent physically delivers their child to someone who will care for the child. Rather, the controlling issue should be whether the parent was aware of, consented to, and participated in the arrangement for the child's support. By agreeing to the joint conservatorship, he allowed them to better provide for R.M. and the evidence is undisputed that they have done an excellent job of providing for R.M. We hold the evidence is insufficient to find that F did not arrange for the child's adequate support. Applying *Hollick*, this means the evidence is necessarily insufficient to find that F had not provided for the adequate support of R.M. Accordingly, termination cannot be supported under (B) or (C) grounds.

Section 161.001(1)(F): provides for termination where a parent has failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition. There was legally sufficient evidence to support this finding. One year means 12 consecutive months, and the ability to pay support must exist each month during the 12-month period. F's testimony that he had worked in the 12 months and his ability to keep current with his other child support obligations show he had a source of income during the eighteen-moth period in question. The evidence, when combined with the fact that F never sent any money or other support to the great aunt and uncle is legally sufficient proof that he failed to provide for R.M. according to his ability. Thus, termination was proper under 161.001(1)(F). This same evidence supports the finding of best interest.

2. *Fox v. Texas Dep't of Protective & Regulatory Services*, No. 03-03-00637-CV, 2004 Tex. App. LEXIS 7637 (Tex. App.--Austin Aug. 26, 2004, no pet.)

Involving: 161.001(1)(F) & burden of proof & incarceration, 151.001(a)(3) (parent has duty to support child), 154.125 (child support guidelines), 154.061 (computing net monthly income).

Factual/Procedural History: F contends that the evidence was insufficient to support the court's findings that he failed to support A.F. in accordance with his ability for a period of one year ending within six months of the date the petition was filed, & that the termination of his parental rights was in A.F.'s best interests.

In January 2002, TDPRS filed a petition requesting termination of the relationships between F & three of his sons, including A.F. At the time of the trial in April 2003, A.F. was 10 years old. Throughout the trial, F was incarcerated; however, he participated by telephone & through counsel in the courtroom. F argues that no evidence supports that he failed to support A.F. or that he was able to support him while incarcerated.

Holding: Affirmed. F's incarceration did not occur during the relevant period under (F). F asserts that he was incarcerated beginning in July 2002. The one-year period of nonsupport must begin no more than 18 months before the petition was filed. The period of nonsupport in this case must have occurred between July 18, 2000 & January 18, 2002, the date on which the original petition was filed. Thus, F was incarcerated about six months after any relevant measuring period ended. Even if he were incarcerated during the relevant period, F testified that he made $40,000 during 2000 & $45,000 during 2001--amounts that impose a duty on him to provide support. The testimony regarding whether F provided sufficient support during the relevant period was not consistent.

F testified that he sent as much as $600 to M for child support four times during 2001 or 2002. He later testified that he sent $100 three or four times, & that he sent money around Christmas 2001. F testified that he was not under any order to support the children & that he & M agreed that he did not need to send money to her because he had supported the children by himself from the time she left (in 1995 or 1996) until she reclaimed possession of the children. M testified that she did not recall agreeing that F did not need to pay child support, but acknowledged that she may have told him that she did not need his money to support the boys. She recalled getting $100 once from him during 2001 & 2002.

The record supports the judgment. Regardless of the existence of a court order, parents have a duty to support their children. *See* TFC § 151.001(a)(3). A parent must support the child in accordance with his ability. TFC § 161.001(1)(F). TFC § 154.125 provides guidelines for child support based on income & number of children. Based on the minimum income F reported for a relevant period ($40,000 in 2000), TDPRS calculates that, under the guidelines, F owed his children $9,543.17 in support annually; if he earned only minimum wage, TDPRS calculates that appellant owed $2,868 per year. TFC §§ 154.061, .125. The maximum support F claimed to have sent totals $2,800; other evidence indicates he sent as little as $100. Even if F sent all of the money he claimed to have paid during a one-year period, he was still short $6,743.17 of the amount of support due based on the minimum $40,000 income he reported earning; in fact, the maximum amount reported sent falls $68 short of his presumptive obligation as calculated by TDPRS even if he earned only minimum wage. Although F claimed without dispute that he supported the children by himself throughout the late 1990s, the record contains no evidence that the amount of support he provided during that time offsets this deficit. We conclude that, even accepting F's testimony as true, the evidence is clear & convincing that he failed to support A.F. in accordance with his ability. If the court accepted other testimony, the evidence of lack of support is even clearer & more convincing.

C. TFC § 161.001(1)(J) – Major Cause of Child's Failure To Attend School

Yonko v. Dep't of Family & Protective Services, No. 01-05-00091-CV, 2005 Tex. App. LEXIS 10629 (Tex. App.--Houston [1st Dist.], Dec. 22, 2005, no pet.)

Involving: Infrequently seen ground, 161.001(1)(J) (major cause of child's failure to be enrolled in school as required by the Education Code). Affirmed discussing only this ground and best interest.

Holding: TFC 161.001(J) provides for termination of parental rights where a parent has been the major cause of "`the failure [of V.Y.] to be enrolled in school as required by the Education Code'". The Education Code provides that "1 a child who is at least six years of age. . .shall attend school'". M admits that she never enrolled the child in school or otherwise provided certified home-school education. M argued that she and V.Y. were never Texas residents for any relevant time period under the statute. TDFPS argued that the statute does not state a residency requirement and case law indicates that moving frequently does not exempt a parent from this requirement. Termination ground affirmed. Court did not address endangerment or conditions and surroundings grounds saying that only one termination ground plus best interest in needed to affirm. Best interest also found.

D. TFC § 161.001(1)(K) – Affidavit of Relinquishment

In the Interest of E.S.S., 131 S.W.3d 632 (Tex. App.--Fort Worth 2004, no pet.)

Involving: Reverse & remand, burden of proof under 161.001(1)(K), 161.103(a) & (b) (affidavit of voluntary relinquishment), 161.001(1)(E) & imprisonment, 161.001(1)(Q) & burden of proof, 153.001 (public policy is that children will have frequent & continuing contact with parents who have shown the ability to act in the child's best interest), review of issues on appeal.

Factual/Procedural History: F was serving a life sentence for murder. Judgment recited termination under 161.001(1)(E) & (Q) & best interest. Court noted in a footnote that although the judgment was apparently based on the appellant's oral relinquishment, the resulting agreed order did not include a finding that F relinquished his parental rights nor did it indicate that the decision was based on F's oral relinquishment. The parties announced an agreement prior to the trial. The agreement was that F would voluntarily relinquish his parental rights in exchange for his mother & brother being named possessory conservators with visitation rights. F then testified that he was relinquishing his rights voluntarily. The court approved the agreement & ordered termination. F did not sign an affidavit of relinquishment. Later, F would not sign the proposed agreed order & wrote a letter to the court expressing that he wanted to revoke his consent to the agreement. F also claims he attempted to revoke his agreement during the hearing on the motion for entry of order. F appealed urging error in court's rendering judgment based on voluntary relinquishment without a properly executed affidavit of relinquishment & because he had

revoked his agreement prior to entry of the order. He also complained that the court erred in entering an agreed order based on grounds that were different from the parties' agreement. F also brought error in that the trial court erred in granting a termination based solely on evidence of the parties' agreement & without evidence of best interest.

Holding: Reversed & remanded finding factually insufficient evidence to support 161.001(E) & (Q) grounds & best interest. It is clear that the trial court did not proceed with a trial on the merits because of reliance on the settlement agreement between the parties. Because we find the agreement unenforceable, we reverse the judgment of the trial court & remand for a new trial on the merits.

TFC 161.103(a) provides for voluntary relinquishment of parental rights but it must be signed, witnessed by two credible persons, & verified before a person authorized to make oaths. There is no statutory provision for oral relinquishment of parental rights & there is no common law authority allowing acceptance of an oral relinquishment in lieu of a signed affidavit. Even if an oral statement on the record in open court would sufficiently meet the requirements of 161.103(a), F's oral statements did not encompass the laundry list of information that must be included in an affidavit of relinquishment per 161.103(b).

The Court next addressed F's other issues whereby he urged error in granting termination based solely on evidence of the parties' agreement & without evidence or a finding that termination was in the child's best interest. The Court stated that it construed this argument as saying that there was factually & legally insufficient evidence to support the termination. The evidence in support of endangerment under 161.001(1)(E) was a single statement regarding F's prison sentence for murder. Texas cases have held that "mere imprisonment will not, standing alone, constitute engaging in conduct, which endangers the emotional or physical well-being of a child". Therefore, the only evidence cannot support termination under 161.001(1)(E).

The Court then addressed the factual & legal sufficiency to support "Q" grounds. Court stated that while F admitted that he is currently serving a prison term that will exceed two years, there is no evidence that F is unable to care for the child & this is not met by showing incarceration alone. "Otherwise, the termination of parental rights could become an additional punishment automatically imposed along with imprisonment for almost any crime". Proof under 161.001(1)(Q) requires: (1) that the party seeking termination establish that the parent's knowing criminal conduct resulted in incarceration for more than two years; (2) the parent must produce evidence as to how he would provide or arrange to provide care for the child during that period, & (3) the party seeking termination must then show that the arrangement would not satisfy the parent's duty to the child. Because no evidence was presented by the State with regard to F's plan to care for the child, the State did not meet its burden of persuasion. With regard to best interest, the relevant evidence on the record was F's statement that he was in prison for murder & that he would relinquish his parental rights in exchange for naming his mother & brother possessory conservators. This alone does not meet the requirement that termination was in the child's best interest or that one of the termination grounds was met. Given the public policy of 153.001 & 161.001, we conclude that the agreement in this case is unenforceable.

E. TFC § 161.001(1)(L) – Convicted Under Enumerated Penal Code Sections

In the Interest of S.F.L. & J.F.L., No. 06-04-102-CV, 2005 Tex. App. LEXIS 3242 (Tex. App.--Texarkana, April 27, 2005, no pet.)

Involving: Proof of conviction under 161.001(1)(L).

Factual/Procedural History: F terminated F's parental rights under (L) grounds based on his conviction for indecency with a child. F appealed arguing that the evidence was insufficient because the State did not meet its burden to prove either that he was the individual who had been convicted of the crime, or that there was a final conviction.

Holding: TFC 161.001(1)(L) does not require proof of a final conviction as in an enhancement context; it only requires proof of a conviction. However, the record contains the criminal judgment, the plea agreement, the opinion from the appellate court dismissing the appeal as untimely & the mandate. Thus, the conviction is final. The record also contains F's application for writ of habeas corpus. F did not testify but the record before the court was that F was identified as the same person who pled guilty & was convicted of indecency of a child.

F. TFC § 161.001(1)(N) – Abandonment[4]

In the Interest of J.J.O., 131 S.W.3d 618 (Tex. App.--Fort Worth 2004, no pet.)

Involving: 161.001(1)(N).

Factual/Procedural History: Termination under (D), (E), & (N) grounds; burden of proof under (N) ground, future conduct can be measured by past conduct.

Holding: Affirmed. Evidence was legally & factually sufficient that M constructively abandoned her child. To establish 161.001(1)(N), the State must prove by clear & convincing evidence that: (1) M constructively abandoned J.J.O. who had been in the temporary managing conservatorship of TDPRS for not less than six months, (2) TDPRS made reasonable efforts to return J.J.O. to M, (3) M had not regularly visited or maintained significant contact with J.J.O. & (4) M had demonstrated an inability to provide J.J.O. with a safe environment. Court affirmed finding that M was late for her visits with J.J.O., she did not touch or speak to her child during the first visit, & M failed to show up for numerous visits. M missed two visits & TDPRS found M in jail for resisting arrest & possession of drug paraphernalia. M also waited a week to call to set up a visit once she was released. During the visit the month before the termination trial, M did not say one word to J.J.O. & the child did not recognize his mother. M has failed to maintain housing or employment. TDFPS became involved with J.J.O. when M left the nineteen month old in a hotel room unattended. M admitted that she had been arrested for prostitution & had been living in hotel rooms. Moreover, M became pregnant with her second child but tested positive for cocaine & then refused drug treatment. M attended only half of her parenting classes & she did not go to counseling or her psychological evaluation.

Best Interest met where M did not have a relationship with J.J.O. & during visits the child would look for his foster mom. Best interest also met where M did not stabilize her lifestyle by maintaining steady housing, employment, & staying away from drugs. The foster parents also testified that they wanted to adopt J.J.O. Although M testified that she planned on working at Boston Market & planned to maintain steady housing, the Court opined that that "[a] trial court can measure the future conduct of parents by their recent past conduct, but is not required to believe that there has been a lasting change in a parent's attitude since his or her children were taken".

G. TFC § 161.001(1)(O) – Failed To Comply With Court Order Designed To Reunify Child With Parent

In The Interest Of M.B., NO. 07-04-0334-CV, 2004 Tex. App. LEXIS 11209 (Tex. App.--Amarillo, December 14, 2004, no pet.)

Involving: 161.001(1) (O), (D), (E).

Editorial Comment: This case is interesting because of F's argument that in order to prevail under section 161.001 (1)(O), "the Department had to first prove there was circumstances and orders relating to those circumstances under which the child would have been returned to [him] had [he] complied with those orders." According to the F, there was no circumstance under which the Department was going to grant him possession of his daughter, thus, section 161.001(1)(O) could not have served as a ground for termination. The only evidence F advanced in support of this argument is his caseworker's testimony that she could not guarantee that he would regain possession of M.B. if he complied with the provisions of the plan. F also argued that (O) grounds could not apply because he was not furnished with a copy of the service plan.

Factual & Procedural History: The Department prepared a service plan detailing the various tasks F was required to perform as a prerequisite to obtaining the return of his daughter. The caseworker who prepared the plan explained to F that "he needed to complete [the] services in order to have his child placed back with him." When the caseworker reviewed the plan with F & requested that he sign it, he asked if she "could guarantee him that he would get his child back if he signed and cooperated" with it. After the caseworker responded that she could make him no promises, F told her that he did not, then, "want to waste his time" by complying with it. Following the adversary hearing, the court, incorporating the terms of the service plan, entered temporary orders. F's caseworker testified at the termination trial that he completed none of those tasks.

Holding: Affirmed. Section 161.001 (1) (O) provides that parental rights may be terminated if the court finds by clear & convincing evidence that (1) the parent failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the return of the child (2) who has been in the permanent or temporary managing conservatorship of the Department for not less than nine months, & (3) the child's removal from the parent was a result of abuse or neglect of the child. F failed to comply with a single requirement of the trial court

[4] *See also In the Interest of T.A.C.W.,* No. 04-04-00195-CV, 2004 Tex. App. LEXIS 7396 (Tex. App.--San Antonio Aug. 18, 2004, no pet. h) & *In the Interest of A.W. & J.K.,* No. 2-03-349-CV, 2004 Tex. App. LEXIS 7297 (Tex. App.--Fort Worth Aug. 12, 2004, no pet. h).

order establishing the actions necessary to obtain the return of the child. While the father might not have received a copy of the service plan, the record showed that he was fully aware of what was expected of him. F offered the testimony of his caseworker who conceded that, after F refused to sign the service plan, she did not give him a written copy of it. The caseworker agreed that F "wouldn't know what was in the plan if [she] didn't leave the plan with him." While F may not have received a copy of the service plan, the record shows he was fully aware of what was expected of him under both the service plan & the temporary orders. Indeed, from the record we discern that F appeared & announced ready at a status hearing in September of 2003 following which the trial court entered an order approving & adopting "the permanency plans and recommendations for the child, set out in the service plans filed with the Court." In the same order, the court advised, "the parents that progress under the service plan [was to] be reviewed at all subsequent hearings." Moreover, we cannot agree with F that the caseworker's remark indicated a determination on the part of the Department that it never would have allowed him to regain custody of his daughter. In fact, given that the responsibility for reviewing F's compliance with the service plan, ultimately, rested with a judge or a jury, not his caseworker, her cautionary statement was appropriate.

H. TFC § 161.001(1)(Q) - Incarceration & Inability To Care For Child For Two Years[5]

1. *In the Interest of C.E.V.*, No. 09-03-00468-CV, 2004 Tex. App. LEXIS 7752 (Tex. App.--Beaumont, Aug. 26, 2004, pet. denied)

Involving: 161.001(E), (F), & (Q), statutory termination ground must be plead to support termination; incarcerated parent has duty to prove ability to care for child while in prison, private termination.

Factual/Procedural History: Christy Lynn Brown & her husband, Kenneth Lee Brown, filed a Petition for Termination & Adoption of Stepchild against F, the biological father of Christy's child, C.E.V. The Browns sought termination of F's parent-child relationship with his daughter on the grounds that he: (1) engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child; (2) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; & (3) knowingly engaged in criminal conduct that resulted in his conviction of an offense & confinement or imprisonment & inability to care for the child for not less than two years from the date of the filing of the petition. The trial court found the latter two, as alleged in the petition. However, the trial court did not find conduct endangerment in accordance with the first allegation, & subsection (E), but found that F "knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child," per subsection (D). The trial court further found termination was in the best interest of C.E.V.

Holding: There was insufficient evidence to support the trial court's findings under 161.001(1)(D) & (F), but found that the evidence was sufficient to support termination under 161.001(1)(Q). Section (D) is a basis for termination, but must have been plead in order to support the judgment. That finding by the trial court cannot support the decree of termination as that ground was not plead.

F further contests the legal sufficiency of the evidence to support the trial court's finding of failure to support. F argues he was never ordered to pay child support; he attempted to support the child through alternative methods such as clothing, a Christmas ornament, a card, & letters; he was prevented by two protective orders from contacting Christy Brown; & he supported his son by paying child support through January 1999. F also complains he was incarcerated & had no means of support. Although the evidence establishes F failed to support the child during the relevant period, the statute also requires evidence establishing the parent had the ability to pay child support during that relevant period. F asserts he was unable to provide such support while incarcerated. The record reflects that F has been incarcerated, on a ten-year sentence, since the petition was filed. The Browns point out that another child of F's has received child support payments while he has been incarcerated. They argue this establishes he had the ability to support C.E.V. However, F testified he did not make those payments that he has not made any payments since being incarcerated, & they must have been made by his mother. The Browns do not direct this court to any evidence in the record demonstrating F's ability to pay child support while he has been incarcerated. Thus, the Browns did not meet their burden of proving, by clear & convincing evidence, that F failed to support C.E.V. in accordance with his ability. Accordingly, the trial court's finding on failure to support cannot support the decree of termination.

F also disputes the trial court's finding that he knowingly engaged in criminal conduct resulting in his conviction & imprisonment & inability to care for C.E.V. The record reflects that F is serving a sentence

[5] *See also In The Interest of E.S.S* under TFC § 161.001(1)(K).

of ten years' imprisonment that commenced on May 24, 1999. F does not contest he "knowingly" engaged in the conduct that resulted in his conviction & confinement. F only asserts that the Browns have failed to establish his inability to care for C.E.V. Once it has been established that a parent's knowing criminal conduct resulted in his incarceration for more than two years, the parent must produce some evidence as to how he would provide or arrange to provide care for the child during that period. The party seeking termination would then have the burden of persuasion that the arrangement would not satisfy the parent's duty to the child. The only evidence F refers to regards attempts by his mother to visit C.E.V. Christy testified that F's mother has not visited C.E.V. since the fall of 2000. F does not refer this court to any evidence that his mother could & would provide care for C.E.V. during his incarceration, & the Browns had no burden to disprove her capacity to care for C.E.V. We conclude the trial court's finding that F's conviction resulted in his inability to care for C.E.V. is supported by clear & convincing evidence; therefore that finding supports the decree of termination.

2. *Brazoria County Children's Protective Services v. Kenneth Frederick*, 01-02-1232-CV, 2004 Tex. App. LEXIS 6354 (Tex. App.--Houston [1st Dist.], June 15, 2004, no pet.)

Involving: Directed verdict, 161.001(1)(Q) & burden of proof, inability to "care" for child under (Q) prong, best interest, admission of evidence of criminal history, standing of CPS to appeal & 161.003(a)(3).

Factual/Procedural History: Appeal by CPS from a directed verdict that denied CPS' request for termination. CPS also challenged the exclusion of evidence of portions of F's criminal history. T.F. was born eight-weeks premature & did not have a throat at birth. He still has esophageal problems & has an eating disorder that results in his vomiting when he eats. F has been incarcerated since October 1997 & is not eligible for parole until 2004. He has been imprisoned throughout the lifetime of his son T.F. who was born in December 1997. F has fathered only one child by his wife, but has eight children by three other women & has not paid any child support. M brought T.F. to see F in prison twice a week until he was transferred to a more remote facility. F sent letters to M asking about the child & has sent him birthday cards. M died in December of 2001 when the child was four years old & M's mother, "GM", assumed care for T.F. On two occasions, neighbors had to bring T.F. back to GM after he wondered away. CPS was eventually called after an incident in which T.F. wandered away after GM blacked out due to a health condition. T.F. was very thin, his teeth were rotted & black & his front teeth were broken.

GM filed a separate adoption suit & the cases were consolidated for a jury trial. During trial, the foster parents intervened. CPS succeeded in presenting some evidence of F's criminal history, but was precluded from introducing his complete criminal history. At the close of CPS' case, F moved for a directed verdict. CPS argued that there was legally sufficient evidence to support termination under 161.001(1)(D), (E), (F), (H) & (Q). The trial court rendered a directed verdict in favor of F; thus, no question was submitted to the jury concerning F's parental rights. The jury returned a verdict in favor of granting GM & the foster mother, JMC. In accordance with the directed verdict in F's favor, the trial court awarded F PC to commence on his discharge from prison.

Holding: Reversed & remanded. F challenged CPS' standing to appeal but it's standing derived from its JMC of T.F. that it shared with the foster parent. *See* TFC 161.003(a)(3) (authorizing termination on CPS petition where TDPRS has been TMC or sole MC of the child for at least six months preceding the date of the termination hearing).

A directed verdict in favor of a defendant is appropriate when the plaintiff does not present evidence to raise a fact issue that is essential to the plaintiff's right of recovery. Section 161.001(1)(Q) requires a showing of the parent's inability to care for the child while he is incarcerated. Incarceration alone does not show inability to care for the child. Although the term "care" has not been defined either in statute or in subsequent case law, this Court concluded that the facts to be considered when deciding inability to care include the availability of financial & emotional support from the incarcerated parent. F acknowledged that he could do nothing financially while in prison & he has never paid child support for any of his children. F has not seen T.F. since 1999 & he did not send gifts to his child from prison. The evidence raised triable issues of fact concerning his ability to provide financial & emotional support for T.F. It is clear that F will be in prison two years from the filing of the petition. F is not eligible for parole until 2004 & the Texas Supreme Court held in *In re A.V. & J.V.* that (Q) grounds allows the State to act in anticipation of a parent's abandonment.

To avoid directed verdict, CPS also had to put on evidence that termination was in T.F.'s best interest. There is no evidence that the child knows his father & he seems happy with his foster parents. The record shows that GM is willing to care for T.F. until F is out of prison but the GM is failing in health & T.F. was removed from her care for this reason. F's mother also came forward at the time of trial but it is undisputed that she has had no prior contact with T.F. The trial

court also erred in directing a verdict in favor of F based on best interest.

3. *Darrell Hampton v. TDPRS*, 138 S.W.3d 564 (Tex. App.--El Paso 2004, no pet.)

Involving: 161.001(1)(Q) & shifting burden of proof, "inability to care" for child under (Q) prong.

Factual/Procedural History: D.H. was born in October 2000. In February 2002, TDPRS removed D.H. from her M's custody. F was in prison.

F contended there was legally & factually insufficient evidence to support the finding that he knowingly engaged in conduct that resulted in his conviction of an offense & confinement or imprisonment & inability to care for the child for not less than two years from the date the petition for termination was filed. F acknowledged that the first prong of this ground is met, as evidence showed that he was incarcerated at the time the original petition was filed on February 8, 2002, & his projected release date was April 2004. He argued only that TDPRS failed to prove by clear & convincing evidence his inability to care for the child during his incarceration.

Holding: Incarceration alone cannot support a termination of parental rights. By including the element that the incarcerated parent has the "inability to care for the child," the legislature clearly recognized this. The burden of proof in (Q) cases requires that once TDPRS has established the incarceration element, the burden shifts to the parent to produce some evidence of how he or she will arrange care during that period. When that burden of production is met, TDPRS is then required to persuade the court that the stated arrangements would not satisfy the parent's burden to the child.

F points to the following as having met his burden. He wrote to the court & suggested his M & sister as potential placements. He wrote nine letters to TDPRS regarding his daughter. When his M & sister were determined to be unsuitable placements, F provided (during trial) the names of other potential relative placements for D.H. He supported his daughter by signing over his IRS refund & six paychecks to D.H.'s M, a total of approximately $2,000. Finally, he submitted a written permanency plan for D.H. to TDPRS, although the content of this plan is not part of the appellate record. TDPRS responds that its application under the Interstate Compact for the Placement of Children to North Carolina, where F's M & sister live, was denied. TDPRS' North Carolina counterpart rejected these relatives as potential caregivers because F 's M "was well known by [the North Carolina] agency, that she had had some children placed with her who were subsequently removed from her care," & his sister had a pending criminal charge for assault. TDPRS further points out that F did not present any testimony or other evidence from anyone--his M, sister, or the other two relatives he named during trial--showing a willingness or ability to care for D.H for the remainder of F's imprisonment. TDPRS contends that this mere naming of relatives, without some showing of willingness, capacity, & competence, is not sufficient to meet F's burden of on this issue. TDPRS also maintains that neither writing letters to TDPRS nor signing over his IRS refund check & final paychecks are any evidence of ability to care for D.H. Under the circumstances here, where the child's M is not caring for her & has relinquished her parental rights, we agree that a fact finder could reasonably give this evidence little weight. Where a responsible M or other caretaker was receiving the funds & caring for the child, however, we might view it very differently. There is legally & factually

160.302. F argues that it was error to find that he had failed to timely file a counterclaim for paternity.

In October 2002, TDPRS took two-year-old A.H. into emergency custody. A.H., her mother Hsing Han, & F were living at the Salvation Army Shelter at the time, & Han was thirty-three weeks pregnant with R.F.H. R.F.H. was born in December 2002, & TDPRS took custody of her almost immediately. TDPRS named F as R.F.H.'s alleged father, stating that his address was unknown. F is not A.H.'s father & was not married to Han. Han was married to Luis Requena when R.F.H. was born but said that F was the father. In its second & third amended petitions, TDPRS named Requena as R.F.H.'s presumed father, *see* TFC § 160.102(13), § 160.204(a), & F as her alleged father.

On July 21, 2003, after unsuccessful attempts at service, TDPRS filed a motion asking that F be served by substituted service. In a supporting affidavit, Katherine Kever, a representative of TDPRS, stated that she had tried to locate F, interviewing Han & investigating police records & Austin's utility records. Kever learned that F had utility services at an address on Circle S Road, but when service was attempted at that address, TDPRS was notified that F had moved. On June 9, however, F called TDPRS to say he was aware that a hearing was approaching on June 20. F said that he would not attend the hearing & wanted nothing to do with Han, R.F.H., or the proceeding. F said that his friends had signed for the notice & told him about the hearing. F also said he was living in Corpus Christi, but refused to provide an address or other "locating information." After the June 20 hearing, F again called TDPRS, saying that he had attended the hearing but had not been recognized & had not come forward. Kever found that notice of the hearing had been sent to the Circle S address & was signed for by an "R. Arrellano," & as of June 30, utilities at the address were still listed in F's name. Kever therefore believed F could be served by leaving citation at the Circle S address. The trial court authorized substituted service, & F was so served; the return of service shows citation was delivered to Alex Lopez on July 21. In its amended petitions, TDPRS stated that if F did not file a statement of or counterclaim for paternity, he would lose all parental rights to R.F.H.

On November 10, TDPRS filed a motion to have F dismissed from the suit, stating that he had not filed any timely assertion of paternity. On November 18, F filed his original answer, stating that he was R.F.H.'s father & asserting a counterclaim of paternity. F also filed a response to TDPRS's motion to dismiss, stating that he had been incarcerated since September 22nd & did not live at the Circle S address when service was made & complaining that counsel was not appointed until October 16. On January 7, 2003, the trial court signed a final order, finding F had been properly served & had failed to timely file an acknowledgment or counterclaim of paternity & terminating his parental rights, if any.

Holding: Affirmed.

An alleged father's rights may be terminated if: (i) after being served he does not timely file an admission or counterclaim of paternity, (ii) he has not registered with the paternity registry and, after a diligent search, cannot be located, or (iii) he has registered with the paternity registry but attempts to serve him at the address provided to the registry & at any other known address have been unsuccessful. TFC 161.002(b). F had notice of the suit no later than June 9, 2003, when he called TDPRS to say he had received notice of the June 20 hearing. In June, F told TDPRS that he was living in Corpus Christi, but refused to give an address. Until September 2003, F showed no interest in asserting his paternity & in fact told TDPRS that he wanted nothing to do with R.F.H. or the termination proceedings. F attended at least one hearing without identifying himself before attending the hearing in September. Upon F's request, an attorney was appointed on October 3, but the attorney filed a motion to withdraw on October 29, stating that F was uncooperative. Not until November 18, eight days after TDPRS filed its motion to dismiss on grounds that F had not filed an assertion of or counterclaim, did F file any kind of assertion of paternity. Indeed, F waited almost a full year after TDPRS took custody of R.F.H. to assert his paternity. Under these facts, we hold it was not error for the trial court to find that F did not timely file an assertion of paternity or a counterclaim for paternity.

J. TFC § 161.003 - Mental Deficiency

1. *In the Interest of K.M.*, No. 07-04-0467-CV, 2005 Tex. App. LEXIS 4332 (Tex. App.--Amarillo, June 7, 2005, no pet.)

Involving: 161.003 but best interest finding only point urged on appeal.

Holding: M did not contest the statutory ground for termination, 161.003, but urged error only as to best interest. The evidence establishing a ground for termination may also be used to support a finding that termination of appellant's parental rights is in the child's best interest. Here no one questions the evidence illustrating that M suffers a life-long mental disorder, schizophrenia, which would most likely prevent her from ever being able to physically care for K.M. The testifying psychologist also stated that people suffering from this kind of illness "tend to be the most dangerous people out of all mental disorders". A witness testified that M recently purchased a firearm

& took lessons on how to use it, & made comments about doing what she needed to do to get her children back. Witnesses also testified that she threatened to shoot various people in the head. Other evidence introduced: M had an I.Q. of 71, M would stop taking her medication, M relinquished her parental rights to her older child after he was removed because she could not take care of him, M had threatened others & has been arrested for assault, M has been seen talking to herself & to a wall, & she has been seen outside CPS offices on all fours barking like a dog. M cannot provide a stable, safe & secure home & this supports the best interest finding.

2. *Morales v. Texas Department of Protective & Regulatory Services,* NO. 03-04-00003-CV, 2004 Tex. App. LEXIS 8752 (Tex. App.--Austin, Sept. 30, 2004, no pet.)

Involving: 161.003 (termination of parental rights where mental illness or deficiency will continue until child's eighteenth birthday), brain injury.

Factual/Procedural Background: Child suffered from severe disabilities & medical conditions that required 24-hour care. The child was born prematurely with a prenatal drug addiction that resulted in severe disabilities & medical conditions. F was permanently disabled due to head injuries from a car accident, which caused him to suffer from short-term memory loss, seizures, damaged vision, & anger management issues. F also has dormant Hepatitis C, high blood pressure & diabetes. F could not drive or work & he lived with his mother who worked full time. F challenged the sufficiency of the evidence to support that (1) he has a mental or emotional illness or a mental deficiency that renders him unable to provide for the physical, emotional, & mental needs of H.C.M.; (2) the illness or deficiency will continue to render him unable to provide for H.C.M.'s needs until her eighteenth birthday; & (3) the Department has made reasonable efforts to return H.C.M. to her family.

Holding: Affirmed. The psychological evaluation of F revealed that F had mild mental retardation & anti-social & narcissistic tendencies. The expert testified that an adult with these tendencies would have a difficult time developing a "healthy balance between his own needs and the needs of other people." Moreover, F did not possess the resources to be able to care for a child & because of his low IQ & severely impaired memory, parenting education was not recommended. A licensed professional counselor experienced in working with patients with brain injuries testified that F had made little to no progress in understanding his limitations. He also cited at least one example of F's tendency to become extremely agitated when discussing his ability to provide for H.C.M. The counselor did not believe that F would be physically abusive but admitted F does lack verbal restraint. It was his opinion that if someone were hurt around F, it would likely be because he was out of control & an accident occurred. The counselor concluded that F should not be the primary caregiver for H.C.M. & that, while he could possibly participate in her care, it would be difficult to assess how much respect F would have for the advice & direction of others.

Our analysis must focus on whether F's disability impairs his ability to provide for her. Upon examination of the record it is clear that a reasonable fact-finder could have formed a reasonable belief or conviction that F does have a mental disability that renders him unable to provide for the physical, emotional, & mental needs of H.C.M., & that the disability would continue to render him unable to provide for H.C.M. until her eighteenth birthday. At trial, F conceded that he could not take care of H.C.M. by himself. In addition, all of the mental health professionals who evaluated F concluded that he should not be the primary caregiver for H.C.M. Two experts concluded that F has difficulty accepting his limitations & that, despite his good intentions, he lacks the ability to understand & effectively deal with H.C.M.'s extensive medical needs. The testimony was that F's narcissistic & antisocial behaviors are a natural response to a severe injury. That is, it is only natural for F to focus his attention on himself after experiencing this injury. This coping mechanism may also impair his ability to parent effectively. The fact that F still refused to accept his limitations after six months of therapy is a concern.

F argues that TFC 161.003(a)(1) only requires that he "provide for" H.C.M.'s needs, but not that he do so personally. He planned to provide for her needs by remaining in his home & having his mother assist with the bulk of her care. The Department's concern with this plan was F's presence in the home. The Department feared that F's mental deficiencies impaired his judgment & that Rivera's full-time employment made it inevitable that he would be left alone with H.C.M. Even if it were possible to arrange a situation where F would never be left alone with H.C.M., the Department & the mental health experts were concerned that he would not respect Rivera's authority regarding decisions affecting H.C.M. Moreover, there were questions regarding Rivera's suitability as a provider for H.C.M. Rivera did not pass a home study because the Department feared she could not protect H.C.M. from F & that she did not appear to fully understand the extent of H.C.M.'s needs. While Rivera may possess the skills to provide for H.C.M., a reasonable fact finder could conclude that she does not have the means to do so alone, while

caring for both F & her elderly stepfather, & at the same time maintaining full-time employment. Similarly, given the nature of F's disability, a reasonable fact finder could form a firm belief that his disability would continue to render him unable to provide for H.C.M. until her eighteenth birthday. No evidence was presented that the damage caused by his head injury could be cured or reversed. Even though there was debate over how much F could learn & the best method for teaching him, no expert suggested that he could learn enough to be H.C.M.'s primary caregiver.

F also complained hat the evidence was factually insufficient to support the finding that the Department made reasonable efforts to reunite him with H.C.M. as required by TFC 161.003(a)(4). The record indicates that the Department had few options. F admits that he should not be the primary caregiver for H.C.M., but argues that the Department made no effort to provide him with parenting & employment training so that he could gain the skills necessary to assist Rivera with H.C.M's care. However, the evidence shows that the Department made reasonable efforts to provide parenting & employment training. F turned down an offer to go into a vocational rehabilitation program that would provide him a place to live & help him find a job. F said he was content with his Social Security income & did not desire a job. He completed one parenting course but the Department did not recommend further parenting education because it felt that, based on F's psychological evaluation, he lacked the memory & comprehension level to benefit from classes offered in a traditional classroom setting. The Department also attempted to provide vocational or "how-to" parenting instruction. At trial, the caseworker testified that she attempted to teach F, by modeling proper parent-child interaction & how to properly hold H.C.M., place her in her car seat, & put her helmet on, but that F did not respond well to the instruction. The Department also contacted several family members to see if any would be willing to care for H.C.M, but they all declined after learning of her special needs. A fact finder could reasonably form a belief that the Department made reasonable efforts to reunite H.C.M. with her family.

K. TFC § 161.004 - Termination After Denial Of Prior Petition To Terminate

Thompson v. Texas Dep't of Family & Protective Services, No. 01-04-00082-CV, 2004 Tex. App. LEXIS 9583 (Tex. App.--Houston [1st Dist.], October 28, 2004, pet. filed.)

Involving: 161.001(1)(L) (criminally responsible for the death or serious injury of a child under enumerated Penal Code sections) & (Q) (knowingly engaged in criminal conduct that has resulted in conviction or imprisonment & inability to care for the child), & 161.004 (termination after denial of prior petition to terminate).

Factual/Procedural History: F challenged the legal & factual sufficiency of the evidence to sustain termination of his parental rights. M.W.D. was born in August 1995. In December 2002, the trial court entered a decree in DFPS's suit to terminate the parental rights of the biological mother & fathers in regard to M.W.D., D.L.M., & J.M.H. The trial court awarded managing conservatorship to DFPS & possessory conservatorship of M.W.D. to the parents, but did not terminate the parents' rights as to him. Instead, it ordered both M & F to comply with a family service plan. F was in prison at the time, having been sentenced in March 1998 to serve a 10-year sentence after violating the conditions of his community supervision for aggravated sexual assault by committing a robbery & failing to report to his probation officer. Before F was incarcerated, at least one referral had been made to DFPS alleging physical abuse of M.W.D. F's plan required him to (1) participate in & complete parenting classes; (2) participate in & complete a substance abuse assessment & follow recommendations; (3) participate in random urinalysis if paroled out of prison; (4) participate in & complete anger management classes; (5) participate in sexual abuse counseling; (6) participate in sexual abuse perpetrators' classes and/or sexual perpetrators' group therapy; & (7) participate in & complete domestic violence perpetrators' classes and/or domestic violence perpetrators' group therapy. The decree specified that if these services were not available to F in prison, or if F was released from prison, DFPS would provide those services that were "still required" to achieve the goal of family reunification. Regardless, F was ordered to obtain these services. The caseworker testified that she sent F the family service plan, with a letter explaining it, & provided contact information. After F signed & returned the plan, the caseworker sent him another letter advising him to mail information to her regarding his attempts to comply with the court's order & service plan. F sent one letter to the DFPS caseworker in which he stated his intention to attend the appropriate classes, but he never contacted her again. Neither the caseworker nor the child advocate investigated whether the prison provided any of the classes F was ordered to complete or whether he completed any of them. In the year following the court's decree, neither M nor F complied with the family service plan, F's request for parole was denied, & the child showed improvement in his behavior while in therapeutic foster care. When DFPS petitioned a second time to terminate parental

rights in December 2003, the trial court terminated both parents' rights.

Holding: Affirmed. After an earlier petition to terminate parental rights has been denied, the trial court may terminate parental rights under 161.004. The second petition was filed a year after the order denying termination was rendered, thus the first statutory element for termination under 161.004(a)(1) is satisfied (petition must be filed after rendition of order denying termination). F was convicted of aggravated sexual assault under section 22.021 of the Texas Penal Code; thus, the third statutory element of 161.004 is satisfied. *See* TFC 161.001(1)(L)(viii) (enumerating acts committed by a parent that would allow involuntary termination of parental rights, including conviction for aggravated sexual assault). *See also* TFC 161.004(a)(3) (requiring proof that parent committed act enumerated under TFC 161.001 before order denying termination was rendered). We thus examine the evidence of the remaining element identified in TFC 161.004--whether there has been a material & substantial change in circumstance to determine whether the evidence was legally & factually sufficient to terminate F's parental rights. Although F contends that there have been no material & substantial changes in circumstances since the original petition was denied, the record shows that there have been such changes to the circumstances of F, M, & the child--all of which are relevant under the statute. M has been unable to follow the service plan, & her rights have been terminated. The change in M's circumstances is relevant to the child's circumstances because there is now no possibility of the child & both parents being reunited in a suitable home. It is also relevant because, as F is in prison, he is in no position to care for the child without M, & he has provided no evidence that other family members can & will care for the child. Although incarceration alone will not support a termination of parental rights, the Family Code provides that termination may result if the court finds that a parent knowingly engaged in criminal conduct that resulted in conviction & confinement for more than two years & an inability to care for the child. TFC 161.001(1)(Q). Here, F violated the terms of his community supervision, resulting in his imprisonment for more than two years for his original offense, beginning in March 1998. In addition, F's application for parole has been rejected; thus, his imprisonment extended beyond two years for that offense. By looking at future imprisonment & inability to care for the child, 161.001(1)(Q) protects children whose parents will be incarcerated for periods exceeding two years after termination proceedings begin; thus, we apply this statute prospectively. Although F suggests in his reply brief that he was under no obligation to make arrangements for his child because the child is in DFPS conservatorship, nothing in the statute relieved him of his responsibility to make arrangements merely because he was in prison & the child was in DFPS conservatorship; nor does this alter the fact that family circumstances have changed, including termination of M.W.D.'s M's parental rights. M.W.D.'s progress in foster care is also a change in circumstance because it has readied him for a more permanent placement. Finally, the record shows that F has not complied with his service plan. The court's order appointing him possessory conservator & establishing a family service plan for him plainly placed the burden on F to participate in & complete parenting classes; participate in & complete a substance abuse assessment & follow recommendations; participate in random urinalysis if paroled out of prison; participate in & complete anger management classes; participate in sexual abuse counseling; participate in sexual abuse perpetrators' classes and/or sexual perpetrators' group therapy; & participate in & complete domestic violence perpetrators' classes and/or domestic violence perpetrators' group therapy. Although F argues on appeal that the agency did not investigate whether the classes were available or otherwise determine whether he complied with his service plan, the trial court's order plainly placed the burden on him to comply with the order, whether or not he was incarcerated; it did not place the burden on TDPRS to ensure his compliance. In a similar case, the Amarillo court refused to place the burden on TDPRS to disprove the existence of anyone with whom defendant's child could be placed during his incarceration because adopting such a rule would place an unreasonable burden on the agency & judicial resources. "The better reasoned rule is that once the Department has established a parent's knowing criminal conduct resulting in their incarceration for more than two years, the parent must produce some evidence as to how the parent would provide or arrange to provide care for the child during that period. When that burden of production is met, the Department would have the burden of persuasion that the arrangement would not satisfy the parent's duty to the child." We agree with the Amarillo court's logic & consider it analogous here. To require TDPRS to continually inquire as to a prisoner's efforts & accomplishments in regard to a service plan is not reasonable. Once the caseworker & child advocate testified that F had not contacted the agency or provided any evidence of his compliance with the service plan, it became his burden to rebut this evidence. As he did not, the evidence of his noncompliance was sufficient. Because each of the conditions with which F failed to comply was a condition precedent to maintaining possessory conservatorship imposed by the court's December

2002 decree denying termination at that time, the evidence that F did not comply with the court-ordered plan is necessarily indicative of a change in circumstance between the time the prior order was entered & the time this suit was filed seeking termination of F's parental rights after denial of the prior petition to terminate. *See* 161.004(a)(2). Before the court imposed the service plan in its December 2002 decree, F had no obligation to undertake these corrective steps. We hold that DFPS met its burden to prove by clear & convincing evidence that circumstances had materially & substantially changed in regard to the entire family during the year following the original order denying termination & the second order terminating the F's parental rights.

L. TFC § 161.106 - Affidavit of Waiver of Interest In Child

In the Interest of an Unborn Child, 153 S.W.3d 559 (Tex. App.--Amarillo 2004, pet. denied)

Involving: 161.106 (affidavit of waiver of interest in child), TEX. GOV'T CODE ANN. § 311.016(1), (2) (Code Construction Act), unborn child, review of findings of fact & conclusions of law on appeal.

Factual/Procedural History: G.W.B. seeks reversal of the judgment declaring that the waiver of interest in child that he signed complied with 161.106 & that the waiver is irrevocable. He also contends the trial court erred in finding that the affidavit was executed voluntarily. Although A.M.B. learned she was pregnant & informed her parents on September 17, 2002, G.W.B., however, was never informed by A.M.B. of the pregnancy. Instead, on September 30, 2002, G.W.B, a high school student, was escorted from class by the assistant principal to his office. Also in the assistant principal's office were two uniformed liaison officers & a school secretary. G.W.B. was informed by the assistant principal that a "lady in Fort Worth had some information to give him". The assistant principal telephoned a paralegal at the Gladney Center & handed the phone to G.W.B. In a three to five minute telephone conversation, the paralegal informed him that A.M.B. was pregnant, he was the probable father, & he needed to sign an affidavit of waiver of interest in the child that had been faxed to the assistant principal's office from the Gladney Center. Following the telephone conversation, the assistant principal & uniformed officers provided unsolicited advice of the consequences of him signing the affidavit. After approximately ten to fifteen minutes, G.W.B. signed the affidavit & was excused to return to class. G.W.B. was not provided with a copy of the affidavit at that time. The following day the Principal spoke to G.W.B. in his office after which G.W.B. was asked to notify his mother of the events of the previous day. After learning of the situation, G.W.B.'s mother called the paralegal & informed her that she wanted to revoke the affidavit & also requested that a copy be sent to her. On October 30, 2002, G.W.B. commenced the underlying action by filing a petition to establish parentage of the child naming A.M.B. as the mother. A.M.B.'s parents & the Gladney Center were also named as parties. After G.W.B. & A.M.B. filed requests for declaratory relief & upon the severance of the parentage issue from the validity of the affidavit of waiver of interest, the court proceeded to consider the request for declaratory relief by an evidentiary hearing. The judgment recited that the waiver complied with 161.106, was executed voluntarily by G.W.B., & the waiver was irrevocable.

Holding: Reversed & rendered because the affidavit of relinquishment is invalid because it did not comply with 161.106.

Findings of fact in a bench trial are not conclusive when a complete statement of facts appears in the record if the contrary is established as a matter of law or if there is no evidence to support the findings. Findings of fact are reviewable for factual & legal sufficiency under the same standards that are applied in reviewing evidence supporting a jury's answer. Our review of trial court conclusions of law is de novo. However, as noted above, although findings of fact are reviewable for legal & factual sufficiency, an attack on the sufficiency of the evidence must be directed at specific findings of fact rather than at the judgment as a whole.

G.W.B. contends the trial court erred in finding that A.M.B. established by clear & convincing evidence that the affidavit of waiver of interest in child complied with section 161.106. As sub-issues, he argues that the uncontroverted evidence established he was not provided with a copy of the affidavit at the time he executed & the Gladney Center, an adoption facility, was not named managing conservator of the child. Therefore, the affidavit was subject to revocation. We agree. Our decision is based on a de novo review of the trial court's conclusions of law that the affidavit signed by G.W.B. complies with section 161.106 & is irrevocable.

Upon request per Rule 296, the trial court signed findings of fact & conclusions of law. However, the court did not designate which of the 42 statements were findings of fact or conclusions of law. Moreover, even where the trial court designates some matters findings of fact & others to be conclusions of law, the designation is not controlling on appeal. According to TRCP 299a, findings of fact should be separately filed. Because G.W.B.'s execution of the affidavit before two witnesses & its verification were not disputed, & the questions of its validity & revocability per section

161.106 are questions of law, we will conduct a de novo review.

Section 161.106(f) provides that an affidavit is irrevocable if it designates TDPRS or a licensed child-placing agency managing conservator of the child. Because the affidavit signed by G.W.B. did not designate TDPRS nor the Gladney Center or any other licensed child-placing agency to serve as managing conservator of the child, the affidavit that G.W.B. signed does not satisfy the requirements of (f) & is not irrevocable under the subsection. Moreover, under subsection (f) any other affidavit under section 161.106 is revocable unless it expressly "provides that it is irrevocable for a stated period not to exceed 60 days after the date of execution." Here, however, G.W.B.'s affidavit provided that it was "final & irrevocable," contrary to the 60-day maximum period allowed for an irrevocable affidavit. In addition, subsection (h) also addresses revocable affidavits. Notwithstanding this provision, the affidavit signed by G.W.B. did not contain any reference to revocation before the 11th day following the execution of affidavit or state the name or address of the person to whom notice of revocation should be delivered. Section 161.106(i) also provides that a copy of the affidavit shall be provided to the affiant when it is signed. However, it is undisputed that G.W.B. was not provided with a copy of the affidavit at the time it was executed. Counsel for A.M.B. argues that G.W.B. was furnished a copy of the affidavit the day after it was signed. Even if the 11-day period for revocation did not commence to run until October 1, 2002, a question we do not decide, nevertheless the affidavit was defective because it did not inform G.W.B. of the 11 day deadline for revocation required under subsection (h). As used in section 161.106 (h) & (i), the terms *must & shall* have particular legal meaning. According to the Code Construction Act, the term *shall* impose a duty, & the term *must* create or recognizes a condition precedent. The affidavit he signed did not comply with section 161.106 & was not irrevocable under section 161.106.

IV. BEST INTEREST - TFC § 161.001(2)[6]

1. V*alancia Roxanne Comer v. TDPRS,* NO. 03-03-00564-CV, 2004 Tex. App. LEXIS 10759 (Tex. App.--Austin, December 2, 2004, pet. denied)

Involving: Best Interest, findings of fact & conclusions of law, review of findings on appeal, domestic violence, & endangerment grounds, long term foster care.

Editorial Comment: This case is interesting in that the Court of Appeals found that because M did not challenge findings that she continued to have partners who abused her & that she failed to remove the children during domestic violence episodes, & failed to challenge that she injured one child & let the children stay with individuals who abused them, was sufficient to support her sole challenged finding that termination was not in the children's best interest. The case also includes a great deal of testimony that may be elicited with regard to endangerment & best interest. It also shows the application of the endangerment evidence to the finding of best interest.

Holding: Termination affirmed; finding of best interest supported. M challenges the legal & factual sufficiency of the evidence supporting certain specific findings & the broader finding that termination was in the children's best interest. She did not challenge the finding that she engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the physical or emotional well-being of the children, nor does she challenge the remaining specific findings of the trial court. M challenges the legal & factual sufficiency of the evidence supporting fifteen of the findings & three of its conclusions, which relate to M's acts & omissions under section 161.001(1)(E), because they may also be probative of the best interest question in 161.001(2). Although proof of grounds from section 161.001(1) does not relieve the Department from proving termination is in the best interest of the child, the same evidence may be probative of both issues. *See C.H.*, 89 S.W.3d at 28.

At the outset of our analysis, we note that many of the trial court's findings remain unchallenged. M does not challenge the findings that she repeatedly entered into relationships in which her partners abused her, failed to obtain protective orders against any of her abusers, & failed to remove the children to safety during repeated episodes of severe domestic violence in their presence, thus endangering the children. A separate finding that M failed to demonstrate adequate parenting skills by failing to protect the children from witnessing violence, by injuring C.F., & by placing them with persons who abused them also goes unchallenged. M does not dispute that she left C.F. with an individual who sexually abused C.F., even though she knew that he had been violent toward her, had abused cocaine, & was homeless. She also does not dispute the finding that, knowing he had been violent towards her in the past, she left both children in the care of John Payton, who failed to retrieve the children from school. Additionally, M admits that she allowed her mother to supervise both children despite knowing her mother's history of physically & emotionally abusing children, abusing alcohol, being unable to safely supervise children, & continuing a relationship with a known sex offender. M leaves

[6] *See also In The Interest of K.M.* under TFC § 161.003.

unchallenged the findings that she considered her mother & Joe Fitzgerald, who endangered J.F. by committing acts of violence against M in J.F.'s presence, suitable permanent placements for her children & the finding that she is unable to utilize the parenting skills necessary to ensure the children's safety in the future.

Given these unchallenged findings, the trial court could reasonably have reached its decision that it was in the children's best interest to terminate the parent-child relationship even without relying on the findings M believes are legally & factually insufficient. She admits that the court properly found that she endangered the children, that she failed to protect them from witnessing severe violence committed by herself & others, that she has injured C.F., & that she has placed both children with persons who abused them. In short, M does not have the skills to ensure these children's safety. Although these findings are all probative of the overall endangerment finding, they are also probative of the best interest of the children issue. These findings weigh against M's ability to effectively utilize parenting skills & ensure that the children will be safe from physical & emotional abuse from her or from others & in favor of the finding that it would be in the best interest of the children for her parental rights to be terminated.

M also challenged the finding that the children's foster parent has met the children's physical, social, & emotional needs, because the foster parent has been unable to prevent J.F.'s decline into aggressive & destructive behavior. There is conflicting evidence regarding the cause. Both children want to return to their mother, & J.F's desire adversely impacts his behavior; however, the court could reasonably have found that J.F.'s desire to return home is not the sole cause of his aggression. The testimony of the children's court-appointed special advocate indicates that J.F. is mimicking violence he has seen by M's partners. There is also conflicting evidence about whether J.F. is bonding with the foster mother. M argues that J.F.'s desire to be with her & his uncontrollable behavior are evidence that the foster parent cannot meet his emotional needs. However a conservatorship officer at the Department testified J.F. cannot follow M's direction either, that he screams, kicks, & slams doors with her, & that he hits & bites her. Witnesses testified that the children both have a strong bond with M & also that they are developing bonds with the foster mother. The foster mother & several caseworkers testified that, while living with Mosley, J.F. & C.F. have received adequate food, clothing, shelter, education, medical & dental treatment, weekly play therapy, psychiatric care, medication, male mentoring, speech therapy, & socialization with family members & peers. We assume that the fact finder resolved these evidentiary disputes in favor of its finding, about which the trial court could reasonably have been firmly convicted.

After J.F. & C.F. were removed from her care, M was involved in intensive family reunification services & counseling when she allowed her boyfriend, Payton, who told her he had just finished a prison term, to move in with her. She insisted that she was not involved in any relationship until it was discovered that she was pregnant. She then refused to provide information for the Department to run a background check on him. When that relationship became abusive M did not seek assistance from her church support network, friends, therapist, Department caseworker, the children's court appointed special advocate, or the court. M was working with her therapist to understand the impact of domestic violence on children, her pattern of choosing violent men & becoming violent herself, & safe solutions to problems with violence. However, after M discussed with her counselor plans for M to safely end the relationship, M confronted Payton, which resulted in violence & her arrest for assault. M & the counselor testified that her confrontational approach ran counter to the counselor's advice.

M also challenged the court's finding that her relationship with the children is more of a peer relationship than a parent-child relationship saying she has provided food, clothing, shelter, attention, & grooming to the children, & has made sure their medical needs are met. There is testimony from M's mother that she is a good mother, takes care of the children's needs, & does not relate to them merely as a playmate. However, testimony revealed that visitation with M has been mainly silliness & playtime & that M has trouble following through with redirection. M testified that J.F. acted as though he wanted to beat up Payton when he abused M & that C.F. tried to help her during at least one violent incident. The court could reasonably have resolved this evidentiary dispute against M, & could have been convinced that the children see themselves as M's equals & protectors.

M challenges the court's findings indicating that it would be in the best interest of J.F. & C.F. for her parental rights to be terminated & for the Department to be appointed sole managing conservator so that the foster mother could adopt the children. The court had evidence that guaranteeing contact with M & preventing adoption was not in the children's best interest. While there was testimony that there is a bond between J.F., C.F., & M, there was also testimony that a bond was developing with the foster mother, that M has difficulty controlling herself & that the children are not better off having contact with her. One caseworker believed that limiting J.F.'s contact with M might help him by giving him more permanency in his current

setting. There was also testimony that emphasized that the children might never experience closure under long-term foster care, which M urges us to consider if she cannot have custody of the children. Adoption by the foster mother would be possible only after M's parental rights were terminated. The State presented testimony that these "children need a sense of permanency, a sense of belonging instead of being in foster care, maybe with the possibility of jumping from home to home." Given the opinion testimony at trial regarding the children's best interest & all the evidence available in this case, a reasonable trier of fact could firmly believe that terminating M's rights & allowing adoption would be in J.F.'s & C.F.'s best interest. Here, the evidence is legally & factually sufficient to support the trial court's finding that it was in the children's best interest to terminate parental rights. The finding that M was arrested for aggravated assault instead of assault with injury, family violence, was not supported by the evidence. Even without that finding, however, the court could have reasonably formed a firm belief or conviction that termination is in the children's best interest. We uphold each of the other individual findings against M's legal & factual sufficiency challenges because, in each instance, the evidence was sufficient to allow a reasonable trier of fact to find best interest.

2. *Silvia Martinez v. TDPRS*, 03-03-318-CV, 2004 Tex. App. LEXIS 4524 (Tex. App.--Austin, May 20, 2004, no pet.)

Involving: Best Interest, termination of two younger children but not two older children.

Factual/Procedural History: M has four children: J.G., thirteen years at the time of trial, A.G., almost eleven, C.T., almost five, & A.C., about nine months old. M appeals from a decree terminating her parental rights to her two youngest children, C.T. & A.C. J.G. & A.G. were placed in the Dallas-Fort Worth area with their paternal grandmother. M concedes that the evidence supports a finding that she engaged in conduct or placed the children with others who engaged in conduct that endangered the children but contends that the evidence is factually insufficient to support best interest.

Holding: Affirmed. Some of the factors to consider in determining best interests are: the child's wishes; her emotional & physical needs now & in the future; emotional or physical danger to the child now & in the future; the parenting abilities of the parties seeking custody; programs available to help those parties; plans for the child by the parties seeking custody; the stability of the proposed placement; the parent's conduct indicating that the parent-child relationship is improper; & any excuses for the parent's conduct. Permanence is of paramount importance in considering a child's present & future emotional & physical needs. A fact-finder may consider the possible consequences of a decision not to terminate & may compare the parent's & TDPRS' plans for a child. A parent's statutorily offensive conduct is often intertwined with the best interest determination. TDPRS need not prove all nine *Holley* factors as a "condition precedent" to termination, & the absence of some factors does not bar the fact-finder from finding by clear & convincing evidence that termination is in a child's best interest, especially when there is undisputed evidence that the parental relationship endangered the child. No one factor is controlling, & the facts of a case may mean that evidence of one factor is sufficient to support best interest.

M argues that the trial court erred because the same circumstances & facts applied to both the older children, with whom she maintains her parental relationship, & the younger children, with whom her relationship was terminated. M is correct that the same conduct was used to support a finding in favor of termination for A.C. & C.T. but not for J.G. & A.G. However, M 's conduct, which she concedes falls within the statutory grounds for termination, is a separate issue from the children's best interests. The trial court found that termination was in the best interest of the two younger children, but not in the best interest of J.G. & A.G., the older children.

There are significant differences between the children's situation. The older children were about thirteen & eleven years old, living with their paternal grandmother for whom a home study had been conducted & approved, had a large & close-knit support system in their paternal family in the Dallas-Fort Worth area, & were old enough to know those family members & to have built relationships with them. The younger children were almost five years & one year old. C.T. had been in foster care since she was three, & A.C. had been with her foster parents almost since birth. Those foster parents wanted to & were approved to adopt both children together. M's history of drug use, neglect, & abuse weighs in favor of termination. The evidence shows that M did not properly provide for their emotional & physical needs in the past & her behavior may put them in emotional & physical danger. The record shows that the foster parents are providing for their needs & keeping them safe & are open to allowing the children to maintain a relationship with their siblings. Although there is a general preference for keeping a parent-child relationship intact, & placing children with family members, the legislature has not required that TDPRS, in addition to proving that termination is warranted by the parent's conduct & the child's best interest, also prove that termination is the only option available for

the child's placement. TDPRS & its caseworkers are tasked with taking into account all options. The record demonstrates that TDPRS considered all options in this instance. The best interest element was supported.

3. *In the Interest of K.W.*, 138 S.W.3d 420 (Tex. App.-- Fort Worth 2004, pet. denied)

Involving: Reversed & rendered. Definition of "admission of paternity" for purposes of termination of parental rights. Termination grounds 161.002(b)(1) (failure to timely file an admission of paternity), 161.002(b)(2) (failure to register with paternity registry and his identity and location are unknown or his identity is known but he cannot be located), 160.301-.302. Also 161.001(1)(D), (E), (N) (constructive abandonment), imprisonment, drug use, criminal endangerment charge, expert witness testimony regarding whether injuries were intentionally inflicted or accidental, TRE 702.

Factual/Procedural History: F served with termination petition when he was incarcerated in New York. Bench trial. M & F terminated under (D), (E), (N) & best interest. F was also terminated under 161.002(b)(1)-(2).

Holding: Affirmed termination of M's parental rights but reversed & rendered as to termination of F's parental rights. Termination as to M affirmed where M admitted that the endangerment & constructive abandonment allegations were accurate. M also admitted that she knew that boyfriend was physically abusing K.W. & that she did nothing about it. M pled guilty to the criminal endangerment charge & was currently incarcerated. She acknowledged she was a drug user during the time she was caring for her child & that she did not have a permanent place for K.W. to live. M also agreed that she had constructively abandoned K.W. for at least a six-month period during which time K.W. was in the conservatorship of TDPRS. The arresting officer & the TDPRS investigator both testified that the injuries exhibited by K.W. were intentionally inflicted, were consistent with child abuse, & were not normal childhood injuries. On appeal, M argued that the evidence of endangerment was insufficient because the determination of whether the child's injuries were accidental or intentionally inflicted requires scientific expertise & neither the arresting officer nor TDPRS were qualified under Rule 702 as experts. We decline to hold that expert medical testimony is mandatory in a suit seeking to terminate parental rights under 161.001(1)(D) or (E). We note that the witnesses' testimony was unobjected to at trial & M herself testified that the evidence supported the two endangerment allegations. She also acknowledged pleading guilty to criminal endangerment because she was guilty. Termination affirmed as to M under (D) & (E). We need not address abandonment grounds because the evidence is sufficient if it supports just one of the alleged termination grounds.

With regard to the termination of F's rights, the judgment recites that F's rights were terminated under 161.002(b)(1) because when he was served with citation he did not respond to the termination suit by filing an admission of paternity or by filing a counterclaim for paternity or for voluntary paternity to be adjudicated under chapter 160 of the TFC. F maintains that he filed several admissions of paternity. F wrote letters to the Court & TDPRS after he was served. In the first he acknowledged that he was the child's biological father & informed the court that he would not give up his parental rights. His second letter recited that he was the child's biological father, was unaware of the child's whereabouts or of any alleged abuse & that he was not going to abandon his parental rights. His third letter to the court asked for a paternity test so he could ask for visitation & partial custody. His last letter stated that he was the biological father & asked for custody upon his release from prison & again asserted his desire not to have his parental rights relinquished. Court cited *Estes v. Dallas County Child Welfare Unit of Texas Dep't of Human Services*, 773 S.W.2d 800 (Tex. App.--Dallas 1989, writ denied) wherein Department took the position that "admission of paternity" must meet the stringent requirements of former sections of the TFC dealing with a "statement of paternity". As in *Estes*, if the Legislature had intended that the strict TFC requirements of a statement of paternity apply, it would have used the term "statement of paternity". We hold that alleged F's letters to TDPRS & to the court constitute admissions of paternity sufficient to put TDPRS & the trial court on notice that he admitted his paternity & wanted to oppose termination. Therefore, there is no evidence to support termination under 161.002(b)(1). Moreover, there is no evidence to support termination under 161.002(b)(2) because it is uncontroverted that TDPRS & the Court knew of his location; thus there is no evidence to support the finding that TDPRS used due diligence in attempting to locate him but was unable to determine his location. There is also no evidence to support (D) or (E) endangerment grounds. The caseworker testified that alleged F said he was not aware of M's situation or of any abuse while he was incarcerated. M testified that F was the child's father & that he did not know of her whereabouts because she did not tell him where she was. She also testified that he did not know of her relationship with her boyfriend, her instability, or use of drugs other than marijuana. F is incarcerated from attempted burglary & attempted criminal possession of a controlled substance. Imprisonment alone will not support endangerment without a showing of a course

of conduct that endangers. There is no clear & convincing evidence of (D) or (E) grounds. There is also no evidence to support (N) where F corresponded with K.W. regularly once he knew of the child's whereabouts. He also corresponded regularly with the caseworker to inquire about the child & expressed a desire to be a part of the child's life. He requested that the child be placed with his aunt. We render that TDPRS take nothing in its termination suit against F & remand this cause to the trial court for further proceedings consistent with the establishment of the parent-child relationship between alleged F & K.W.

4. ***In The Interest of A.B.,*** No. 12-03-00064-CV, 2004 Tex. App. LEXIS 1962 (Tex. App.--Tyler, February 27, 2004, pet. denied)

Editorial Comment: Good case discussing

& that there could be a link to M's drug use. She denied that because M is a drug addict, "she possesses, ipso facto, more than a reasonable degree of risk to the child".

The parental abilities of the individual seeking custody: The foster mother was doing her best to provide a safe & stable environment for the child. The counselor recommended that M not be allowed to visit A.B. after observing a visit. The child struck M in the breasts several times & this behavior was abnormal & indicated anger toward M. A clinical psychologist reported that M had a history of substance abuse & remission. M also reported two previous suicide attempts in July & November of 2001. He believed that M was at a high, or at least moderate, risk for relapse for the rest of her life. A forensic psychologist testified that M had relationships with men who abused drugs & alcohol & who had criminal histories but that M was capable of caring for the child. He testified that any evidence of physical or sexual abuse is not compelling because at the time M & her husband were living in a very chaotic situation. It was his opinion that M had maintained her sobriety for over a year, had been through treatment & had cooperated with TDPRS. He considered M's age as a good prognostic factor. Another forensic psychologist testified that there was not more than a reasonable risk that M would relapse but that M had taken no responsibility for A.B.'s emotional disturbance. A psychotherapist testified that M's past behavior had been erratic, including two addiction relapses & she was concerned about M's ability to parent. She also testified that M had been violent while under the influence of drugs & alcohol. M had made some improvements but needed continuing counseling. M is in denial about her relationship with her husband & admitted that she neglected A.B. when she was on drugs & alcohol. She was concerned with M's history of associating with men with addictive personalities, antisocial behaviors, & criminal histories. The CPS caseworker also testified that "[c]ompletion of a service plan is not always tantamount to reunification because the trauma to the child could be so massive that a return would be trauma [*sic*]". The counselor told the caseworker that A.B. was traumatized in the home, possibly sexually & physically abused, & neglected.

The plans for the child: The foster parents want to adopt A.B. & they have a strong bond with the child. The CASA supervisor testified that adoption could provide the child with stability & nurturing. *The programs available to assist the individual seeking custody:* M completed the family service plan & a recovery program for her alcohol & drug abuse. *The stability of the home:* Counselor testified that A.B. was living in a very chaotic situation before the incident in November of 2001. M had a history of drug & alcohol abuse, two relapses & two suicide attempts. M refuses to admit that she or her husband could have been responsible for A.B.'s emotional problems.

The acts or omissions of M, which may indicate that the existing parent-child relationship is not a proper one & any excuse for the acts or omissions: M stipulated to "D" & "E" grounds. Child taken to hospital allegedly for dog bite but hospital staff said bites were human. M's answers to caseworker were inconsistent & evasive & her behavior was bizarre. She admitted using drugs & appeared intoxicated. The child had a human bite mark on his right shoulder blade, scratches on his back that looked like human scratches, & "pinch marks" on his ears. A.B. was covered with dried blood, had numerous bruises, scratches & dig marks on his head. His ears were full of dried blood. The child had a band-aid on his right eye, which was swollen, a large scratch covering his eyelid, & numerous cuts & scratches on his face. He also had bruises, scratches & digs on his back. A.B. also had what appeared to be a human bite on the left shoulder blade. A.B. told the counselor that M & her husband had hurt him & that M's husband had sexually abused him. A.B. made similar allegations against the foster parents.

Additional evidence relating to the best interest of the child: Counselor did not believe it was in A.B.'s best interest to return him to M because of the extreme nature of his behavior, his history of violence, aggression, sexual acting out, anxiety & fearfulness, & verbalizations that M & her husband had harmed him. A psychologist testified that she did not believe that a child of three or four was a reliable reporter.

The Court held that the evidence was sufficiently clear & convincing that a reasonable trier of fact could have formed a firm belief or conviction that termination of M's parental rights was in A.B.'s best interest. The Court also concluded that "although there is some disputed evidence, this evidence is not so significant that a reasonable trier of fact could not have reconciled this evidence in favor of its finding and formed a firm belief or conviction that termination of [M]'s parental rights is in A.B.'s best interest".

Burden of proof on best interest: M also complained on appeal that the trial court erroneously put the burden on her to prove that it was in the child's best interest to be returned to her & that it was TDPRS' burden to prove that termination was in A.B.'s best interest. The burden of proof is on the person seeking to deprive the parent of their parental rights. There is a strong presumption that the best interest of the child is served by preserving the parent-child relationship. It is TDPRS' burden to rebut this presumption. During the trial the judge made statements that indicated that he was focusing on the best interest of A.B. & presumed

M to be a capable parent. Accordingly, the trial court did not shift the burden of proof from TDPRS to M.

Testimony about adoption: M argued that it was an abuse of discretion for the trial court to allow A.B.'s foster mother to testify about her willingness to adopt A.B. Citing *In re C.H.*, the Court held that "[e]vidence of placement plans and adoption is relevant to best interest".

Impartiality of Trial Judge: M urged that she was denied due process & due course of law under the Texas Constitution & the United States Constitution because the trial judge was unfair, partial, & biased. The Court held that "[f]ar from exhibiting bias against [M], the trial judge unequivocally stated that she was a redeemed parent and that his sole focus was on the best interest of the child". M failed to make a clear showing & failed to rebut the presumption that the judge was a neutral & detached officer.

5. *In The Interest of S.A.W.,* 131 S.W.3d 704 (Tex. App.--Dallas 2004, no pet.)

Involving: Best interest, drug history, & recent positive parental developments pre-trial. M also pled guilty to child endangerment, findings of fact & conclusions of law.

Factual/Procedural History: M contends that there was legal & factually insufficient evidence to support best interest. M points to testimony of several TDPRS witnesses who indicated that M had made significant improvements since the child's removal. M stipulated to termination under 161.001(1).

Holding: Termination affirmed. To the extent that M appears to argue that the best interest question is so broad that the trial court was required to make specific findings on the determinative fact issues, the Court disagreed. A trial court is only required to make findings on ultimate controlling issues, not on mere evidentiary issues. An ultimate fact issue is one that is essential to the cause of action & seeks a fact that would have a direct effect on the judgment. Whether the termination of appellant's parental rights was in the child's best interest is a controlling fact issue. Other factual determinations the court may have used in determining the controlling issues were merely evidentiary issues.

Best interest finding affirmed. Appellant argued that there was undisputed evidence about her history of drug use & relationships with violent men, but that this "pattern of behavior" was insufficient to establish a present & future emotional & physical risk to S.A.W. The Court held that "[a]lthough appellant ultimately complied with TDPRS's service plan, and had made significant lifestyle improvements in the year before trial, all of TDPRS's witnesses continued to express doubt that M had developed a real understanding about which of her behaviors and attitudes posed a danger to S.A.W. The trial court could conclude that this lack of understanding would continue to pose a danger to S.A.W. if he was returned to appellant".

V. INEFFECTIVE ASSISTANCE OF COUNSEL[7]

On July 3, 2003, the Texas Supreme Court settled the question on whether ineffective assistance of counsel claims applied to civil termination cases. *See In re M.S.*, 115 S.W.3d 534 (Tex. 2003). In that case, the Court found that ineffective assistance of counsel claims are viable in parental termination cases where there is a statutory right to appointment of counsel because the parent is indigent. Since that date, there have been at least 34 cases on appeal involving an appellant who asserted an ineffective assistance of counsel claim. With the exception of the *Brice v. Denton* case briefed below, the author has found no other termination judgments that have been reversed based upon an ineffective assistance of counsel point. The *Brice* opinion includes a lengthy dissent and the dissent has been briefed. This case was denied petition by the Texas Supreme Court.

1. *Middleton v. TDFPS*, No. 03-03-766-CV, 2005 Tex. App. LEXIS 3586 (Tex. App.--Austin, May 12, 2005, no pet.)

Involving: Preservation of factual insufficiency claims where also claim of ineffective assistance, TRCP 324(b)(2), TRAP 33.1(a).

Holding: M contended that the evidence was factually insufficient to support the finding of best interest or to overcome the presumption that the children should be placed with relatives. M admitted in her brief that she had not preserved the factual sufficiency point by timely filing a motion for new trial. The Court held that "in cases in which the appellant also claims she was denied ineffective assistance of counsel, we may consider factual insufficiency in conjunction with the ineffective assistance claim although the argument is not properly preserved". *See M.S.*, 115 S.W. 3d 534, 549-50 (Tex. 2003). The Court then went on to consider the issue in conjunction with the ineffective assistance claim. The Court affirmed finding that M had not met her burden to show how counsel was deficient or how she was

[7] *See In the Interest of K.A.F.* under Section II, Texas Supreme Court Cases. *See also In The Interest Of B.T., M.J.R.B., T.B., & M.T.* in the Trial Court Jurisdiction subsection under Section VII, *In The Interest of D.B. & E.A.B.* under Mandatory Dismissal, *Manning v. TDFPS* under Timeframe for Appointment of Counsel.

prejudiced by any deficiency. Court affirmed finding factually sufficient evidence to support the termination.

2. *In the Interest of S.D.S., G.R.R., J.R.R., & E.E.M.R.*, No. 07-04-261-CV, 2005 Tex. App. LEXIS 3386 (Tex. App.--Amarillo, May 3, 2005, no pet.)

Involving: Ineffective assistance, counsel's failure to appeal decision of associate judge that was adopted by district court judge, Anders Brief filed by appellant's counsel.

Holding: F claims that he received ineffective assistance of counsel because his trial attorney failed to appeal the associate judge's order of termination to the referring court. In support of this argument, he contends that he was entitled "to challenge the associate judge's Order of Termination at every state of the appellate process" & because the trial court found that appellate counsel was ineffective in failing to file an appellate brief, "it can not be concluded that Appellant received ineffective assistance of counsel for failure to request a trial *de novo* to the referring court. . . ". Assuming, that the latter logically follows from the former, nothing is said about how the result would have differed had he received a trial *de novo*. The evidence warranting termination would not change; nor does F suggest that it would. One claiming ineffective assistance of counsel must establish not only that his counsel was deficient but also that the deficiency was prejudicial. F has not demonstrated how he was harmed by his attorney's conduct & thus has not met his burden. Point overruled.

3. *Taylor v. Brazoria County Children's Protective Services Unit,* No. 10-03-00148-CV, 2004 Tex. App. LEXIS 8729 (Tex. App.--Waco, Sept 29, 2004, no pet.)

Involving: Ineffective assistance, failure to file motion for new trial, Indigence & TFC 107.013(a)(1) (appointment of trial counsel for indigent parents in termination cases).

Editorial Comment: Although the appellate court affirmed the underlying termination & refused to find ineffective assistance of counsel, the appellate court erroneously applied *In re M.S.* to a case where counsel was not indigent & thus did not have a right to appointment of counsel. The Texas Supreme Court pronouncement in *M.S.* was based on the Family Code or statutory right for *indigent* parents to have counsel appointed where the parent has appeared in opposition to the termination

Holding: Affirmed. The statutory right to counsel in parental-rights termination cases embodies the right to effective counsel. The appellant must show that counsel's assistance fell below an objective standard of reasonableness & that counsel's deficient performance, if any, prejudiced the defendant. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. M argued that counsel, who agreed to represent M without charging her a fee, was ineffective because she agreed to take the case only days before the trial was to begin & did not have time to prepare. She argues that counsel should have requested a continuance. However, M was present at a permanency review hearing on January 14 when the court told her that the "case is going to go to trial because it has a dismissal date that requires it be tried prior to March 7th . . . there's no chance for a continuance and no chance for an extension." Counsel's decision not to request a continuance was not unreasonable under the facts.

M also argued that counsel's failure to file a motion for new trial denied her effective assistance of counsel. Rule 324 requires a motion for new trial to preserve a complaint of factual sufficiency. Not every failure to preserve factual sufficiency issues rises to the level of ineffective assistance. When a motion for new trial is not filed in a case, the rebuttable presumption is that it was considered by the appellant & rejected. We indulge the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, including the possibility that counsel's decision was based on strategy or that counsel, in her professional opinion, believed the evidence factually sufficient such that a motion for new trial was not warranted. Assuming without deciding that counsel's failure to file a motion for new trial was unreasonable, we determine whether counsel's failure caused harm. We conduct a factual sufficiency review as if factual sufficiency had been preserved to determine whether the result would have been different but for counsel's unprofessional errors. In a factual sufficiency review in a termination case, we consider whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations. In light of the entire record, we cannot say that the jury could not have reasonably formed a firm belief or conviction about the truth of the termination grounds or best interest. The evidence is therefore factually sufficient & M was not harmed by her counsel's failure to file a motion for new trial on that ground.

M's second issue argues that the trial court abused its discretion in refusing to appoint counsel for her, thus preventing her from receiving effective assistance of counsel. The Family Code requires the trial court to appoint counsel to represent an indigent parent who has appeared in opposition to the termination. The burden rests on the individual seeking to establish

indigency to prove that they could not pay the costs. There is nothing in the record to show that M made a prima facie case that she was indigent.

4. *In the Interest of T.N. & M.N.*, 142 S.W.3d 522 (Tex. App.--Fort Worth 2004, no pet.)

Involving: Failure of children's attorney ad litem to perform statutory duty to children, standing of M to bring that claim, or to make her such claims for herself or the father of the children.

Factual/Procedural History: M complains that the children's attorney ad litem's failure to perform statutorily mandated duties violated her due process & equal protection rights under the state & federal constitutions. The record demonstrates that the children's attorney ad litem did not meet with his clients until three days after trial began. It also demonstrates no evidence of the children's desires about termination.

Holding: A party may not complain of errors that do not injuriously affect her or which only affect the rights of others. An exception exists when the appellant is deemed to be a party under the doctrine of virtual representation, which requires among other elements that the appellant and, in this case, F & the children, have identical interests. The record does not show that M, F, & the children have identical interests, nor does M claim that they do. Instead, without presenting any evidence that she suffered harm therefrom, M seeks to exploit the alleged deficiencies of the children's counsel for her own use on appeal.

While we do not reach the substance of M's complaint, we are appalled that any attorney, much less one appointed to represent the interests of vulnerable children, could fail to meet with his clients, not to mention fail to ascertain his clients' trial objectives, until such trial was well underway. Nevertheless, M

admitted using drugs during her pregnancies with K.K. & the twins. Thus, there is evidence to support the 161.001(1)(D) ground.

The Texas Supreme Court recently held that the statutory right to counsel in parental-rights termination cases embodies the right to effective counsel. M asserts that the failure of her trial counsel to object to the charge's submission of the termination of M's parental rights by broad-form question deprived M of her statutory right to effective assistance of counsel. In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. TRCP 277. The charge in parental rights cases should be the same as in other civil cases. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). The controlling question is whether the parent-child relationship between the parent & child should be terminated, not what specific ground or grounds under the controlling statute the jury relied on to answer affirmatively the questions posed. In so holding, the Supreme Court approved both the instruction, which disjunctively submitted the alternative grounds for termination, as well as the broad-form submission of the controlling issue: whether the parent-child relationship should be terminated.

We are aware of a recent trend among practitioners to question the continued viability of *E.B.* in the wake of *Crown Life Insurance Co. v. Casteel*, in which the Supreme Court held that it is harmful error to submit to a jury a single broad form question that commingles valid & invalid liability theories. *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). However, the Supreme Court has answered the question as it relates to ineffective assistance of counsel in a termination proceeding, i.e., that counsel was ineffective for failure to object to a broad form submission. In *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the Court concluded that in light of its decision in *E.B.*, it could not be said that counsel's failure to object fell outside the wide range of professionally competent assistance. Although counsel could have raised the issue in the trial court so as to "ultimately implore this Court to reconsider *E.B.*, it is not outside the bounds of competency to follow a decision of this court." Given that *J.F.C.* postdates *Casteel*, we are constrained to agree. Thus, we conclude that the failure of M's trial counsel to object to the broad-form submission did not deprive M of her statutory right to effective assistance of counsel.

6. ***In the Interest of M.S., E.S., D.S., S.S., & N.S.***, 140 S.W.3d 430 (Tex. App.--Beaumont 2004, no pet.)

Involving: Failure to preserve factual sufficiency issue, failure to file motion for new trial & ineffective assistance, review of ineffective assistance claims on appeal. Decision on remand from Texas Supreme Court.

Factual/Procedural History: M appealed the termination. The appellate court affirmed the judgment on original submission. The Supreme Court reversed the appellate court's judgment & remanded the case with instructions to "determine whether counsel's failure to preserve the factual sufficiency issue was not objectively reasonable, and whether this error deprived M of a fair trial."

Holding: The evidence in this case was factually sufficient. As a result, we cannot conclude that there is a reasonable probability that, but for counsel's failure to preserve the factual sufficiency issue for appellate review, the result of the proceedings would have been different. In the exercise of his professional judgment, trial counsel could reasonably have decided not to challenge factual sufficiency. Therefore, M was not deprived of effective assistance of counsel due to counsel's failure to preserve the sufficiency issue by filing a motion for new trial.

To paraphrase the standard articulated by the Supreme Court, we must indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, including the possibility that counsel's decision not to challenge factual sufficiency was based on strategy, or even because counsel, in his professional opinion, believed the evidence factually sufficient such that a motion for new trial was not warranted. The rebuttable presumption is that it was considered by the appellant & rejected. It is the appellant's burden to establish that counsel's performance fell below an objective standard of reasonableness. If we determine that counsel's performance was deficient, we must determine whether there is a reasonable probability that, but for counsel's failure to preserve error, the result of the proceeding would have been different. Such a review calls upon us to determine harm as if factual sufficiency had been preserved, under our established factual sufficiency standard in parental-rights termination cases, understanding that the evidentiary burden in such cases is "clear and convincing." If counsel's failure to preserve a factual sufficiency complaint was unjustified & fell below being objectively reasonable, then it must hold that counsel's failure to preserve the factual sufficiency complaint by a motion for new trial constituted ineffective assistance of counsel, & we must reverse the trial court's judgment, & remand the case for a new trial. In assessing the prejudice prong, we must determine whether, on the entire record, the jury could reasonably form a firm conviction or belief that M violated one of the alleged conduct predicates of section 161.001(1) & best interest.

The evidence of violence against the children, neglect, & illegal drug use supply ample evidence to

show condition endangerment, conduct endangerment, & constructive abandonment. The jury could also have reasonably found the allegations of failure to submit to a court order & failure to comply with a court order. The jury could have also reasonably determined that termination was in the best interest of the children.

7. *In the Interest of D.B. & E.A.B.*, 153 S.W.3d 575 (Tex. App.--Amarillo 2004, no pet.)

Involving: Failure to seek dismissal of suit & ineffective assistance of counsel, 263.401, 263.402.

Factual/Procedural History: The children's foster parent filed an intervention in suit to terminate M's parental rights. The trial court terminated M's rights. M claimed ineffective assistance of counsel based on applicability of the 263.402(b) waiver provision & her counsel's failure to seek dismissal pursuant to 263.401(a).

Holding: The appellate court rejected M's complaint because M failed to demonstrate prejudice from counsel's alleged ineffective assistance. To prevail on her claim of ineffective assistance of counsel, M has the burden to affirmatively prove both deficient performance by counsel & prejudice from the allegedly deficient performance. To prove prejudice, she must prove a reasonable probability that but for counsel's alleged error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Even had counsel moved for & obtained dismissal of DPRS's claims for termination, M does not assert or demonstrate that the dismissal would have altered the termination judgment. Accordingly, she has failed to demonstrate prejudice from counsel's alleged ineffective assistance.

8. *In The Interest of J.W.M.,* 153 S.W.3d 541 (Tex. App.--Amarillo 2004, pet. denied)

Involving: Ineffective assistance of counsel in that counsel was appointed only 21 days before the termination hearing.

Holding: Ineffective assistance point overruled. M argued by analogy that Rule 245 requires 45 days notice of a trial setting; thus, appointment of counsel 21 days before the hearing necessarily rendered counsel's assistance ineffective. Counsel did not request a continuance or otherwise raise an objection & TDPRS argued that M waived the issue. M argued that she is entitled to raise the issue for the first time on appeal. The appellate court overrules the issue but does so saying it will express no opinion on that issue. Citing *Strickland v. Washington & In re M.S.*, the Court noted that M did not assert that she was ineffectively represented. M also states that the short time counsel was provided "greatly affected" her ability to properly prepare for trial but she does not point to any act or omission of counsel that rendered representation ineffective.

9. *In the Interest of J.A.L.*, No. 09-03-545-CV, 2004 Tex. App. LEXIS 2445 (Tex. App.--Beaumont Mar. 18, 2004, no pet.)

Involving: Abated appeal, ineffective assistance.

Factual/Procedural History: The appellate court abated an appeal of termination of parental rights so that the trial court could conduct a hearing to determine whether the appellant was deprived of a free record due to ineffective assistance of counsel. The trial court found that the appellant was not indigent. The appellate court set a due date for filing the record. The record was not filed by the due date & the appellant did not respond to TDPRS's motion to dismiss the appeal for want of prosecution.

Holding: The appellate court dismissed the appeal for want of jurisdiction.

10. *In the Interest of A.J.H.*, No. 14-03-01016-CV, 2004 Tex. App. LEXIS 1969 (Tex. App.--Houston [14th Dist.] Mar. 2, 2004, no pet.)

Involving: Inadequate briefing of ineffective assistance of counsel complaint on appeal, setting up ineffective assistance claim at hearing on motion for new trial.

Factual/Procedural History: M complained that she received ineffective assistance of counsel at the termination trial. On appeal, M summarily states that her trial counsel was deficient in that counsel "did not appear from the record" to do certain things, & lists thirteen items of alleged deficiency in her brief (most of which appear to be pretrial matters). Although M filed a motion for new trial, on which a hearing was held, trial counsel did not attend the hearing.

Holding: M has waived this complaint by failing to properly brief it. Aside from briefing waiver, M has not met her burden of proving by a preponderance of the evidence that her counsel was ineffective. M correctly cites authority for the proposition that parents are entitled to effective counsel at a termination proceeding. But, she otherwise fails to properly develop this argument. An appellant has a duty to cite specific legal authority & to provide legal argument based upon that authority. Thus, M has not preserved review on this point of error. M does not inform this court how her counsel was deficient, cite a single case for the proposition that any of the deficiencies she alleges amounts to ineffective assistance of counsel, or demonstrate how she was harmed.

Moreover, an appellant usually cannot meet the burden to show ineffective assistance if the record does not specifically focus on the reasons for trial counsel's conduct. In the absence of a proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. When there is no hearing on a motion for new trial or if trial counsel does not appear at such a hearing, an affidavit from trial counsel becomes almost vital to the success of a claim of ineffective assistance of counsel. Here, there is no such affidavit in the appellate record. M has not rebutted the presumption that her trial counsel made all significant decisions in the exercise of reasonable professional judgment, & M has not demonstrated in the record that trial counsel rendered ineffective assistance. We will not speculate about counsel's strategic decisions, & thus, we cannot find M's trial counsel ineffective.

11. ***Brice v. Denton,*** 135 S.W.3d 139 (Tex. App.-- Waco 2004, pet. denied)

Editorial Comment: In his dissent, Chief Justice Gray does a good job of setting out the legal background with legal references for: duties & responsibilities of ad litems, ineffective assistance of counsel (criminal & civil law & discusses U.S. Supreme Court *Massaro* case), importance of the record in ineffective assistance cases, abatement of appeals for hearings in the trial court for representation issues, 263.405(e) & appointment of counsel on appeal, appellate jurisdiction & failure to timely file notice of appeal, establishment of termination ground as a matter of law, imprisonment issues.

Involving: Ineffective assistance of counsel, 107.001(2), 107.013(a), 263.405(e), appellate jurisdiction, duties & responsibilities of attorney ad litems.

Factual/Procedural History: M filed a suit to terminate the parental rights of the biological father of her two children. Her new husband wanted to adopt her children. F, an inmate filed a *pro se* answer opposing termination & a "Declaration of inability to pay costs". F had been convicted of aggravated sexual assault of his children. F received the notice of hearing five days before the hearing but could not attend. The trial court appointed an attorney ad litem for F on the day of the hearing. Trial court terminated under 161.001(1)(L)(viii) for violating section 22.021 of the Penal Code (aggravated sexual assault) & best interest. F appeals urging error in appointing an attorney ad litem on the day of the final hearing, thereby denying him effective assistance of counsel & violating his due process rights & that the attorney rendered ineffective assistance during the hearing. F also complained that the trial court prevented him from timely requesting a jury by appointing an attorney on the day of the final hearing, or alternatively, by proceeding to final hearing without giving F the 45-day notice required under TRCP 245, & by failing to rule on a bench warrant request to allow F to attend the final hearing.

Holding: Majority: Reversed & remanded. *Ineffective Assistance of Counsel*: The appointed attorney allowed the hearing to proceed even though he had not consulted with F. Counsel introduced no evidence for F & only conducted a perfunctory cross-examination of M & did not request a continuance. Counsel had no opportunity to consult with her client. The record further shows that counsel prepared for trial only by reviewing his criminal history & her presentation of evidence filled only one & a half pages of the record. Moreover, counsel adduced evidence with regard to F's criminal history during her cross-examination. Applying the first prong of the *Strickland v. Washington* test, the Court found that counsel's assistance fell below an objective standard of reasonableness. The Court next determined whether or not counsel's deficient performance prejudiced F. Counsel took no opportunity to interview F, to request a bench warrant, to find & interview potential witnesses, to investigate the conviction that was the basis for termination, to request a jury, or to challenge the pleadings or the statute. We find that F was prejudiced by counsel's deficient assistance. We hold that F was denied effective assistance of counsel.

Dissent: The majority disregards the limits of jurisdiction, disregards our precedents in failing to consider the matter of appointment of counsel on appeal, & then errs in finding ineffective assistance of counsel at trial. *Jurisdiction*: In acting outside of our jurisdiction, we violate the requirements of due process of law & due course of law that is due the children & their mother. M does not raise jurisdiction but jurisdiction can be raised at any time, including from the trial court. A timely notice of appeal is necessary to vest an appellate court with jurisdiction. If an appeal is not timely perfected, the court does not obtain jurisdiction to address the merits of the appeal & can take no action other than to dismiss the appeal. The judgment was signed on September 28, 2001. On November 6, 2001, F mailed his motion to extend time for filing his notice of appeal. He filed his notice of appeal in the trial court on November 8, 2001. The Court received F's motion for extension on November 9th & he filed the motion on November 30th. On December 28, 2001, the Court purported to grant the motion & extend the time for filing the notice of appeal to November 12th. The notice of appeal would have been timely if filed by October 18, 2001. The Court had no authority to grant the extension & the Court lacks jurisdiction over the appeal.

Appointment of Counsel on Appeal: Under the current statutes, the record does not show that F is entitled to an appointed attorney ad litem on appeal. He has at least a conditional right to appointed counsel in an appeal of termination of his parental rights. Whether he has an actual right to counsel is a matter for the trial court to determine. Thus, assuming the Court had jurisdiction, the Court should remand the case to the trial court to determine whether procedural due process requires appointed counsel on appeal. It is ironic that the majority would reverse the judgment on ineffective assistance without giving any consideration to the conditional due-process requirement of counsel on appeal. The Texas Family Code has provided for the mandatory appointment of an attorney ad litem for indigent parents in termination suits where the parent has responded in opposition to the termination suit. Although the statute does not expressly address the appointment of an attorney ad litem on appeal, this Court has held that the statutory requirement extends to the appellate level (citing *In re T.V.*). At the time of *T.V.*, the Court did not expressly address the appointment of an attorney ad litem on appeal & our opinion filled the gap. The Texas Legislature effectively abrogated *T.V.* in 2001 when it enacted 263.405. Now the Family Code expressly provides for procedures for the appointment of an attorney ad litem on appeal. TFC 262.405(e) provides for the appointment of appellate counsel where a parent claims indigency & requests the appointment of an attorney. Section 263.405(e) controls over the more general section 107.013. However, to the extent that *T.V.* was based on the constitutional right to appointed counsel on appeal, that holding is not affected by the enactment of 263.405(e). A parent whose parental rights have been terminated has a conditional, constitutional right to appointed counsel on appeal. Whether those conditions are satisfied must be determined by the trial & the appeal would have to be abated for that determination. The record does not show that F requested the appointment of an attorney ad litem or otherwise satisfied the statutory prerequisites for such an appointment on appeal. The United States Supreme Court in *Lassiter* held that parents in termination cases have no per-se constitutional rights to counsel. The dispositive question is whether when considering the *Lassiter* factors & weighing them against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, this suffices to rebut that presumption & leads to the conclusion that due process requires the appointment of counsel. Because court appointed attorneys are paid by county funds, decisions regarding the appointment & substitution of appellate counsel must be made at the trial court level. When it is not clear whether appointed trial counsel continues to represent the client on appeal, we should abate & remand to the trial court for a determination of the matter. In termination appeals, this Court has remanded for a hearing to determine whether counsel was effectively representing the client on appeal. In *T.V.*, this Court abated with instructions to the trial court to determine why a parent's appointed appellate counsel had not timely filed a brief, & to take appropriate action. If the Court had jurisdiction, it would be bound to abate the cause & remand to the trial court. The record does not show that F's appointed trial counsel withdrew from representing F. Counsel may thus represent F. F has prosecuted this appeal *pro se*. The record does not show whether he intended to waive appointed counsel on appeal. It is for the trial court to determine these matters. Assuming the Court had jurisdiction, there were two courses available to the Court. First, we could abate the appeal for a determination by the trial court of whether F is represented by counsel & if not, whether he wants appointed counsel, if he wants counsel, whether he is indigent, & if indigent, whether procedural due process requires the appointment of counsel in this appeal. The only other course would be to expressly overrule *T.V.* which I decline to do today.

Ineffective Assistance of Counsel: The majority errs in holding that F was denied effective assistance of counsel. In *M.S.* the Texas Supreme Court found that the statutory right to appointed counsel "embodies the right to effective counsel". In a footnote, the dissent commented that the Legislature's prospective definition of the duties of appointed attorneys in termination suits might have been abrogated (citing TFC 107.001(2)). He noted that in 2003 this statute defining "attorney ad litem" specifically included "competent representation". The dissent noted that the Court in *M.S.* was interpreting the law prior to the statutory adoption of the "competent" representation standard. Dissent noted that the *Strickland* ineffective assistance standard has two prongs – performance & prejudice.

The U.S. Supreme Court in *Massaro* demonstrates that "the presumption of effective assistance can only be overcome by an affirmative record". Moreover, the Texas Supreme Court in *M.S.* held that the appellate court can "only consider the record presented to it, and. . .cannot speculate on what might or might not be in the missing portions of the record". The majority completely disregards the requirement of the record & the prejudice prong. The majority opines that nothing in the record suggests that counsel requested a record & that counsel had no opportunity to meet with her client & she "apparently" requested none. The very words of the majority show that it is ignoring the requirement that the record affirmatively show ineffective assistance. We cannot draw conclusions

from a silent record or from no record. Moreover, like the performance prong, the prejudice prong must also be shown on the record & cannot be decided on "retrospective speculation". The majority has not observed the requirement that ineffective assistance must be affirmatively shown in the record. The majority points to the statement by the court to F's counsel that "I've appointed you to represent the biological father". This statement hardly bears the weight that the F & the majority would put on it. Indeed, it affirmatively refutes the contention that Counsel was appointed immediately before the trial. The record shows that at trial, Counsel stated that he had reviewed F's criminal history.

With regard to the allegation that Counsel elicited testimony about F's criminal history, Counsel conducted a cross-examination of testimony that had previously been elicited. Quoting *Graves v. State*, "merely because counsel's trial strategy ultimately 'backfired', does not render his performance deficient". F also complains that counsel's presentation of the evidence only filled one & a half pages of record but this fails to take into account the cursory nature of the trial, of which F does not complain. The *Strickland* analysis requires that all of the circumstances of the case be considered. Moreover, with regard to the prejudice prong, the majority does not even take a cursory analysis of prejudice. The majority errs in finding prejudice independent of deficient performance, & in ways that F does not allege. The majority finds prejudice in matters that have not even been mentioned in the analysis of counsel's performance. Also, the record does not show that Counsel did any of the things that the majority alleges, nor does it show that she did not do them. Statements of alleged deficient performance cannot support the prejudice analysis. "A court's mere belief, unsupported by law, precedent, or rationale, is worthless". As for Counsel's not taking the opportunity to challenge the pleadings or the statute, we may not reverse on a theory not advanced by the appellant. The majority also does not suggest how F suffered prejudice in ways that the F alleges. The majority also states that Counsel took no opportunity to interview F or to find & interview potential witnesses. Neither F nor the majority attempt to show prejudice in this regard. There is also no showing that but for counsel's failure to do this, the result of the proceeding would have been different. The record also does not show what the testimony would have been or how it would have benefited F. Moreover, there was testimony that showed that termination would be in the children's best interests because there was testimony that the children had no desire to see F, M testified that her new husband wanted to adopt the children, & that the adoption was what the children wanted. "The best-interest element of the termination cause of action concerns the interest of the child, not of the parent". The majority also does not suggest how, even if it were in the record, how these allegations would undermine confidence in the outcome of the trial. "In light of the unchallenged evidence, this termination cause of action comes at least very close to being established as a matter of law."

Moreover, in light of F's convictions & imprisonment, this is strongly probative that termination would be in the children's best interest. Quoting the TSC opinion of *In re C.H.*, the dissent wrote that "[e]vidence of a parent's criminal history may be probative of a parent's 'pattern of conduct that is inimical to the very idea of child-rearing'". "A parent's criminal conduct is probative on the best interest of the child when it can be inferred from the conduct that the parent has directly endangered the safety of the child and when the conduct results in the parent's long imprisonment". The evidence showed that F was convicted of "molesting" his children & was sentenced to 30 years confinement. A defendant imprisoned for this long will not become paroled for at least fifteen years & it is doubtful that the parole board would ever let him out on parole. The children were nearly ten years old at the time of trial. It is therefore very unlikely that the children will ever even see F during the remainder of their childhood. Under these circumstances, F's allegations of deficient performance by his attorney ad litem do not undermine confidence in the outcome of the trial & thus does not show prejudice.

12. *In the Interest of S.G.S., S.A.S., & S.L.L.*, 130 S.W.3d 223 (Tex. App.--Beaumont, 2004, no pet.)

Involving: Parents raise ineffective assistance of counsel claim against children's attorney ad litem, 107.014.

Factual/Procedural History: The jury terminated both parents' rights. Both parents argued on appeal that the "failure of the Attorney Ad Litem to perform statutorily mandated duties violates the parents' Due Process and Equal Protection rights afforded by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sec. 9 and 10 of the Texas Constitution." The parents contend that the children's attorney ad litem provided ineffective assistance of counsel. For the moment, we will set aside the issue of whether the performance of the children's representative affects the parents' rights to due process & equal protection, & focus upon the factual basis for the complaint raised on appeal.

Holding: The parents did not establish that the children's attorney ad litem failed to perform the actions required by 107.014. The record does not

reveal deficient performance by the attorney sufficient to overcome the presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The person raising the claim of ineffective assistance has the burden of establishing both deficient performance & sufficient prejudice to the defense. The parties agree that the attorney ad litem's duties are set forth in 107.014. Those duties include investigating "to the extent the attorney ad litem considers appropriate to determine the facts of the case." "An attorney ad litem appointed to represent a child shall within a reasonable time after the appointment … interview all parties to the suit." The parents argue that the attorney failed to satisfy her duty to investigate because she never met with them. Counsel's effectiveness was not formally challenged in the trial court, either during the trial or in a motion for new trial hearing. Her investigation of the case is not described in the record. In support of their factual assertion that the children's attorney failed to interview them, the parents rely upon testimony given by M during cross-examination by F's attorney. To the extent that this testimony can be said to prove the parents' claim that the attorney ad litem never met with them, it is controverted by the testimony given by F during his cross-examination by the attorney ad litem.

VI. JURY CHARGE ISSUES[8]

1. *In The Interest Of L.C.,* 145 S.W.3d 790 (Tex. App.--Texarkana 2004, no pet.)

Involving: Alleged jury charge error, broad form & disjunctive submission, TEX. R. CIV. P. 277.

Factual/Procedural History: The State's petition for termination alleged three statutory grounds or predicates. The jury charge did not require the jury to make a specific finding on each statutory ground, instead charging the jury that termination was authorized if at least one of three enumerated predicate acts occurred. M argued the trial court erred in denying her request that the jury be asked to decide separately which of the three alleged statutory grounds had occurred. She contends this method should have been used instead of the disjunctive charge & broad questions format that was used.

Holding: Affirmed. In all jury cases, the court shall, whenever feasible, submit the cause on broad-form questions. The Texas Supreme Court in *E.B.* determined that Rule 277 applies in termination proceedings, thus resolving this issue contrary to M's position. It also held that the controlling question was whether the parent-child relationship should be terminated, not what specific termination grounds the jury relied on to answer affirmatively the questions posed. The Texas Supreme Court has impliedly affirmed it's holding in E.B. *See In the Interest of B.L.D.*, 113 S.W.3d 340, 354-55 (Tex. 2003) (concluding the charge "follows our precedent in *E.B.*, tracks the statutory language of the Family Code, and comports with Texas Rules of Civil Procedure 277 and 292"). Despite *E.B.*'s holding, several other biological parents have advanced this "ten jurors" argument. The issue has repeatedly been resolved against them (citations to intermediate courts omitted). We, too, are bound by *E.B.* It permits submission of a disjunctive question regarding a parent's predicate act or omission under section 161.001(1).

2. *In the Interest of S.T., O.T.H., G.T.H., & M.L.T.*, 127 S.W.3d 371 (Tex. App.--Beaumont 2004, no pet.)

Involving: Broad-form submission where it is argued that there was legally & factually insufficient evidence to support the jury's verdict on one or both termination grounds.

Holding: The jury was instructed in answering the termination question that, in order to terminate F's parental rights, "it must be proven by clear and convincing evidence that termination is in the best interest of each child and that at least one of the following events has occurred". The provisions of 161.001(1)(D) &(E) were then reproduced for the jury & the jury was asked whether F violated (D) & (E) [grounds were set out]. F argued that because the evidence was legally & factually insufficient to support the verdict on one or both of the two submitted grounds, the trial court erred in submitting a single, broad-form question. We note this issue was properly preserved & ably argued by counsel. F's objection was overruled. The trial court submitted a single "Yes/No" termination question for each child. We have concluded the evidence is legally & factually sufficient to support either ground for termination as to S.T., O.T.H., & G.T.H. Our review of issue seven is focused on the termination of F's rights as to the infant, M.L.T., because M.L.T. was removed from F's care on her release from the hospital & so was not "placed" or "allowed" to remain in the environment the other three children lived in for the prior four years.

Citing *Crown Life Ins. Co. v. Casteel*, F contends that when a trial court submits a single, broad-form question incorporating multiple grounds, including both valid & invalid theories, & objection to the charge is properly presented, the error is harmful & a new trial is required, because an appellate court cannot determine under those circumstances whether the jury based its verdict on the improperly submitted ground.

[8] *See In The Interest Of B.L.D.* in Expert Witnesses subsection under Section VII, *Pamela Babcock King v. TDPRS* in Section V on ineffective assistance of counsel.

TDPRS responds that *Casteel* involved the mixing of invalid & valid legal theories in the jury charge, & here two valid grounds for termination were submitted. TDPRS also argues that *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002) involved the submission of a "damage" element lacking evidentiary support, not a "theory of liability," & is inapplicable to the circumstances in the instant case. TDPRS relies on the Supreme Court's decision in *Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). In *E.B.*, the Supreme Court approved a broad-form submission substantially the same as the jury question & instructions here. The sufficiency of the evidence was not at issue in *E.B.*

In *Harris County v. Smith* the Supreme Court held that because an element of damage had no support in the evidence, its submission, along with valid damage elements, resulted in an erroneous jury charge. The Court also held that the charge error was harmful, because the appellate court was prevented from determining whether the jury based its verdict on the improperly submitted element of damage. The significance to our case of the *Harris County v. Smith* holding is that the Court applied *Casteel* harm analysis to a broad-form submission which was erroneous because an element submitted had no support in the evidence. The problem addressed in *Harris County v. Smith* is a potential difficulty to be avoided in any broad-form submission, including the type of submission approved in *E.B.* & at issue here. We are not entirely persuaded, however, that an instruction in a termination case that tracks the statute, & tells the jury that at least one of the grounds for termination must be proven by clear & convincing evidence, necessarily suffers from the same no evidence, harmful error infirmity as the instruction in *Harris County v. Smith*, when the termination grounds are so closely related as here & the ultimate fact inquiry is the same. Section 161.001(1)(E) includes alternate facts for termination & theoretically raises the same issue as 161.001(1)(D) in M.L.T.'s case. But to insist on a granulated submission of each possible statutory "fact" finding, breaking out direct & indirect acts, or conceivably "emotional" & "physical" well-being of the child, would run contrary to *E.B.'s* support for broad-form submission. The instruction here tracked the statute accurately, & we believe properly informed the jury of the essential facts required to be proven to answer the termination question affirmatively.

Even assuming the trial court should have limited either the predicate instructions or the broad-form question as to M.L.T. to section 161.001(1)(E) conduct by F, we do not believe the inclusion of the instruction on section 161.001(1)(D) as to M.L.T. requires reversal. TRAP 44.1 provides that "no judgment may be reversed on app003 .8(1.6(t)5.5(o)-1.8(e gro8(1.6nd(t)5.5(o)-1.8hat the trial ro8(1.6r)01.6ct)]TJET46.8430.44 244.8 0.540

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her & other parents in similar circumstances to erroneous termination of parental rights to future-born children.

Holding: M argues that the broad form submission improperly lowered the State's burden of proof & made it impossible to be sure on which ground ten or more jurors agreed. M acknowledges that in *E.B.*, the Supreme Court approved of the use of broad-form questions in termination cases. She contends, however, that *E.B.* must be harmonized with the more recent decision in *Crown Life Insurance Co. v. Casteel*, in which the Supreme Court held that it is harmful error to submit to a jury a single broad-form question that "commingles valid and invalid liability theories." She contends that because the evidence is insufficient to support the jury's findings as to each of the asserted grounds, allowing the jury to find that her parental rights should be terminated without determining on which ground or grounds the jury relied violates her rights to due process because the termination may be based on a ground that lacks evidentiary support.

Although the jury charge stated that M's parental rights to K.C. & D.B. could be terminated if clear & convincing evidence established one of four grounds for termination, the charge asked in a broad-form question simply whether her rights to K.C. & D.B. should be terminated. Likewise, with regards to J.T.C., the charge allowed for her rights to be terminated based on two grounds, but asked simply whether her rights to J.T.C. should be terminated. To both broad-form questions, the jury answered "yes." In the charge's general instructions, the jury was instructed that "the same ten or more of you must agree upon all the answers made and to the entire verdict."

In this case, we have held that sufficient evidence supports each of the grounds for termination of Carr's parental rights to her children. Therefore, we need not decide whether it is error to submit in a broad-form question a ground for termination not supported by legally sufficient evidence. Furthermore, as noted in J.M.M., absent evidence to the contrary, we must presume that the jury followed the trial court's instructions that the same ten or more of them must agree on the verdict & all the answers made. Moreover, this Court has held that *Crown Life* does not apply in cases where disjunctive allegations track statutory language, as the jury charge does in this cause.

VII. PRETRIAL & TRIAL ISSUES

A. Trial Court Jurisdiction

1. *In Re Zuflacht,* 150 S.W.3d 249 (Tex. App.--Texarkana, November 12, 2004, no pet.)

Involving: Mandamus action, 155.001, jurisdiction, venue, estoppel, adoption, termination, adoption agency.

Factual/Procedural History: Following the filing of the mother's affidavit of voluntary relinquishment of parental rights to a licensed child-placing agency & an affidavit of the status of the child, District Court in Bexar County signed a decree terminating the parental rights of the mother & the child's unknown father. A publisher's affidavit shows that notice to the unknown father was published in Gregg County, where the real party in interest filed an original SAPCR suit in Gregg County. Following a hearing, the district court of Gregg County entered an order denying the agency's request for continuance & pleas in abatement & plea to the jurisdiction, & deferring a ruling on the agency's motion to transfer the case to the district court of Bexar County. The Gregg County court further ordered the child to be produced for DNA paternity identification. The agency filed a mandamus action & a request for temporary orders. Relator, director of adoption agency filed a mandamus petition to compel district judge to vacate its order which denied Relator's pleas in abatement & plea to jurisdiction; to vacate the court's order to present the child for paternity testing; & to dismiss the action filed by the real party in interest. The appellate court stayed the trial court's order for paternity testing & directed real party in interest to respond to agency's requests for mandamus & for temporary orders.

Holding: Writ of mandamus conditionally granted. Finding that the Bexar County district court has continuing, exclusive jurisdiction, the appellate court conditionally granted Relator's request, pending the trial court's compliance with its ruling. The district court of Bexar County was vested with continuing, exclusive jurisdiction when the affidavit of relinquishment & affidavit of status were filed. That court continued to assert its jurisdiction with issuance of the order of termination. *See* TFC § 155.001. Real party in interest directed appellate court to discrepancies in the child's date & time of birth, evidenced by the information contained in the birth certificate, by the agency's pleadings, & by the testimony of the agency director/relator. Real party in interest also claimed that the mother's voluntary relinquishment affidavit did not show it was executed more than forty-eight hours after the child's birth. *See*

TFC § 161.103. Real party in interest alleged the agency was guilty of "perjurious statements" & misconduct that estop that party from contesting any jurisdictional dispute. Based on the record, there is not sufficient evidence that the agency is guilty of such inequitable conduct as will estop it from relying on the first suit that was filed to abate a subsequent proceeding brought by an adversary. While it is true that less than forty-eight hours would have elapsed between the child's date & time of birth as evidenced on the birth certificate & the date & time noted on the mother's affidavit of voluntary relinquishment, the record is not sufficient to establish that such inconsistencies are the type of inequitable conduct as would estop the agency from proceeding in Bexar County. Any discrepancy between the birth certificate & the mother's affidavits, or any other evidence which might be adduced regarding the merits of the case, do not involve the forum or venue. From the scant record before us, it appears the agency instigated a suit to terminate & place the child for adoption at a time when the child resided in Bexar County. None of the issues involved in the instant controversy bear on the initial choice of forum; yet the issues in both the Bexar County suit & the suit filed in Gregg County involve the same issues & parties. It is clear that jurisdiction was established in the Bexar County District Court. Real party in interest has failed to demonstrate that the conduct of the mother or relative estops the agency from proceeding in Bexar County. The District Court in Gregg County was under a ministerial duty to dismiss real party in interest's action in favor of the court in Bexar County. The trial court erred by failing to dismiss this proceeding, as a court of continuing, exclusive jurisdiction had been previously established.

2. *In The Interest Of B.T., M.J.R.B., T.B., & M.T.,*
154 S.W.3d 200 (Tex App.--Fort Worth 2004, no pet.)

Involving: Failure to have adversary hearing & 262.201 & TEX. R. CIV. P. 680, jurisdiction & plenary jurisdiction, ineffective assistance of counsel, preservation of ineffective assistance claim in motion for new trial & Rule 324(b)(1), statement of points & 263.405(b), waiver & rendering of extension order, mandatory dismissal statute (263.401), motion for continuance.

Editorial Comment: This case holds that an ineffective assistance point may be raised for the first time on appeal & does not have to be raised in the trial court. It also holds that a parent who files a motion for continuance & requests the court to reschedule the trial until after the one year statutory deadline has agreed to an extension under the mandatory dismissal statute.

Factual & Procedural History: F & M assert ineffective assistance of counsel & challenge the sufficiency of the evidence to support termination. F also claims that the termination order is void. TDPRS filed its original petition for termination on June 28, 2002, & on that same date the trial court appointed TDPRS temporary managing conservator. The trial court scheduled a full adversarial hearing for July 11th but on July 10th reset the adversary hearing for July 30, 2002 & signed an order extending the temporary orders for the pendency of the suit or until further order of the court. There is no other order in the clerk's record concerning an adversarial hearing.

Holding: *Ineffective Assistance of Counsel & Preservation of the Claim* - On appeal, M & F claim for the first time that their court-appointed counsel provided ineffective assistance because counsel did not object to the trial starting after the one-year deadline expired or to the court's failure to conduct a fourteen-day adversarial hearing.

TDPRS contends that Appellants did not preserve their ineffective assistance of counsel claims because they did not include this issue in either their statements of points or motions for new trial. TDPRS also contends that F & M waived their ineffective assistance of counsel claims because they did not raise them in their motions for new trial. TDPRS argues that rule of civil procedure 324(b)(1) requires the claims to be raised in the motions for new trial because they are complaints on which evidence must be heard. We disagree. An ineffective assistance of counsel claim can be raised for the first time on appeal without being preserved in the trial court. *In re J.M.S., 43 S.W.3d 60, 64 (Tex. App.--Houston [1st Dist.] 2001, no pet.)*; *see In re M.S., 115 S.W.3d at 546-50* (considering ineffectiveness of counsel even though no motion for new trial filed). By not presenting the issue in a motion for new trial & developing a record of ineffective behavior, the proponent of the claim has a difficult burden to overcome because the challenged action might be considered sound trial strategy. But this does not preclude presentation of the issue on appeal.

Fourteenth Day Adversary Hearing & Ineffective Assistance – F also argues that his counsel was ineffective because the trial court failed to have an adversary hearing within fourteen days after TDPRS was appointed as TMC. *See* TFC 262.201(a). As a result, F contends that the trial court had no discretion but to return the children; therefore, he claims his counsel was ineffective because had his counsel but asked, the trial court would have been compelled to return the children. We disagree. The trial court does not lose jurisdiction if it fails to timely conduct the hearing. Instead, the remedy for the parents & TDPRS is to compel the trial court by mandamus to conduct the adversary hearing promptly. Without addressing whether counsel acted competently, we hold that

Father failed to show he was prejudiced by counsel's failure to seek return of the children on the basis that there was no adversary hearing within the fourteen-day window.

Ineffective Assistance & Failure to Object to One Year Deadline Issue: Both F & M contend that their appointed counsel were ineffective because they did not object to the trial starting more than one year after the trial court appointed TDPRS as temporary managing conservator. They assert that had their counsel objected, the trial court would have had no discretion but to dismiss the case & return their children to them. TFC 263.401 provides that, unless the trial court has rendered a final order on the first Monday after the first anniversary of the date the court appointed TDPRS as TMC in a suit affecting the parent-child relationship, the court "shall dismiss" a suit filed by TDPRS that seeks the termination of the parent-child relationship. The trial court may extend this deadline for up to 180 days if, by the Monday after the first anniversary date, the court finds that continuing TDPRS's conservatorship of the child is in the child's best interest & renders an order that complies with section 263.401(b). If the trial court grants an extension, but does not render a final order within the 180-day period, it must dismiss the suit. A party may, however, waive the right to object to the trial court's failure to comply with these statutory deadlines. Under section 263.402(b), a party "who fails to make a timely motion to dismiss the suit or to make a motion requesting the court to render a final order before the deadline for dismissal . . . waives the right to object to the court's failure to dismiss the suit." To be timely, a motion to dismiss must be made before TDPRS has introduced all of its evidence, other than rebuttal evidence, at the trial on the merits. It is undisputed that the trial started more than one year after TDPRS was awarded conservatorship of the children & that neither F nor M's attorney objected to the trial starting after the one-year deadline. F & M both contend that their attorneys' waiver by failing to timely object to trial starting after the one-year deadline was ineffective assistance of counsel. However, they fail to meet their burden to show that their appointed attorneys' assistance fell below an objective standard of reasonableness.

Mother points out that no extension order is included in the clerk's record. TDPRS responds by referring us to the order extending the temporary orders during pendency of the suit. Furthermore, the reporter's record contains two references to an extension, both made without objection by the other party. At one point TDPRS's attorney asked a witness: "Are you aware that TDPRS has extended the dismissal date and we're actually in the extension period?" At another, F's attorney asked a different witness: "You know this case had an extension to July?" & "Did you know that an extension was granted in May?" Section 263.401(b) simply requires the court to "render" an extension order. Thus, an extension of time for the dismissal deadline announced in open court may properly be rendered according to the statute. F & M have failed to provide an adequate record on appeal to show that the dismissal deadline was not orally rendered. An allegation of ineffective assistance of counsel must be firmly founded in the record, & the record must affirmatively demonstrate the alleged ineffectiveness. Furthermore, F filed both a motion for continuance & a motion for extension. In both motions, F asserted that he needed more time to complete his service plan. There is no order on either motion in the clerk's record. Nevertheless, a party who requests the trial court to reset the trial date beyond the original one-year deadline set out in 263.401(a) has agreed to an extension under section 263.401(b). Because F sought an extension only weeks before the one-year deadline expired, F's attorney could have reasonably concluded that F agreed to an extension beyond the one-year deadline. F & M failed to show that their appointed counsel acted unreasonably by failing to object to trial starting after the one-year deadline. Accordingly, we need not address their arguments that counsel's allegedly deficient performance prejudiced their defense.

Jurisdiction & Failure to Hold Adversary Hearing - In his second issue on appeal, F raises a confusing issue seeming to argue that the final judgment is void because the trial court failed to hold the full adversary hearing & enter a temporary order extending the TDPRS's status as TMC within fourteen days after the children were taken into possession as required by section 261.201(a). F concedes that this court has held that both 262.201 & 263.401 are procedural rather than jurisdictional. But F argues that the failure to comply with those statutes nevertheless has "jurisdictional implications." F analogizes the June 28, 2002 order appointing the TDPRS as TMC to a temporary restraining order, & the July 11, 2002 order extending the date for the adversary hearing to July 30, 2002 to an order extending the time for a hearing on a temporary injunction. *See* TEX. R. CIV. P. 680. He argues that the problem is that there was no full adversarial hearing conducted on the extended date of July 30, 2002. He argues that because the TDPRS did not proceed with an adversary hearing, both the June 28, 2002 order & the July 11, 2002 order expired & the trial court had no alternative but to order the children returned to the parents. *See* TFC §262.201 (a) (full adversary hearing required unless TDPRS returns children), §262.201(b) ("court shall order the return of the child to the parent"), §262.201(c) (unless court issues appropriate temporary order). We rejected the

jurisdictional argument invoking Rule 680 in *In re J.M.C.*, in which the parent likewise asserted that, when the original ex parte temporary possession order expired without a full adversary hearing, the trial court was required to dissolve the order & render a final judgment returning the child to the parent. We pointed out that expiration of a temporary restraining order under Rule 680 does not deprive the court of jurisdiction over the subject matter of a civil suit, & nothing in that rule or in section 262.201 deprives the court of jurisdiction over a termination case simply because a temporary possession order expired without a full adversary hearing. Conceding that expiration of a TRO or temporary injunction normally has no jurisdictional implications, F argues it is what the trial court must then do after the orders expire that deprives the court of jurisdiction. He points to the mandatory nature of the requirement that the trial court "shall order the return of the child to the parent," citing sections 262.201(b) & (c), arguing that such an order is a final judgment and, therefore, that jurisdiction is lost upon the expiration of the trial court's plenary power under Texas Rule of Civil Procedure 324(b)(1). F urges that the signing of a mandatory order under the statute is merely a ministerial duty, the right to which exists before the trial court signs the order. Notwithstanding the fact that the trial court did not sign an order returning the children to F, he argues that such an order must be deemed to have been rendered by operation of law. Thus, he says, the trial court's plenary power expired before the case proceeded to trial, & everything done after that time was void. In *In re E.D.L.*, we rejected a virtually identical argument that, because the court did not conduct an adversary hearing within fourteen days after the TDPRS took possession, & because the language of the statute is mandatory, the trial court lost jurisdiction & the case was therefore dismissed by operation of law. We noted that, despite the language in section 262.201 mandating a hearing, the statute contained no corresponding provision dictating dismissal for noncompliance. If the legislature had intended to require a dismissal as the result of a failure to hold an adversary hearing, it could have so provided.

3. *In the Interest of K.B.A., B.W.A., & D.J.A.*, 145 S.W.3d 685 (Tex. App.--Fort Worth Aug. 24, 2004, no pet.)

Involving: TFC 152.202, continuing exclusive jurisdiction.

Factual/Procedural History: F did not challenge the initial jurisdiction of the trial court in the prior custody proceeding in 2002, but challenged the exclusive continuing jurisdiction of the trial court to enter the termination order in this case. Appellate court held that because one litigant, M, still resides in Texas, the Texas trial court that made the original child custody determination is the only court that has jurisdiction.

F, his children, & the children's maternal grandparents, appellees, all live in Arizona. The children lived in Texas with M in the past, but have lived in Arizona with appellees since August 2002. In their respective pleadings, both parties concede that the same Denton County district court issued a prior custody order granting appellees custody of the children sometime in 2002. On October 27, 2003, appellees filed a petition in Denton County to terminate the parental rights of their daughter, the children's mother, & F, the children's father. F answered by filing a letter with the district clerk denying the allegations in the petition, objecting to the adoption of the children by appellees, & requesting that the court dismiss the case or set a hearing to review the case seven months from the date of filing. In closing the letter, F requested that if the court did not dismiss the case, that it transfer the case to the appropriate jurisdiction in Tucson, Pima County, Arizona. On December 18, 2003, the trial court heard the case. Neither F nor M appeared before the trial court. In a default judgment, the trial court ordered that the parental rights of F & M be terminated for failure to support the children for a one-year period preceding the termination filing. F timely filed a motion to vacate the judgment & motion for dismissal without a hearing on the grounds that he filed an answer, did not receive notice of the termination hearing, & filed a "Foreign Judgment and Modification of Child Custody" in Arizona on November 25, 2003.

Holding: The Texas trial court that made the original child custody determination is the only court that has jurisdiction. Because the custody of the children is the underlying issue in this case, jurisdiction is predicated on the Uniform Child Custody Jurisdiction & Enforcement Act, which Texas adopted effective September 1, 1999. Because F seeks *interstate* transfer, chapter 152 of the family code governs our review.

All parties concede the trial court had jurisdiction to make the initial custody determination sometime in 2002. A court of this state that has made a prior child custody determination has exclusive continuing jurisdiction over the determination until: (1) a court of this state determines that neither the child, nor the child & one parent, nor the child & a person acting as a parent, have a significant connection with this state & that substantial evidence is no longer available in this state concerning the child's care, protection, training, & personal relationships; or (2) a court of this state or a court of another state determines that the child, the

child's parents, & any person acting as a parent do not presently reside in this state. TFC § 152.202.

Whether a trial court has subject matter jurisdiction is a question of law reviewed under the de novo standard. As the parties seeking to invoke the trial court's jurisdiction, appellees had the burden to allege facts that affirmatively showed the trial court had subject matter jurisdiction over their case. In determining whether jurisdiction exists, we look not to the merits of appellees' claims, but to the allegations in the pleadings. We accept them as true, & construe them in favor of the pleader. Where the pleadings do not affirmatively demonstrate an absence of jurisdiction, a liberal construction of the pleadings in favor of jurisdiction is appropriate. It is uncontested that F, the children, & the maternal grandparents, who have custody of the children, all live in Arizona. According to the appellees' petition, they have had custody of the children for more than one year preceding the filing of the petition to terminate appellant's parental rights. The pleadings also allege that the children's M is a resident of Arlington, Texas. Construing the pleadings in favor of a finding of jurisdiction, we hold that because the pleadings allege that one parent still resides in the State of Texas & because the trial court had previously entered an initial child custody determination regarding the children, the trial court retained exclusive continuing jurisdiction. Because one litigant, M, still resides in Texas, the Texas trial court that made the original child custody determination is the only court that has jurisdiction.

B. Service

Salinas v. Texas Dep't of Protective & Regulatory Services, No. 03-04-00065-CV, 2004 Tex. App. LEXIS 7640 (Tex. App.--Austin, August 26, 2004, no pet.)

Involving: TRCP 106, TRCP 109a, TRCP 120, substituted service, waiver of any defect in service by answer or appearance.

Factual/Procedural History: F appeals, contending that TDPRS's affidavit filed in support of its motion for substituted service did not comply with rule 106(b) of the rules of civil procedure. F further contends that the substituted service purportedly done under rule 106(b) was in fact "rule 109a service in disguise."

In October 2002, TDPRS took two-year-old A.H. into emergency custody. A.H., her mother Hsing Han, & F were living at the Salvation Army Shelter at the time, & Han was thirty-three weeks pregnant with R.F.H. R.F.H. was born in December 2002, & TDPRS took custody of her almost immediately. TDPRS named F as R.F.H.'s alleged father, stating that his address was unknown. F is not A.H.'s father & was not married to Han. Han was married to Luis Requena when R.F.H. was born but said that F was the father. In its second & third amended petitions, TDPRS named Requena as R.F.H.'s presumed father, & F as her alleged father.

On July 21, 2003, after unsuccessful attempts at service, TDPRS filed a motion asking that F be served by substituted service. In a supporting affidavit, Katherine Kever, a representative of TDPRS, stated that she had tried to locate F, interviewing Han & investigating police records & Austin's utility records. Kever learned that F had utility services at an address on Circle S Road, but when service was attempted at that address, TDPRS was notified that F had moved. On June 9, however, F called TDPRS to say he was aware that a hearing was approaching on June 20. F said that he would not attend the hearing & wanted nothing to do with Han, R.F.H., or the proceeding. F said that his friends had signed for the notice & told him about the hearing. F also said he was living in Corpus Christi, but refused to provide an address or other "locating information." After the June 20 hearing, F again called TDPRS, saying that he had attended the hearing but had not been recognized & had not come forward. Kever found that notice of the hearing had been sent to the Circle S address & was signed for by an "R. Arrellano," & as of June 30, utilities at the address were still listed in F's name. Kever therefore believed F could be served by leaving citation at the Circle S address. The trial court authorized substituted service, & F was so served; the return of service shows citation was delivered to Alex Lopez on July 21. In its amended petitions, TDPRS stated that if F did not file a statement of or counterclaim for paternity, he would lose all parental rights to R.F.H.

A hearing was held on September 22 & 23. F appeared at the hearing in person & requested an attorney. Han relinquished her parental rights to R.F.H., & on October 3, the trial court signed an interlocutory decree of termination, finding that R.F.H. was born while Han was married to Requena & that Requena was R.F.H.'s presumed father & terminating Han's & Requena's parental rights to R.F.H. The trial court took no action with regards to F's parental rights, if any. Also on October 3, the trial court signed an order appointing counsel to represent F. A second order appointing the same attorney as counsel was signed by a different trial judge on October 16.

On November 10, TDPRS filed a motion to have F dismissed from the suit, stating that he had not filed any timely assertion of paternity. On November 18, F filed his original answer, stating that he was R.F.H.'s father & asserting a counterclaim of paternity. F also filed a response to TDPRS's motion to dismiss, stating

that he had been incarcerated since September 22 & did not live at the Circle S address when service was made & complaining that counsel was not appointed until October 16. On January 7, 2003, the trial court signed a final order, finding F had been properly served & had failed to timely file an acknowledgment or counterclaim of paternity & terminating his parental rights, if any.

Holding: We hold that F has waived any objection to TDPRS's affidavit or to the rule 106(b) service.

TRCP 106(b) provides that if an affidavit is filed stating that regular service of citation has been attempted unsuccessfully & stating the defendant's usual place of business or abode or other location where he can probably be found, service may be made by leaving a copy of the citation with anyone over sixteen years of age at the location specified in the affidavit. F appeared in court on September 22, 2003, & filed an answer to TDPRS's suit on November 18, 2003. In his answer, F did not complain of defective or improper service. The filing of an answer or some other appearance generally waives any defect in the service of citation. *See* TRCP 120 (defendant may "enter an appearance in open court," which shall be noted by judge & shall "have the same force and effect as if the citation had been duly issued and served as provided by law"). Therefore, any defect in service was waived.

If citation by publication is authorized under rule 109, a trial court may allow an alternative means of service that it finds will be as likely as citation by publication to give the defendant actual notice of the suit. Even if error had been preserved, the affidavit was sufficient to warrant substituted service under rule 106(b). The rules of civil procedure provide several options for serving defendants for whom personal service has been unsuccessful, & rule 106(b) does not limit its provisions for service to a party's place of business or abode. It also allows substituted service to be made at any "other place where the defendant can *probably* be found."

Kever stated that personal service had failed because TDPRS was told that F had moved from the Circle S address. However, the utilities were still in his name & he received notice of the June 20 hearing, which was sent to the Circle S address. One of TDPRS's records relates that F said his friend signed for the notice. TDPRS opted to serve F under rule 106(b), believing that leaving service of process at the Circle S address, with which he apparently kept some kind of contact, would be more effective than service under rules 109 or 109a. F never asserted that he did not receive the substituted service. TDPRS sufficiently established that the Circle S address was appropriate for rule 106(b) service.

Further, F's attacks on the substituted service in the court below, if they can truly be characterized as such, do not make the same arguments as he makes on appeal. On appeal, he argues that the affidavit was insufficient & that the substituted service was actually "disguised" rule 109a service. F first raised the issue of the substituted service in his response to TDPRS's motion to dismiss him as a party, stating only that he did not answer the door when service was performed & did not live at the address at the time. F never attacked the affidavit & did not allege that he did not receive notice or that service was improper. He argued only that there was some uncertainty as to when he received actual notice.

C. Default Judgments

In the Interest of L.M.Q., H.D.Q., & A.D.Q., No. 04-04-085-CV, 2005 Tex. App. LEXIS 3134 (Tex. App.--San Antonio, April 27, 2005, no pet.)

Involving: Default, unsworn testimony & statements of counsel as "evidence", reverse & remand.

Factual/Procedural History: F sought review of a judgment granting a default against him & terminating his parental rights under 161.001(1)(A)-(C).

Holding: Default judgment reversed & remanded. The record showed that F was properly served & that the return of service was on file for at least ten days before the default was granted. However, the evidence was insufficient to support the termination because unsworn statements used in an attempt to prove up the default, were not legal evidence. Although an opponent of testimony can waive the requirement by failing to object that there should be an oath, however, this cannot apply where the party or his attorney who should have objected was not present & a default was taken. Under such circumstances, statements made by the attorney could not constitute evidence.

D. Duty Of Court Reporter To Make A Record

In the Interest of J.A.G., 04-04-00009-CV, 2004 Tex. App. LEXIS 7002 (Tex. App.--San Antonio, August 4, 2004, no pet.)

Involving: 105.003 & duty of court reporter to take a record, setting aside a default under the *Craddock* test. Reverse & remand.

Factual/Procedural History: Ant, an inmate acting *pro se*, appeals from a default judgment establishing his parent-child relationship with J.A.G. The Office of the Texas Attorney General filed a

petition to establish the parent-child relationship between Ant & J.A.G. Although properly served, Ant was incarcerated & relied on his attorney to answer & appear at the hearing on his behalf. His counsel failed to appear & did not file a timely answer. The trial court entered a default judgment adjudicating Ant the biological father of J.A.G., appointing him joint managing conservator, & ordering him to pay current & retroactive child support. Ant filed a general denial after the judgment was signed. During the trial court's plenary jurisdiction, Ant filed a motion for rehearing denying paternity & a motion for DNA testing, which were overruled. On appeal, Ant contends that the trial court erred in entering the default judgment because he is not the child's father, & he was incarcerated at the time of the hearing & relied on counsel to appear on his behalf. The Attorney General acknowledges that the judgment must be reversed & remanded because the trial court erred in failing to make a record of the proceedings & failing to grant Ant's motion for rehearing & request for DNA testing.

Holding: Reversed & remanded. The Supreme Court has held that the trial court has an affirmative duty to insure that the court reporter makes a record of proceedings involving parent-child relationships, unless waived by the parties with the court's consent, & failure to do so constitutes error on the face of the record requiring reversal. *Stubbs v. Stubbs*, 685 S.W.2d 643, 645-46 (Tex. 1985). Section 105.003 states that a record of proceedings in SAPCRs must be made unless waived by the parties with the consent of the court. Where a party is not present or represented by counsel at the hearing, however, the making of a record cannot be waived as to the absent party & a trial court commits error in consenting to the waiver of a record. Here, the judgment recites that "[a] record of the proceedings was waived by the parties with the consent of the court." Because Ant was not present at the hearing nor was he represented by counsel, he could not waive the making of a record & the trial court erred in consenting to the waiver of a record. Accordingly, the judgment must be reversed & remanded for a new trial based on the lack of a record.

In addition, we conclude the trial court abused its discretion in failing to grant Ant's motion for new trial & motion for DNA testing. Before a default judgment can be set aside & a new trial granted, the defendant must satisfy all the elements of the *Craddock* test. Under *Craddock*, a default judgment should be set aside & a new trial granted in any case in which the defendant demonstrates: (1) that his failure to answer was not intentional or the result of conscious indifference; (2) that he has a meritorious defense; & (3) that granting a new trial will not operate to cause delay or other injury to the plaintiff. Where the elements of the *Craddock* test are satisfied, it is an abuse of discretion to deny the defendant a new trial.

As the Attorney General concedes, the record shows that Ant's failure to appear at the hearing was not intentional or the result of conscious indifference; there is no conflicting evidence on this issue. Ant's motion for new trial asserts a meritorious defense that, if proved, would change the result of the proceedings. Finally, the Attorney General agrees that the parties will not be harmed by a delay for a new trial & DNA testing; rather, such a delay is preferable if it results in the necessary evidence to determine paternity of the child. Because all the elements of the *Craddock* test are met, the court abused its discretion in denying Ant a new trial. Further, in view of the unique nature of a paternity action & the fact that paternity is generally, & preferably, resolved by DNA testing, we conclude that the court also abused its discretion in failing to grant Ant's motion for DNA testing.

E. Discovery

In Re Fulgium, 150 S.W.3d 252 (Tex. App.--Texarkana 2004, no pet.)

Involving: Mandamus action, discovery, depositions, protective order, 261.201 (disclosure of information relating to child abuse investigation); 264.408 & 264.613. Also TEX. GOV'T CODE ANN. § 311.016 (Code Construction Act).

Factual/Procedural History: Trial court granted a protective order finding that the information sought was work product & that there was no showing of substantial need or undue hardship. The order denied depositions of a CASA case manager as guardian ad litem & for the custodian of records of Texarkana Children's Advocacy Center (CAC), & discovery of CASA's & CAC's records. Grandparents sought a writ of mandamus compelling respondent judge to set aside a protective order in the termination suit.

Holding: Petition for writ of mandamus denied. TFC provides that information relating to a child abuse investigation cannot be disclosed absent a determination that disclosure is essential to the administration of justice & would not endanger anyone. The exception has not been met. Moreover, although 261.201 does not enumerate the entities that are encompassed by the statute, TFC 264.408 & 264.613 applies to CASA & CAC. TFC 264.613 provides that 261.201 applies to CASA. The creation of CASA is authorized by 264.000 *et seq.* Section 264.613 provides that the "files, reports, records, communications, and working papers used or developed in providing services under this subchapter are confidential . . . and may only be disclosed for purposes consistent with this subchapter," &

specifically lists the entities to which disclosure may be made. Neither the parents nor the grandparents of the child, or their attorney(s), are on this list. Further, 264.613(c) provides that "information related to the investigation of a report of abuse or neglect of a child under Chapter 261 and services provided as a result of the investigation are confidential as provided by Section 261.201." Similar provisions protect CAC's records. Under subchapter E, which applies to Child Advocacy Centers, section 264.408 provides that the "files, reports, records, communications, and working papers used or developed in providing services under this chapter are confidential . . . and may only be disclosed for purposes consistent with this chapter," & specifically lists the entities to which disclosure may be made. As in section 264.613, neither the parents nor the grandparents of the child, or their attorney(s), are on the list in 264.408. Further, 264.408(b) provides that "information related to the investigation of a report of abuse or neglect of a child under Chapter 261 and services provided as a result of the investigation is confidential as provided by Section 261.201."

Section 261.201(a) states that "the following information is confidential . . . and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency." Such information includes "except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation." *See* § 261.201(a)(2). Section 261.201 does include an exception that the trial court "may order" disclosure if after a hearing it is determined that the requested information is "essential to the administration of justice" & not likely to endanger the life or safety of the child, the person who reported the abuse, or any other person involved. The exception allowing the trial court to order the disclosure is discretionary. Under the Code Construction Act, the word "may" creates discretionary authority. *See* TEX. GOV'T CODE ANN. § 311.016. If a hearing determines that the disclosure of the information is essential to the administration of justice & there is no danger to the child or another person, a court may order the disclosure at its discretion. The trial court held a hearing concerning the matter. Because there is no showing that the information is essential to the administration of justice or that the disclosure poses no danger to the child or another person, we cannot say the trial court clearly abused its discretion in refusing to order the disclosure. Further, there is no showing that disclosure would be consistent with the Family Code or required by federal or state law.

F. TFC § 263.401 & § 263.403 - Mandatory Dismissal & Return & Monitor Statutes[9]

1. *In the Interest of D.C.G. & D.J.W.*, No. 07-04-0250-CV, 2004 Tex. App. LEXIS 9357 (Tex. App.--Amarillo October 21, 2004, no pet.)

Involving: Mandatory dismissal statute, endangerment & imprisonment, repentance of parent for endangering acts.

Factual/Procedural History: On appeal, M asserted two complaints: (1) the action had to be dismissed since a final order had not issued within the time specified by statute; & (2) insufficient evidence.

M, an admitted drug addict, gave birth to her first child in 1994 & the second in 1997. Neither child was in her custody at the time of the termination hearing. At the time of the termination trial, M was serving her first year of a five-year prison sentence for engaging in organized crime. Prior to beginning that sentence, M had been serving an eight-year term of probation. During that period she lived with her two children in less than a stable environment. According to her testimony, she was "kind of staying everywhere," which included "staying with [her] grandmother" & "with [her] friend on the street or in the apartments." M used drugs (crack cocaine) "off and on" while on probation, which was a violation of the terms of probation. M also repeatedly failed to report to her probation officer. She began to associate with a person having a criminal record. She did not maintain employment; indeed, the longest period in which she held a job was six & one-half months. Nor did M abide by her curfew, attend narcotics anonymous classes, or attend the "GED lab." All of these conditions of probation were required of her & could have been used to revoke her probation at any time. These circumstances are of import because M had no support system in place to care for her or her children had she been imprisoned. According to her own testimony, her parents & family were either taking or selling drugs & were of little help. And, it was due to this missing support system that she "gave up" & resumed her consumption of narcotics. While released on bond pending appeal after her probation was revoked & the trial court sentenced her to five years imprisonment, she again used drugs though knowing "that staying off of . . . [them] was going to be important . . . to have a chance to get [her] children back." During the seven-month period while released

[9] *See In The Interest of B.T., M.J.R.B., T.B., & M.T.* in the Trial Court Jurisdiction subsection under Section VII. *See also In the Interest of D.B. & E.A.B* under ineffective assistance.

on bond, M ceased all contact with her Child Protective Services caseworker & her children.

Holding: Affirmed.

(1) M first contended that the action had to be dismissed because the trial court neither executed a final order within the time period specified under 263.401 nor extended, within the applicable window of opportunity, that one-year period. A motion to dismiss due to the failure to comply with the deadline imposed by 263.401 or a request for a final order is timely if made before the Department introduces all its evidence at the trial on the merits, save for rebuttal evidence. Because M failed to timely move for dismissal or request a final order, we overrule issue one.

(2) Engaging in intentional criminal activity while knowing that it could result in imprisonment can be considered engaging in an endangering course of conduct. Here, the record permitted a factfinder to reasonably develop a firm belief or conviction that M engaged in a course of conduct having the effect of endangering her children. She is an addict & has failed to provide her children with a stable environment while on probation. She also engaged in activities, some criminal & some not, which she knew could result in the revocation of probation & this imprisonment. And, if the latter occurred, no one, other than the State & its child foster programs, would have been available to care for her daughters. That M professed repentance on the witness stand does not change our conclusion. By that time, the 28-year-old woman had already exposed her children to her endangering conduct. Repentance may have been indicia that the factfinder could have considered, but it did not obligate the factfinder to either believe the penitent or continue the parent-child relationship. The evidence underlying termination on the basis TFC 161.001(1)(E) was both legally & factually sufficient.

2. *Phillips, v. Texas Department of Protective & Regulatory Services*, 149 S.W.3d 814 (Tex. App.--Eastland 2004, no pet.)

Involving: Mandatory dismissal deadline & what is an appropriate order for extending the deadline, oral rendition.

Factual/Procedural History: F brought forth error complaining that the trial court did not have jurisdiction of the case because it did not enter an appropriate order under 263.401.

Holding: Section 263.401(a) provides for the dismissal of suits such as this. If the trial court has neither entered a final order nor granted an extension by the first Monday after the first anniversary of the date it entered temporary orders appointing TDPRS as temporary managing conservator ("TMC"), then it shall dismiss a SAPCR filed by the Department that requests termination of the parent-child relationship or that requests that the Department be named conservator of the child. Section 263.401(b) contains provisions that allow the trial court to extend the dismissal date & to retain the suit on the docket for an additional period of 180 days if it finds that continuing the appointment of the Department would be in the child's best interest. The order of extension must contain a new date for dismissal that is not later than 180 days of the date called for in Section 263.401(a). The order must also provide for further temporary orders as necessary for the protection of the child & as necessary to avoid further delay. Further, the court must set forth in the order a date for a final hearing; the date must be before the required date for dismissal.

Appellants claim that the trial court did not enter an order that complied with 263.401. On December 22, 2000, the court entered temporary orders in which it appointed the Department as TMC. On November 30, 2001, a permanency hearing was conducted. The court announced that it was extending the deadline "to the next six month period from today's date." The court further announced: "The extension will be granted as requested." The court then set the case for final disposition before a jury on April 8, 2002. The court entered a written order to that effect on March 1, 2002. Another permanency hearing was held on March 22, 2002. Fs attorney called for dismissal claiming that the trial court did not have jurisdiction because of its failure to enter a signed order in accordance with 263.401. A.P.'s attorney ad litem also expressed concern over the claimed lack of compliance. The motion to dismiss was denied, & the case later proceeded to trial before a jury in May of 2002.

The first Monday after the expiration of one year from the date of the temporary orders in this case was December 24, 2001, the date on which the trial court would be required to dismiss the case unless it had entered a final order or an extension under 263.401(b). We hold that the trial court's oral pronouncement satisfied the requirements of 263.401(b). The trial court rendered its decision when it made the oral pronouncements at the November 30, 2001, permanency hearing. When a trial court, in open court, orally announces its decision, it has rendered judgment. The trial court must clearly indicate its intent to render judgment at the time the words are expressed. Here, in its oral rendition, the trial court stated that the extension was granted "to the next six month period from today's date." That date would have been May 30, 2002. In the order, the trial court also set the date for the final hearing, April 8, 2002, a date within the extension period. The case was actually tried before the May 30 dismissal date. The trial court complied with section 263.401.

3. *In the Interest of M.N.G.*, 147 S.W.3d 521 (Tex. App.--Fort Worth 2004, pet. denied)

Involving: 263.401 (mandatory dismissal statute), 263.402 (waiver statute), Original opinion withdrawn on rehearing, dissent in earlier opinion.

Factual/Procedural History: M had four children prior to giving birth to M.N.G. in 2001. M's rights to her oldest child, H.W., were terminated in April 1990. Years later, DFPS filed an original petition to terminate M's parental rights to her three remaining children, D.H., M.H., & L.H. (#323-67629J-00). On May 24, 2001, while the termination proceeding was pending, M gave birth to M.N.G. DFPS immediately received a referral regarding M.N.G., alleging that M had tested positive for barbiturates. DFPS later determined that the allegation was false. On May 31, 2001, DFPS amended its original petition in the pending case to include M.N.G. because it was concerned about M's ability to maintain stable housing & employment. The court signed an order appointing DFPS TMC of M.N.G. on the same day. In June of 2001, M.N.G. left the hospital & went directly into foster care. On July 9, 2001, M's rights to D.H., M.H., & L.H. were terminated. On M's motion, the trial court severed the cause involving M.N.G. on July 11, 2001 & assigned it a separate case number (#323-69693J-01).

DFPS acted as M.N.G.'s TMC while M.N.G remained in foster care. Nothing else happened in the severed suit regarding M.N.G. until March 21, 2002 when DFPS filed a third amended petition. The third amended petition alleged new facts & requested that M's parental rights to M.N.G. be terminated because the rights to her other children had recently been terminated. On April 2, 2002, M filed a petition for writ of habeas corpus in the trial court seeking to regain M.N.G. on the grounds that the previous lawsuit (#323-67629J-00) had been dismissed & no subsequent action had been filed. Basically, M had claimed that the trial court lost jurisdiction because no final order had been entered since the child's removal approximately eleven months prior. M claimed that the trial court lost jurisdiction on July 10, 2002. The trial court denied her habeas relief. On April 5, 2002, DFPS filed another new petition with a new cause number (#323-71676J-02) & the trial court again appointed DFPS TMC of M.N.G. M moved to dismiss cause number 323-71676J-02 on January 27, 2003 alleging that it had been more than a year since DFPS was named TMC of M.N.G. The trial court conducted a hearing & denied M's motion. The case in cause 323-71676J-02 went to trial on March 17, 2003, within the statutory one-year limit in the new cause number 323-71676J-02 & M's parental rights were terminated. This appeal involves only #323-71676J-02. Neither of the prior two cases, #323-67629J-00 or #323-69693J-01, were appealed by M.

Holding: M complains that the trial court erred by denying her motion to dismiss. The motion alleges as grounds for dismissal the failure of DFPS to comply with the procedural requirements of TFC 263.401(a). This section requires a trial court to dismiss a SAPCR if it fails to render a final order or grant an extension on the first Monday following the anniversary date that the court appointed DFPS as TMC.

DFPS was appointed TMC of M.N.G. under the case appealed (#323-71676J-02) on April 5, 2002. M contends that we should calculate the dismissal date from the date DFPS was first appointed TMC on May 31, 2001 in cause # 323-67629J-00. If we use this date, the first dismissal date relating to 323-67629J-00 is June 3, 2002. M argues that the statutory timetable expired then. However, before the June 3, 2002 deadline DFPS had abandoned its initial suit involving M.N.G. The trial court severed the initial termination suit out of cause # 323-67629J-00 into cause #323-69693J-01 which DFPS abandoned with the filing of its April 5, 2002 petition. On April 5, 2002, DFPS had filed a new lawsuit (323-71676J-02) in which it again sought to terminate M's parental rights to M.N.G.

A dismissal under 263.401(a) is without prejudice so that DFPS may refile the case asserting the same grounds for termination as originally alleged. However, DFPS cannot keep a child in foster care absent new facts supporting removal from the home. DFPS may reinitiate proceedings for termination following a dismissal, despite the statutory time limitation, if new facts are alleged justifying relief on the same grounds averred in the first action. Here, DFPS did just that. We believe these same principles apply when DFPS abandons, rather than dismisses, the initial case.

The petition in cause 323-71676J-02 that DFPS filed on April 5, 2002, alleged some new facts & grounds for termination & was supported by a new affidavit. Under the heading "Required Information" DFPS included two new paragraphs. The first requested that the court waive the requirements of a service plan & reasonable efforts to return M.N.G. to M & instead accelerate the trial. The second requested that the court find that M.N.G. had been subjected to aggravated circumstances because M's parental rights had been involuntarily terminated with regard to another child due to M's violation of 161.001(1)(D) & (E) or a substantially equivalent provision of another state's law. *See* TFC 161.001(1)(M) (termination based on finding that parent's conduct was in violation of (D) or (E) or substantially equivalent provisions of law of another state).

In the new affidavit, the DFPS caseworker states that M.N.G. is now in foster care instead of the hospital

& that DFPS has participated in other litigation concerning M.N.G.'s custody. Her new affidavit reflects additional details regarding prior investigations of M for abuse of other children. For example, she notes that M's rights to all four of her other children have been terminated. The rights to M's first child, H.W., were terminated in 1990 under the statutory precursor to 161.001(1)(D) & (E). Later, DFPS filed a petition to terminate M's rights to D.H., M.H., & L.H. under the same sections. After M executed an affidavit of relinquishment as to these three children, the court terminated M's rights. Further, the caseworker states that M is employed, but does not work much & only receives a small check. She pointed out that M's living situation was not stable. Finally, the caseworker describes the procedural history of the case, possible placement options, M.N.G.'s custodial situation, medical & developmental treatment, visitation, & counseling. Very little of this information was included in her affidavits supporting the termination petitions in the prior cause numbers.

In light of the above information, we conclude that DFPS pled additional facts sufficient to support refiling the termination proceeding against M. Because DFPS filed a new cause, alleging new facts, before the statutory period relating to the May 31, 2001 order expired, the court did not err by entering new orders appointing DFPS TMC of M.N.G. Consequently, DFPS was not required to return M.N.G. to M because, for the purposes of appeal in cause # 323-71676J-02, the final order in this cause was entered by the Monday following the one-year deadline. For the purposes of cause #323-71676J-02, we conclude that the statutory one year limitation began to run on April 5, 2002, the date that the court entered the order appointing DFPS TMC of M.N.G. in that cause. Therefore, we hold that the trial court did not err by denying M's motion to dismiss in cause #323-71676J-02.

4. ***In the Interest of D.B. & E.A.B.***, 153 S.W.3d 575 (Tex. App.--Amarillo 2004, no pet.)

Involving: 263.401 (mandatory dismissal statute), 263.402 (wavier provision); 263.401(d) (definition of final orders). Effective date of 263.402. Ineffective assistance of counsel.

Factual/Procedural History: On September 30, 1998, TDPRS filed a SAPCR seeking conservatorship of M's son E.A.B. The number assigned was 59,321-D. On March 23, 1999, the trial court appointed DPRS PMC of E.A.B. M did not argue that the order was not a "final order." On April 12, 1999, DPRS filed a petition seeking conservatorship of M's daughter D.B. That cause was assigned #60,262-D. In #60,262-D the trial court appointed DPRS TMC of D.B. on April 27, 1999. On January 20, 2000, the trial court issued a Permanency Hearing Order in #60,262-D which, among other things, extended the dismissal date of the suit until October 13, 2000. On January 28, 2000, DPRS filed an Original Petition for Termination in cause #59,321-D & an Amended Petition for Termination in #60,262-D. On July 24, 2000, Todd & Kathleen White filed petitions in intervention in both the suits. By their interventions, the Whites sought termination of the parent-child relationship between M & the children, & appointment as managing conservators of the children.

At a January 22, 2001 hearing, the trial court consolidated the cases under #59,321-D, appointed DPRS MC of the children & appointed M as PC. The written order was signed on April 27, 2001. On October 25, 2001, the Whites filed a separate suit seeking to terminate the parent-child relationship between M & both of the children. The suit was assigned #64,685-D. On August 8, 2002, the trial court consolidated causes 64,685-D & 64,646-D, a suit filed seeking grandparent access to the children, into #59,321-D. In January & March 2003, White amended her petition seeking termination which was by then pending as part of #59,321-D. Todd White nonsuited his action. Although she filed an answer to the original pleading in #64,685-D, M did not challenge the suit, nor did she file a response to White's amended petitions in the consolidated #59,321-D. On March 24, 2003, #59,321-D was called for trial & M announced ready. The trial court terminated & appointed White & DPRS as PMCs of E.A.B. & D.B. The judgment was signed on April 24, 2003. It is from this judgment that M appeals.

On appeal, M argued that 263.401(a) deprived the court of subject matter jurisdiction to terminate because the suits should have been dismissed prior to the termination hearing. M also argued that the waiver provision contained in 263.402(b) did not apply because it became effective after the mandatory dismissal date under 263.401(a), & if 263.402(b)'s waiver provision is applicable, then trial counsel's failure to timely file a motion to dismiss constituted ineffective assistance of counsel. She does not, however, challenge the trial court's jurisdiction to terminate her parental rights pursuant to either White's intervention petition in #59,321-D, or White's original suit in #64,685-D, which was consolidated into #59,321-D.

Holding: When a separate & independent ground that supports a judgment is not challenged on appeal, the appellate court must affirm the lower court's judgment. Both White's intervention & her separate, original suit, which was not challenged, vested the trial court with jurisdiction to terminate M's parental rights. Because M does not challenge the trial court's jurisdiction over claims to terminate her parental rights

via White's intervention & suit, & because White's claims vested the trial court with jurisdiction to terminate M's parental rights, we need not & do not address M's first & second issues which challenge the trial court's failure to dismiss DPRS's claims for termination.

M also claims ineffective assistance of counsel based on the 263.402(b) waiver provision & her counsel's failure to seek dismissal of the DPRS' suit pursuant to 263.401(a). To prevail on her claim of ineffective assistance of counsel, however, M has the burden to affirmatively prove both deficient performance by counsel & prejudice from the allegedly deficient performance. To prove prejudice, she must prove a reasonable probability that but for counsel's alleged error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Even had counsel moved for & obtained dismissal of the DPRS' claims for termination of M's rights pursuant to 263.401(a), M does not assert or demonstrate that the dismissal would have altered the judgment terminating her parental rights based on White's claims. Accordingly, she has failed to demonstrate prejudice from counsel's alleged ineffective assistance. Her issue is overruled. Because we do not address the merits of M's challenges to the trial court's jurisdiction, we express no opinion on whether the trial court's ruling would have been correct had the court sustained such a jurisdictional challenge, had one been presented.

5. ***In The Interest of J.W.M.,*** 153 S.W.3d 541 (Tex. App.--Amarillo 2004, pet. denied)

Involving: 263.401 (mandatory dismissal statute), 263.403 (monitored return statute), 263.402 (wavier, no changing of dismissal rules by agreement), 102.004(b) (intervention in pending TDPRS suit), 161.001(1)(E), 161.001(2), improvements by parent in months before trial.

Factual/Procedural History: M has history of drug problems but she emphasized evidence that there were improvements in her life during the months just before trial. TDPRS filed an Original Petition on May 14, 2002. The Court appointed TDPRS TMC on May 18, 2001 & set an original dismissal date of May 20, 2002 pursuant to 263.401. On May 17, 2002, F filed a motion requesting the court to retain the suit but to set a new dismissal date. The Court granted the motion & set a new dismissal date of November 13, 2002, pursuant to 263.401(b). A final hearing was set for November 1, 2002. In October 2002, the Court ordered all parties to mediation. M did not attend. The parties who were present reached an agreement whereby TDPRS would return the children to their father under supervision. They also agreed that TDPRS would be allowed to file a supplemental petition, adding the children's foster parents as parties to the suit. At a hearing on November 1, 2002, the Court found that it was in the children's best interest to be placed in the father's home & ordered them returned under a monitored return. Although notified, M was not present at the hearing. The children were returned to the care of their father on November 5, 2002. Pursuant to 263.403(b), the dismissal date was reset for April 30, 2003, 180 days from the date the temporary order was rendered. The monitored return ended on December 17, 2002 & the children were ordered returned to TDPRS' care. The Court reset the final date for dismissal to June 15, 2003 in accordance with 263.403(c). On June 9th & 13th, the Court held a termination hearing. On June 13th, the Court rendered judgment that termination should be granted & on June 16th, the Court signed a written judgment to that effect. On appeal, M urges error in the trial court's rendering of a termination order beyond the time frame allowed by 263.401.

Holding: Affirmed. *Dismissal Deadlines:* Absent a one-time extension of up to 180 days under the section, the mandatory dismissal statute dictates dismissal of the suit one year following the date the court rendered the order naming TDPRS TMC. The dismissal deadlines in the statute cannot be extended by the agreement of the parties. There is an exception to 263.401 under 263.402 where TDPRS returns the child to the parent but under TDPRS' supervision. This is referred to as a "monitored return" of the child. The Court sets a new dismissal date that is no more than 180 days from the date of the order returning the child to the parent. If TDPRS removes the child from the parent before the new dismissal date, the dismissal date is reset to 180 days from the date of the removal. M relies on *In re T.M.* for the proposition that an agreement to extend the 263.401 dismissal date is unenforceable. The Court rejected M's contention that the trial court extended the deadline for a final hearing in order to comply with the terms of the mediation agreement. The Court held that the trial court followed the agreement to the extent it returned the children to their father's possession but the terms of the agreement were not binding on the court. Moreover, the deadline for the final order was not extended by agreement but by the provisions of 263.403. M urged that allowing additional extensions under 263.403, when the 18-month maximum case duration under 263.401 has expired, defeats the legislative intent that child custody issues be resolved speedily. However, the language of 263.403 is clear & unambiguous & the Legislature could have limited 263.403 if that were its intent.

M's also complained of error in allowing the foster parent's joinder, & their subsequent appointment as possessory conservators under a mediation agreement. The appellate court found that the complaint was waived because M did not challenge the joinder at the time of trial. Moreover, the foster parents expressed a desire to adopt the children & with the exception of the five weeks where the children were with their father, they were the sole caregivers from December of 2001 to June of 2003. TFC 102.004(b) allows the court to allow intervention of a person who has had substantial past contact with the child in a suit filed by TDPRS.

Sufficiency of the evidence under 161.001(1)(E) (endangerment) & 161.001(2) (best interest): The twins were born in May 2000 & M has had little involvement with their care after April 2001; therefore the evidence with regard to M's conduct focuses on the first year of care. M testified to a history of drug problems & she began to use drugs at the age of sixteen. She uses marijuana & cocaine, & she started using methamphetamines several years before the twins' birth. She testified that she did not do drugs during pregnancy but she resumed use of drugs three months after the children were born. She testified that the children were in danger when they were in her care & she was under the influence. F testified that M's drug use led him to contact TDPRS when the twins were approximately eight months of age. During periods when she did not leave the children with their F, she left them in the care of drug users. A caseworker testified that M admitted to leaving her children with a friend for as long as a month. On another occasion, she left the children with a friend who was arrested while caring for the children. The friend's fifteen-year-old daughter cared for the children until M returned. M also left the children home with F when he was unconscious from drinking. There was evidence to support termination under 161.001(1)(E).

Best Interest: Citing *In Re C.H.*, the Court opined that "[t]he evidence offered to prove the grounds for termination is also relevant in determining if termination is in the children's best interest". Court noted that M's pattern of absence continued after the twins were in TDPRS' care. The record reflects little contact for a period of eighteen months beginning about the time of their first birthday. M also left a halfway house & did not notify TDPRS of her whereabouts for approximately nine months. She then contacted TDPRS but after a short time disappeared again for six months. She did not provide financial support for her children. During M's absence, the children bonded with the foster parents, they are thriving under their care, & the foster parents want to adopt the children. M argued that the court should not base a finding of best interest simply on the conclusion that the foster parents would be a better placement. "While the prospect of adoption into a stable home cannot alone be said to be a determinative factor, it clearly is among the factors the court properly could consider in this case" & although M "does not directly make the argument,. . .her emphasis on the evidence of improvements in her life during the months just before trial suggest greater weight should be given that evidence, mandating the conclusion that the evidence in favor of best interest is factually insufficient. Such an analysis is not appropriate in this case. M's long absence from the twins' lives at a tender age and their bonds with prospective adoptive parents provide support for the trial court's finding. Further, although there was evidence that M's own prospects for stability had improved before trial, it cannot be said that her rehabilitation was free from doubt. Finally, although the evidence of M's resumption of drug use was controverted, the trial court was not required to disregard it."

G. TFC § 107.013 - Appointment of Counsel

1. *In Re C.D.S.*, NO. 2-04-189-CV, 2005 Tex. App. LEXIS 6425 (Tex. App.--Fort Worth, August 11, 2005, no pet.)

Involving: Failure to appoint attorney ad litem for parent pursuant to TFC 107.013 and statutory interpretation of "responds in opposition to termination", definition of "indigency", reverse and remand.

Holding: Reversed and remanded for new trial. In the sole point of error, M argued that the trial court erred in failing to appoint an attorney ad litem to represent her. TFC 107.013 provides that in a termination suit filed by a governmental entity, the court shall appoint an attorney ad litem to represent the interests of an indigent parent who responds in opposition to the termination". The Texas Family Code does not define "indigency". "[W]e hold that the term `indigent' in section 107.031(a)(1). . ..means a person who does not have the resources, nor is able to obtain the resources, to hire and retain an attorney for representation in the termination case. In making this determination, the court can consider the purported indigent's income, source of income, assets, property owed, outstanding obligations, necessary expenses, number and ages of dependents, and spousal income available to the defendant. These considerations are consistent with the indigency determination made under the Fair Defense Act, contained in article 26.04(m) of the Texas Code of Criminal Procedure". M was receiving $375 in food stamps and $167 from temporary assistance for needy families. She also indicated that because the child was in CPS custody, this amount will be lowered. "Receipt of public

assistance benefits is prima facie proof of indigency". M also indicated that she owned no property, had no money and had no relatives or friends from whom she could borrow. The trial court erred in failing to find M indigent. Moreover, although the State argues that M had not filed an answer as of the date of the adversary hearing, the trial court's finding that she had appeared in opposition was erroneous. M testified at the adversary hearing that she was opposed to the removal of her child so we find no merit to the State's position.

2. ***Manning v. Texas Department of Family & Protective Services***, No. 03-04-451-CV, 2005 Tex. App. LEXIS 3585 (Tex. App.--Austin, May 12, 2005, pet. filed)

Involving: Ineffective assistance, 107.013 & the timing of appointment of counsel, also involves the disqualification of an attorney ad litem & guardian ad litem, broad form submission (not briefed).

Factual/Procedural History: F complains that the ten month delay in appointing his trial attorney after his request for an attorney violated his statutory & constitutional rights, or constituted ineffective assistance of counsel. Trial counsel was appointed five months before trial. He also argued that the trial court erred by failing to remove both the attorney ad litem & guardian ad litem for statutory violations. He also argued that the trial court erred by denying his motion to disqualify the attorney ad litem in light of an alleged conflict of interest in his dual representation of J.M. & another sibling.

Holding: TFC 107.013 requires a court-appointed attorney for indigent parents opposing the termination of their parental rights. The legislature did not mandate a specific deadline for the appointment & the timing is left to the discretion of the trial court.

need for witnessing the inmate's demeanor and credibility; (5) whether the trial is before the jury or judge; (6) the possibility of delaying trial until the inmate is released; (7) the inmate's probability of success on the merits; (8) whether the inmate is represented by counsel or is pro se; and (9) whether the inmate can and will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone, or some other means. A trial court's findings of fact are binding on an appellate court unless they are so contrary to the great preponderance of the evidence as to show a clear abuse of discretion.

M's counsel stated in a memorandum to the trial court coordinator that she believed a conference call during the final hearing would be sufficient for M to defend her position. At the final hearing, M participated by telephone conference call, testified, and was cross-examined by opposing counsel and the amicus attorney. In its findings of fact, the trial court stated that it denied M's motion for a bench warrant after the conference with M's counsel. According to the trial court, its denial was based on the following factors: (1) the distance from Longview, Texas to Plane State Jail in Dayton, Texas; (2) the expense of transporting M to and from Dayton, Texas; (3) the unnecessary delay in resetting the case until M's release from jail; (4) the scheduling of the trial as a bench trial and not a jury trial; (5) M's participation in the entire bench trial by telephone; (6) M's representation by a competent attorney during the entire bench trial; and (7) M's right to testify during the bench trial and to listen to the testimony of the other witnesses and the argument of the attorneys. The trial court's findings of fact demonstrate that it did not arbitrarily refuse to issue the requested bench warrant. Moreover, we are bound by the trial court's findings unless they are so contrary to the great weight and preponderance of the evidence as to show a clear abuse of discretion. M does not point to any evidence in the record to show that the trial court's findings were contrary to the great weight and preponderance of the evidence.

2. *Boulden v. Boulden*, 133 S.W.3d 884 (Tex. App.--Dallas 2004, no pet.)

Involving: Bench warrant, dismissal for want of prosecution & TRCP 165a, affidavit of indigence & TRCP 145.

Factual/Procedural History: H was in prison. H filed a petition for divorce & an affidavit of inability to pay costs under TRCP 145. The trial court sent H a notice of a dismissal hearing directing him to appear in person before the court administrator before that date. The notice stated the court would dismiss the case for want of prosecution pursuant to TRCP 165a unless there was good cause to maintain the case on the docket. The notice directed that H should not telephone or write for a continuance. H filed a motion for a bench warrant to appear in person at the hearing or, in the alternative, for a hearing by conference call. He also filed a pauper's affidavit requesting appointment of an attorney ad litem & reiterating his financial condition. There is no record of any action taken on these filings. H also filed an amended petition for divorce specifically requesting the clerk to issue & serve citation on W at her address. The trial court signed an order of dismissal for want of prosecution.

Holding: Litigants cannot be denied access to the courts simply because they are inmates. By requiring a pro se inmate's personal appearance at a hearing while not acting on that inmate's motion for a bench warrant or to conduct the hearing by telephone conference or other means, the trial court effectively closed its doors to the inmate. H could not physically appear in court and, as indicated in his filings with the court, could not afford to retain an attorney to appear on his behalf. Although there is no absolute right for an inmate to appear in person in a civil case, where the trial court determines personal appearance is not warranted it should allow the inmate to proceed by affidavit, deposition, telephone, or other effective means. H proposed alternative means of appearing such as appointment of an attorney ad litem or conducting the dismissal hearing by conference call. It appears that H did everything he could to respond to the trial court's notice of dismissal. Thus, the trial court abused its discretion by dismissing the case for want of prosecution.

J. Jury Selection[10]

a. *In the Interest of P.A. & C.A.*, No. 2-03-277-CV, 2004 Tex. App. LEXIS 9384 (Tex. App.--Fort Worth October 21, 2004, pet. denied)

Involving: TRCP 233 (number of preemptory challenges), 107.001 (definitions), 107.003 (powers & duties of attorney ad litem for the child), TRCP 193.6 (failing to timely respond to discovery).

Factual/Procedural History: On appeal, M complained (1) that the trial court erred by not equalizing peremptory strikes between the attorney ad litem for the children & DFPS; (2) that the loss of the parties' peremptory strike lists & the jury identification cards prevented M from adequately presenting issue number one on appeal; (3) that the evidence was

[10] *See In The Interest of T.N. & M.N.* under Expert Witnesses.

factually insufficient to show grounds for termination under TFC 161.001(1)(D) & (E); (4) that the evidence was factually insufficient to show that termination was in the best interest of the children under TFC 161.001(2); & (5) that the trial court erred by allowing DFPS to call M as a witness when it had not designated M as a witness in its discovery responses.

When C.A. was three years' old, C.A. made an outcry to M of sexual abuse against "David." C.A. claimed that David had licked her vagina. M & her boyfriend David Leach lived together at the time of the allegations. C.A. lived with her biological father when she made the allegation. Although DFPS focused on David Leach as the perpetrator of C.A.'s sexual abuse, M contends that C.A. also knew David Hammer (C.A.'s paternal grandmother's boyfriend) & that he could have been the abuser. David Leach was also a multiple felon whose parole requirements prohibited him from being around children without supervision. M admitted that she was a "heavy" alcohol abuser & that she used methamphetamines & marijuana around P.A. & C.A. & while she was pregnant with her last child. Additionally, even after C.A. identified Leach as her abuser, M refused to move away from Leach as required by the DFPS service plan. M married Leach on May 9, 2003, approximately a month before this case went to trial. The trial court terminated M's parental rights on endangerment by conduct & environment, & best interest grounds.

Holding: Affirmed.

(1) A review of the ad litem & DFPS's statements to the trial court that they were not aligned at the time they exercised their strikes, pleadings, pretrial proceedings, & voir dire convinces us that the trial court did not err in finding that the ad litem & DFPS were not aligned at the time the strikes were made. Thus, the trial court did not err by denying appellant's motion to equalize the peremptory challenges. Under the family code, an attorney ad litem shall "participate in the conduct of the litigation to the same extent as an attorney for a party." TFC 107.003(1)(D). "No harm or violation of any Statute has been shown in allowing the attorney ad litem to make peremptory strikes, question the witnesses and argue to the jury." (citation omitted). Therefore, the trial court correctly allotted the ad litem her own peremptory strikes. However, upon M's motion to equalize, the trial court, having allowed the ad litem strikes, was obligated to determine whether the ad litem was aligned with either side. In multiple party litigation, upon the motion of a party made prior to the exercise of any peremptory challenges, the court has the duty to equalize the number of peremptory strikes among the sides. In allocating peremptory challenges when multiple litigants are involved on one side of a lawsuit, the trial court must determine whether any of those litigants on the same side are antagonistic with respect to an issue of fact that the jury will decide. TRCP 233. The existence of antagonism is a question of law that is determined after voir dire & prior to the exercise of the parties' strikes & is based upon information gleaned from pleadings, pretrial discovery, information & representations made during voir dire, & any other information brought to the trial court's attention. If no antagonism exists, each side must receive the same number of strikes. An attorney ad litem is appointed to represent the interests of the children who are the subject of a termination proceeding, not the interests of DFPS or the parents. TFC 107.001(2). However, the interests of the children may be aligned with the parents or DFPS's interests. Therefore, we must determine whether the trial court erred in finding that the ad litem & DFPS were not aligned on the same "side." "The term 'side' . . . is not synonymous with 'party,' 'litigant,' or 'person.' Rather, 'side' means one or more litigants who have common interests on the matters with which the jury is concerned." TRCP 233. Accordingly, we review all the information brought to the trial court's attention prior to the exercise of the parties' strikes, including, but not limited to, pleadings, pretrial discovery, & other information & representations made during pretrial hearings & voir dire. During the pre-trial hearing, M made an oral motion to equalize peremptory challenges. In response to the trial court's questions regarding possible alignment between DFPS & the ad litem, the ad litem stated that "obviously, I'm concerned with the best interest of the children . . . As far as being aligned with [DFPS] at this point in time, you know . . . I haven't heard all the evidence in the case, so I don't know all the allegations they have . . . I really can't say at this time that I'm aligned with the State." DFPS stated, "I don't believe that we're aligned at all. I've got . . . all these people wanting different things, and, to me, that doesn't stack up to alignment." DFPS continues saying, "[s]ometimes I have an ad litem standing next to me urging me for the termination, Do it, do it. You know, I've got that sort of situation. But I don't really have that situation in this [case]." During voir dire, the ad litem's first questions to the venire focused on finding jurors who would be capable of terminating parental rights if the State proved its case by clear & convincing evidence. Next, the ad litem asked the potential jurors if they would have difficulty believing a young child's version of events. The ad litem also asked the potential jurors about their preconceptions regarding children's veracity & capability for lying & whether the jurors thought a child might tell the truth about important or serious things that happen to them. She inquired whether the potential jurors would give credence to a child psychologist's opinion & whether a sexually

abused child might exhibit behavioral or emotional problems. The ad litem asked the jurors what would be an appropriate reaction from a mother who was told by her child that she was sexually abused & whether the mother would be obligated to further investigate the allegation. The ad litem asked the potential jurors whether they agreed that children might have shame or be uncomfortable talking about sexual abuse & how it might affect a child if he or she were not believed. The ad litem concluded voir dire by asking whether any of the potential jurors believed that sexual abuse "doesn't really happen." After voir dire, M reurged her motion for equalization & argued that the ad litem & DFPS were aligned on the termination grounds, but not necessarily best interest. M contended that it was evident from the ad litem's voir dire questions that she thought there were grounds for termination. DFPS responded, "I just didn't hear anything in [the ad litem's] voir dire that would suggest we are aligned. I mean, she wants what's in the best interest of the children." M argues in her brief that during closing arguments, "[t]rue to her voir dire, the guardian ad litem for the children also advocated terminating [M's] parental rights." M concludes that this is proof that the ad litem was aligned with DFPS at the time of voir dire. We disagree. The determination of alignment of parties is to be made on the basis of the pleadings & from information disclosed during pretrial procedures & other information that has been specifically called to the attention of the court. "Although hindsight is often better than foresight, the action of a trial court in apportioning strikes must of necessity be evaluated in terms of information available at the time the challenges are allocated not on the basis of changes in the alignment of parties which may possibly occur thereafter during the course of the trial."

(2) Because we hold in issue one that the trial court did not err in finding that the parties were not aligned at the time they exercised their strikes & that the trial court did not err by denying appellant's motion to equalize the peremptory challenges, appellant's second issue regarding harm is moot.

(3) Because M was a named party, DFPS was not required to designate her as a witness in its discovery responses before calling her to testify. TRCP 193.6. In the petition to terminate M's parental rights, M is listed under the heading "Parties to be Served." A named party is an exception to the requirements of TRCP 193.6.

b. ***In the Interest of M.N.G.***, 147 S.W.3d 521 (Tex. App.--Fort Worth 2004, pet. denied)

Involving: Trial court's failure to apportion strikes, TRCP 233, reversible or harmful error, past conduct as an indicator of future conduct.

Factual/Procedural History: M complains that the trial court erred by not equalizing the peremptory strikes between M on one side, & DFPS & the attorney ad litem on the other, & by denying her motion for mistrial after she showed that the other parties were aligned & had coordinated their strikes. At voir dire, DFPS used all of its peremptory strikes. The attorney ad litem used his strikes to strike another venire member. M's counsel objected. FPS responded that the ad litem should be allowed his six strikes because he represented a party & no one had moved to align the strikes. Counsel responded that no one motioned to expand the strikes. The court overruled the objection saying the ad litem had an interest he represented. The ad litem went on to exercise his six strikes to remove different venire members. Jury was empanelled & sworn. The next day M requested an evidentiary hearing on the peremptory strikes that DFPS & the ad litem had exercised. The ad litem admitted that his position had been aligned with the State's position for two years. He also admitted telling M's counsel the day before that he would leave the jury selection to DFPS & M. The ad litem also admitted that he had coordinated the use of his strikes with DFPS in order to avoid duplicating their strikes. He conceded that M might have been slightly prejudiced by the fact that he & DFPS together had twelve peremptory strikes compared to M's six. However, he also said that the jury had been a fair & open-minded one. M's trial counsel also testified at the hearing. He stated that had it not been for the ad litem's promise that he was not going to use his strikes, M would have exercised her strikes more broadly. M's counsel reminded the court that he had objected as soon as it became clear that the ad litem intended to use his strikes. However, the court pointed out that prior to that moment, M had made no objections to the alignment of the parties, & M agreed. M moved for a mistrial on the basis that the parties were aligned & the peremptory strikes were not equalized between them. The court denied M's motion. The court also denied M's motion for a stay to file a writ of mandamus.

Holding: The duty of the judge to alter the normal allocation of peremptory challenges in multiple party cases is set forth in Rule 233. In multiple party litigation, upon the motion of a party made prior to the exercise of any peremptory challenges, the court has the duty to equalize the number of peremptory strikes. When multiple litigants are involved on one side of a lawsuit, the trial court must determine whether any of those litigants on the same side are antagonistic with respect to an issue of fact that the jury will decide. If no antagonism exists, each side must receive the same number of strikes. The existence of antagonism is a question of law that is determined after voir dire & prior to the exercise of the parties' strikes & is based

upon information gleaned from pleadings, pretrial discovery, information & representations made during voir dire, & any other information. Any error in the allocation of jury strikes must be preserved by a timely objection. Generally, the proper time to object would be at the same time that the determination of antagonism is made--after voir dire & prior to the exercise of the strikes as allocated by the court.

The Texas Supreme Court has recognized that, when defendants have collaborated on the exercise of their peremptory challenges, this factor supports a finding that the defendants have used their ostensibly antagonistic positions unfairly. Because the ad litem admitted that he & DFPS had coordinated their strikes in such a manner that they made no double strikes, we hold it was error for the trial court to allow those parties twice as many strikes as M. DFPS argues that M failed to preserve that error for review because she did not object timely. M did not object at the general time because she was relying on the ad litem's representation that the ad litem would not exercise any strikes & would leave the jury selection up to DFPS & M.

This case is similar to *Van Allen v. Blacklede*. In Van Allen, prior to jury selection, the trial court held a hearing to allocate peremptory challenges among the parties. The trial court ordered the defendants to exercise their strikes independently. The defendants proceeded to exercise their strikes in separate rooms. Immediately after the jury was selected & the panel was seated & sworn, plaintiffs moved for a mistrial on the grounds that the defendants had violated the court's mandate & collaborated in exercising their strikes. The trial court denied their motion. On appeal, the defendants argued that plaintiffs had waived their objection because they did not object in a timely manner. The appellate court held that the plaintiffs did not waive their objection under the circumstances because they objected at the earliest possible moment after it became clear that the defendants had coordinated their strikes in violation of the court's mandate. Similarly, M objected when it first became apparent that the ad litem had coordinated his strikes with DFPS & that the ad litem planned to use his six strikes after all. After being overruled & after the jury was empanelled & sworn, M moved for a mistrial. The court held a hearing in which the ad litem admitted that he had told M's counsel that he would not exercise any strikes & that he was aligned with the position of DFPS. Under these circumstances, we hold that the M did not waive her objection.

We must now examine whether the trial court's failure to apportion challenges among the parties or grant a mistrial constitutes reversible error. To obtain reversal of a judgment based upon an error in the trial court, M must show that error occurred & it probably caused rendition of an improper judgment, or probably prevented M from properly presenting the case to the appellate court. Once error in the apportionment of peremptory jury challenges has been found, a reversal is required only if the complaining party can show that the trial was materially unfair. This showing is made from an examination of the entire record. If the trial is hotly contested & the evidence sharply conflicting, the error in awarding peremptory challenges results in a materially unfair trial.

A review of the entire record shows that the evidence presented at trial was not sharply conflicting. M agreed with the State that she had endangered her other children by exposing them to abusive partners, had a pattern of conduct wherein she relied upon others to provide shelter & money for her, had difficulty maintaining a stable home, had been unable to remain employed for longer than a few months, & had difficulty providing food & medical care for her children. She admitted that her rights to her first child were terminated on (D) & (E) grounds in a default judgment because she failed to appear at trial. She also conceded that she relinquished her rights to three other children because she could not care for them & felt that termination was in their best interests. Ultimately, M only contests DFPS' conclusion that the evidence of her past conduct indicates that she has no ability to care for M.N.G. in the future. None of the parties dispute the facts regarding M's past conduct or her present living situation. M contends that although she has failed as a parent in the past, this time if the child is returned to her it will be different. However, none of the testimony or the evidence in the record indicates that M received an unfair trial.

A review of voir dire also does not indicate that M was prejudiced by the selection of any of the jurors on the panel. M argued that she would have exercised her strikes more broadly had she known that the ad litem intended to use his strikes in coordination with DFPS. The ad litem's intent became clear only when he began to strike venire member number twenty-one. Because M exercised her six peremptories under the assumption that the ad litem would not exercise his strikes we begin our review of voir dire starting at venire member twenty-one. The jury members selected for the panel from the group starting after twenty-one were [enumerates venire member numbers]. The potential jurors' answers during voir dire revealed nothing prejudicial about any of the jury members selected from this group. Nothing in the voir dire indicates that the failure to apportion strikes among the parties resulted in a materially unfair trial that caused the rendition of an improper judgment. We hold that although M's complaint regarding peremptory challenges was not waived & the trial court erred in failing to allocate peremptory challenges among the

parties, any error on the part of the trial court was harmless error & does not require reversal. Thus, we overrule M's ineffective assistance point as moot.

K. Guardian Ad Litem Excused From "The Rule"

In the Interest of K.C.P. & J.D.P., 142 S.W.3d 574 (Tex. App.--Texarkana 2004, no pet.)

Involving: TRE 614, guardian ad litem excused from "the Rule", 107.002(c)(4) & (6).

Factual/Procedural History: Jury terminated parent-child relationship between M & her two children. A representative of CASA, who was also the guardian ad litem for the children, was allowed to be present during the trial. M contends the CASA representative was subject to Rule 614 & should have been excluded from the courtroom during the testimony of the other witnesses. TFC § 107.002(c)(4) & (6) specifically provide that a guardian ad litem is entitled to attend all legal proceedings in a case & to testify in court regarding the guardian's recommendation. The Code Construction Act provides that where general provisions conflict with special provisions the specific controls. In this case, the specific provision of the TFC prevails over the more general language of the TRE.

Holding: The trial court did not err by abiding by the requirement of the TFC & allowing the guardian ad litem to be present during the course of the trial.

L. Evidentiary Issues[11]

1. Expert Witnesses[12]

a. *In the Interest of S.E.W. & S.A.W.,* No. 05-03-01175-CV, 2005 Tex. App. LEXIS 3809 (Tex. App.--Dallas, May 19, 2005, no pet.)

Involving: Reverse & remand & expert witness testimony, TRE 702, failure to preserve error but remand in interest of justice.

Holding: Reversed & remanded because the error in admitting expert witness testimony regarding drug test results probably caused the rendition of an improper judgment. The trial court abused its discretion in admitting an expert witness' opinion under TRE 702 because he did not possess the expertise concerning the subject matter of his opinion. Moreover, the results of the tests were not reliable just because the expert testified that they were. The expert admitted that he had no knowledge of how the actual tests were performed on the drug samples, of the protocols used for the instruments or whether those protocols were followed with these samples, & whether or not a standard was run before or after the tests. He also admitted that he was not an expert on the operation of the instruments for conducting a GCMS (gas chromatography mass spectrometry) test. By his own admission, he was not qualified to give an opinion as to the results of the scientific tests on the hair samples his company collected. Thus, his interpretation of the lab results failed to establish that those results were reliable. His opinion that the samples tested positive for cocaine was beyond the scope of his expertise & based entirely on the written report he received from the lab. Thus he did not have expertise concerning the actual subject about which he offered his expert opinion. The Department did not offer evidence explaining the scientific theory & reliability of the tests for determining whether a person had used cocaine. Nor did the Department request the trial court to take judicial notice of the reliability of these scientific tests. Thus, the trial court was not presented with the information necessary for it to perform its gatekeeping function. We recognize that Texas & Federal courts have found the test to be reliable & that it has been generally accepted in the scientific community. However, the record does not reflect that the trial court took judicial notice of the reliability of such methods or was provided with the information necessary to take judicial notice. We conclude that the trial court abused its discretion in admitting the testimony. Moreover, the evidence regarding drug use in this case was critical & disputed & was harmful error. The Department testified that the decision to remove the children was based solely on M's positive hair test. The Court agreed that the M failed to preserve error on her objections to the reliability of the expert testimony. However, the Court opined that "we have broad discretion to remand in the interest of justice".

b. *In The Interest Of B.L.D.,* No. 10-99-335-CV, 2004 Tex. App. LEXIS 8342 (Tex. App.--Waco, September 15, 2004, pet. denied)

Involving: Qualification of nurse expert witness to testify whether scalding was intentional, admissibility of alleged sexual misconduct & other bad acts, TEX R. EVID. 401 & 402, alleged constitutional violation in failing to ask the jury to make a separate, specific finding on best interest, alleged error in that final judgment recites best interest of children will be

[11] See *In the Interest of C.J.P., E.P. and T.I.P.* under the miscellaneous section on Conduct Of Judge. This case involves issue of admission of hearsay statements, specifically caseworker affidavits and drug test results.

[12] *See In The Interest of J.L.* under Section II Texas Supreme Court Cases. *See Also In The Interest of A.B.* under Section IV "Best Interest". This case discusses expert witness testimony & their application to best interest & the jury.

served by termination but does not recite a predicate act necessary for termination.

Factual/Procedural History: Parents sought review of a termination of their parental rights. In a prior decision, the court reversed the judgment. The Texas Supreme Court disagreed with the court's holding, reversed the judgment, & remanded for consideration of the remaining issues. The issues on remand include: (1) whether Nurse Duncum was qualified to testify as an expert about whether the scalding of the child was the result of an intentional act; (2 & 3) whether the evidence was legally & factually sufficient to support endangerment & conditions & surroundings grounds; (4) whether evidence of alleged sexual misconduct & other bad acts was admissible; (5) whether the court should have submitted specific questions asking whether termination was in the best interest of the children; & (6) whether the judgment improperly failed to include specific findings of best interest.

Holding: Affirmed. The parents complain about rulings of the trial court in admitting evidence. One concerns the expert testimony of a nurse; the second concerns evidence of bad acts. Rule 401 provides that evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides in part: "[e]vidence which is not relevant is inadmissible." Evidentiary rulings will result in a reversal of the cause only where the whole case turns on that evidence. The trial court admitted testimony of a nurse that M intentionally immersed B.R.D. in hot water when he was fifteen months old. Nurse Duncum was the trauma nurse who treated the burns in an emergency room. At trial, she testified that she told M that her story did not match the physical evidence of B.R.D.'s leg burns. The parents point to Nurse Duncum's testimony that she was not an expert; the State says the complaint on appeal does not comport with the objection at trial. We believe that the issue on appeal was preserved by the objection at trial & will address the issue. The Department qualified Duncum as an expert out of the presence of the jury. The question arose whether she would be permitted to say that the scalding of the child was "intentional" or that M's version about how it happened was inconsistent with the injury. The court asked the witness, "Ms. Duncum, in arriving at your opinion that the burns were not consistent with the story that the mother gave you, are you relying upon your training and experience as a registered nurse and as a trauma nurse in arriving at that opinion?" The witness answered in the affirmative. Based thereon, we find no abuse of discretion in admitting the evidence.

With regard to extraneous bad acts, one of the Department's witnesses, an expert, testified that M said F had a "sexual interest" in the children. There was, however, no objection to this testimony. The trial court permitted the State to show that F (a) committed an abusive act towards M, (b) downloaded a pornographic picture from the Internet, & (c) served as a drug informant. Evidence of the assault on M also was presented through the testimony of two other witnesses, without objection. Even though it may have been inadmissible because the assault occurred at a time when the children were in the Department's custody, the admission of cumulative evidence that is not controlling will not result in a reversal. The parents argue that there was no direct evidence that it was F who downloaded the information from the Internet & that the picture's title, "Young F___," does not necessarily indicate that it depicted a child. As the Department points out, however, counsel stated "no objection" when the exhibit was offered. Evidence of F's acts as a drug informant was adduced by the Dosseys during cross-examination of a Departmental witness. Having done so, they cannot now complain. Issue complaining about the extraneous bad acts is overruled. There was also legally & factually sufficient evidence to support the termination grounds.

Parents also assert a constitutional violation in failing to ask the jury to make a separate, specific finding on "best interest". We believe that the Texas Supreme Court's holding that issues related to the charge were waived by failing to object disposes of this issue. Parents also argue that the final judgment recites that the best interest of the children will be served by termination but does not recite a predicate act necessary for termination. Although we express no opinion about whether a recitation of findings is necessary, we note that the judgment states that the issues were submitted to a jury & that the verdict is incorporated into the judgment "for all purposes."

c. *In the Interest of T.N. & M.N.*, 142 S.W.3d 522 (Tex. App.--Fort Worth 2004, no pet.)

Involving: Standing to complain of children's attorney's performance, waiver of challenges for cause, duties of attorney ad litem, expert & lay testimony, (D) & (E) grounds, best interest & no evidence about children's desires & potential persons for permanent placement & whether children would be together.

Factual/Procedural History: M does not challenge the jury findings on the endangerment grounds or best interest. She complains only of the children's attorney's performance & about the trial court's rulings on her challenges for cause. F brings error on the jury findings on endangerment & best interests, contends that the trial court abused its

discretion in admitting the testimony of a witness who was disqualified as an expert, & that the trial court erred in denying his challenges for cause.

Holding: Affirmed. M complains that the children's attorney ad litem's failure to perform statutorily mandated duties violated her due process & equal protection rights under the state & federal constitutions. She also complains that the ad litem's ineffective assistance violated F's & her due process rights. M does not point to any evidence in the record demonstrating how her constitutional rights were violated. A party may not complain of errors which do not injuriously affect her or which only affect the rights of others. An exception exists when the appellant is deemed to be a party under the doctrine of virtual representation, which requires among other elements that the appellant, & in this case, F & the children, have identical interests. The record does not show that M, F, & the children have identical interests, nor does M claim that they do. Instead, without showing any evidence that she suffered harm M seeks to exploit the alleged deficiencies of the children's counsel for her own use on appeal.

The record demonstrates that the children's attorney ad litem did not meet with his clients until three days after trial began. It also demonstrates no evidence of the children's desires about termination. "While we do not reach the substance of M's complaint, we are appalled that any attorney, much less one appointed to represent the interests of vulnerable children, could fail to meet with his clients, not to mention fail to ascertain his clients' trial objectives, until such trial was well underway".

Nevertheless, M does not have standing on appeal, nor did she at trial, to complain about the performance of the children's attorney on the children's behalf. At the time of trial, CPS had TMC including the right to represent the child in legal action & to make other decisions of substantial legal significance concerning the child. M did not have that right then, nor does she now. M also has no standing to complain about the children's lawyer on her own behalf. Even though no party's trial counsel elicited any evidence about the children's desires, we note that M does not challenge her own trial counsel's effectiveness. Additionally, M does not have standing on appeal to complain about a violation of F's due process rights.

M contends that the trial court erred in denying her challenges for cause to panel members who admitted a bias against her. At trial, M did not specifically identify an objectionable juror who would serve on the jury because of the court's failure to grant the challenges for cause or to allow her additional peremptories. She did not object to the jury as seated. Because M did not identify a specific, objectionable juror, she failed to preserve this issue for appeal. For the same reasons, F has also waived his complaint with regard to this issue.

F contends that the trial court abused its discretion in admitting expert opinion testimony regarding his & M's fitness as parents from a witness the court wholly failed to qualify as an expert. The trial court ruled that a licensed professional counselor could not give any expert opinions; however, she could testify as to what she observed, heard, or was told. The court did not prohibit the witness from giving the same testimony that a lay witness would be allowed to give. The counselor testified, over objection, that M reported past separations from F, that the parents' behavior was "childlike, argumentative, and verbally abusive," & that the parents used "humiliating words" toward each other. These opinions were admissible as lay testimony, & the trial court did not abuse its discretion by admitting them.

Evidence also supported (D) & (E) grounds where F repeatedly left the children with their paternal GM, even though he knew she abused alcohol & other substances while the children were under her care & had had two wrecks while she was driving under the influence of alcohol or drugs with the children in the car. The children were repeatedly observed unsupervised outside their GM home, once at night, when the older child struggled to keep her toddler sister out of the street. F continued to leave his children with his M even after the police, & later CPS, warned him that his mother was not an appropriate caregiver. The evidence also shows that F was emotionally & physically abusive to the GM in front of the children & that he & M physically fought in front of the children.

With regard to best interest, in addition to the evidence of endangerment recited above, the evidence also shows that Father lacks a stable employment history & has not provided stable housing. He also did not have a stable relationship with the children's mother. His participation in CPS-recommended programs was less than stellar. He completed parenting classes but did not complete counseling. He missed some visits with the children, & he refused to take at least one drug test. Disturbingly, there was no evidence about the children's desires or any specific evidence about particular persons who CPS believed were qualified to offer the children a permanent placement or adoption. There was no evidence showing a commitment to place the children together in the future, or, at the very least, to maintain their relationship through letters, telephone calls, & visits. At the time of trial, the children were thriving in a foster home with a couple who were more like surrogate grandparents. But F also had no concrete plans for the children. He had no apartment & he

testified that he would provide for the girls' needs from the financial support of relatives.

d. *In the Interest of A.J.L. & C.R.L.*, 136 S.W.3d 293 (Tex. App.--Fort Worth 2004, no pet.)

Involving: TRE 702 (expert witness testimony & distinguishing between hard & soft sciences, play therapy, hearsay testimony by expert witness, allowing closing arguments by intervening grandparents, & natural father, 102.004 (grandparents may intervene in SAPCR suit), TRPC 269 (final argument).

Factual/Procedural History: M grew up in foster care & had a lifetime history of violence & an inability to control her temper & emotions. CPS in Kansas & TDFPS had removed M's children from her care on multiple occasions because they had bruises, burns, & bites on them. M also had a criminal & drug abuse history & an unstable home life & employment history. After the third removal, DFPS petitioned to terminate M's parental rights.

At trial, the Trevinos, paternal grandparents of A.J.L., intervened asking to be named JMC of A.J.L. The natural father of C.R.L., Donald "Bobby" Wall, filed an original answer to the termination petition & filed a counter-petition asking to be named the sole MC of C.R.L. During the trial, the court allowed play therapist Brigitte Iafrate to testify on play therapy she conducted with A.J.L. Using puppets in a play-acting scenario, it was her opinion that A.J.L. felt that he needed to protect his baby sister & that he had been traumatized at home. Before allowing Iafrate to testify, the trial court conducted a Daubert hearing to determine the admissibility of Iafrate's expert testimony as a professional counselor. M objected to portions of Iafrate's testimony, contending it was unreliable & based on hearsay. The trial court overruled her objections.

Prior to closing arguments, M objected to the grandparents & the father making closing arguments to the jury. The court overruled her objection, & both presented closing arguments. The court charged the jury only on termination, not conservatorship. The court terminated M's parental rights based on the jury's findings of endangerment & conduct as to both children.

Holding: M complains that the trial court erred by allowing the attorneys for Wall & the Trevinos to present closing arguments to the jury. The State filed its first amended petition alleging that Wall was the biological father of C.R.L. & asked the court to find that, if reunification could not be achieved, the court terminate his parental rights. Wall, as a respondent, answered with a general denial & filed a counter-petition affirming that he was the biological father of C.R.L., asking that M's rights to C.R.L. be terminated, & that the trial court award him custody of C.R.L. As a respondent, Wall is also a party to the suit. The Trevinos intervened & filed an intervention requesting custody of A.J.L. The Family Code expressly provides grandparents with standing to intervene subject to the trial court's discretion. Unless the trial court does not allow the intervention, the interveners become parties to the suit for all purposes. Because the trial court approved the intervention, the Trevinos are also parties to the suit.

After all the evidence is presented in the case, the parties may argue the case to the jury. Where there are several parties to a case, the trial court may prescribe the order of argument between them. The alignment of these parties remained consistent throughout the trial. Contrary to M's assertions, both Wall & the Trevinos filed pleadings. Additionally, both had an interest regarding termination of M's parental rights. Wall specifically requested that M's rights to C.R.L. be terminated & the Trevinos asked to be appointed MCs of A.J.L. Upon termination, the court shall appoint a MC of the child. Thus, the termination of M's rights was a matter of interest to both Wall & the Trevinos. We hold that the trial court did not err by allowing Wall & the Trevinos to make closing arguments to the jury.

M also complains that the trial court erred by admitting the expert testimony given by licensed professional counselor Iafrate because (1) it was not scientifically reliable under *Daubert v. Merrell Dow Pharm., Inc.*, & (2) the evidence was based, in part, on hearsay. Iafrate testified about play therapy that she conducted on A.J.L. TRE 702 governs the admissibility of expert testimony.

Once the opposing party objects to proffered expert testimony, the proponent of the witness's testimony bears the burden of demonstrating its admissibility. To be admissible, the proponent must demonstrate: (1) that the expert is qualified; & (2) that the expert's testimony is relevant & reliable. Based upon Iafrate's education, experience & training, we hold that the trial court did not abuse its discretion in qualifying Iafrate as an expert witness.

The Texas Supreme Court has identified a non-exclusive list of factors which can be considered in assessing the reliability of scientific evidence. *See Gammill v. Jack Williams Chevrolet, Inc., E.I. du Pont de Nemours & Co. v. Robinson*. In *Nenno v. State*, the Court of Criminal Appeals divided "scientific" expertise into two subcategories: "hard" sciences & "soft" sciences. The Criminal Court of Appeals in *Nenno* provided a framework by which to test the reliability of the fields outside of hard science, such as social sciences or other fields based upon experience & training as opposed to scientific method (soft sciences). *See In the Interest of J.B.* (explaining why *Nenno*

framework should be used to evaluate "soft science" testimony in civil cases pending guidance from the supreme court). S*ee also In the Interest of G.B. (*applying *Nenno* to a parental termination case).

In assessing the reliability of fields outside of hard science, the trial court looks at whether (1) the field of expertise is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of that field & (3) the expert's testimony properly relies upon or utilizes the principles involved in that field. First, we focus on whether the trial court abused its discretion in determining that play therapy is a legitimate field of expertise. Iafrate testified that play therapy is highly regarded & is a generally accepted method for counseling children. She testified that the research showed that play therapy is a successful & effective way to work with children. She found no studies that challenged the reliability of play therapy. Moreover, she noted that it has been used for decades & is widely accepted in the counseling community. Case law also illustrates that play therapy is often used as a basis for expert testimony. Thus, the trial court did not err in determining that play therapy is a legitimate field of expertise.

With respect to whether Iafrate's testimony was within the scope of her legitimate field of expertise & whether she properly utilized the principles of play therapy, we look to her testimony at trial. Iafrate's testimony set out in detail the methodology she used in her play therapy sessions with A.J.L. She also gave numerous specific examples of play therapy in the sessions, what A.J.L. did in those sessions, & what significance A.J.L.'s actions during the play sessions had for her as an expert. We hold that Iafrate's testimony was sufficiently reliable under *Nenno* & the trial court did not err by allowing it.

M also complains that Iafrate's opinion testimony was based upon hearsay. Specifically, she complains of the testimony regarding the session where A.J.L. tapped on the table in response to yes & no questions. An expert may form opinions or make inferences on facts that are not otherwise admissible into evidence if those facts are of the kind reasonably relied upon by experts in the field. An expert may testify regarding the underlying facts & data supporting an expert opinion. We hold that the trial court did not err by admitting this portion of Iafrate's testimony.

2. Texas Rule of Evidence 510 - Confidentiality of Mental Health Information

In The Interest Of Baby Girl Smith, No. 05-04-00139-CV, 2005 Tex. App. LEXIS 990 (Tex. App.--Dallas, February 8, 2005, no pet.)

Involving: Objections to testimony of social worker, TEX. HEALTH SAFETY CODE, TEX. R. EVID. 510, timely objection, waiver of complaint for appeal.

Procedural & Factual History: Mother appealed the termination of her parental rights; however, she brought forth only one point of error alleging trial court error in admitting confidential communications regarding her mental health in violation of Texas Rule of Evidence 510. During the trial TDPRS asked the social worker about her contact with M, & M's attorney objected. He stated "[t]here are specific mental health *Miranda* warnings that are read to patients to advise them that anything they tell caseworkers, social workers, and other individuals gathering information can be used against them at later proceedings. And I would like to inquire as to whether that was done. If it wasn't done, I think it would be grounds to suppress that information." The attorney questioned the social worker on voir dire; she said she was familiar with confidentiality laws, but not the "mental health *Miranda* warnings in the Texas Health and Safety Code." She said their clients sign confidentiality consents, & she added, "When we have to do what is considered a 9-1, we tell them that the information that is in the charts can be used by the court." However, she did not "specifically sit down and read the statutory warning under the Texas Health and Safety Code." M's attorney asked again if she had advised M if anything she said could be used against her, & the social worker responded, "With the 9-13, right off the top of my head, I would have to look at it and see if it says on there." M's attorney again asserted his objection "to any statements that [his] client may have told the social worker or caseworkers." The court overruled his objection. After the social worker was excused from the witness stand, M's attorney again objected. He stated that "Rule 510 . . . provides that confidentiality in mental health cases applies in civil cases . . . and . . . that all communications are confidential . . . ." The court overruled that objection. TDPRS then recalled the social worker to the stand, & she provided additional testimony.

Holding: Affirmed. M waived her complaint about the testimony of a social worker. The complaint was waived because the objection at trial did not comport with her complaint on appeal. Moreover, TEX. R. APP. P. 33.1 & TEX. R. EVID. 103 requires that a complaint must be timely made to the trial court. At

trial M objected saying that the social worker had not followed the procedures under the Texas Health & Safety Code; however, M did not complain on appeal that a Health & Safety Code provision had not been followed. She urged error saying that the testimony violated rule 510 of the Texas Rules of Evidence. This complaint did not comport with the objection made at the time the testimony was offered. M's other objection which was on the basis of Rule 510, was not timely because it was made after the social worker testified. To preserve error for appeal, a complaint must be made to the trial court in a timely fashion, as soon as the grounds for the complaint are apparent or should be apparent.

3. Motion to Strike Testimony

Keith & Karla White v. Texas Department Of Family & Protective Services, No. 01-04-00221-CV, 2005 Tex. App. LEXIS 659 (Tex. App.--Houston [1st Dist], January 27, 2005, no pet.)

Editorial Comment: The opinion is well-written because it breaks down the opinion into headings & discussion that correspond to the requisite elements of constructive abandonment. It also includes language that clearly illustrates that all you need in order to affirm on appeal is one termination ground plus best interest.

Involving: Motion to strike testimony of rebuttal witness & failure to take care of child's medical needs.

Procedural & Factual History: The issues on appeal were: (1) whether the evidence at trial was legally & factually insufficient; (2) whether appellants properly preserved their point of error asserting their right to have the jury hear questions regarding conservatorship when the original petition requested conservatorship & termination of parental rights; & (3) whether the trial court erred by denying appellants' motion to strike testimony of a rebuttal witness.

Holding: Affirmed. *Review of Termination Grounds on Appeal:* "The separate grounds for termination are listed in the Texas Family Code, joined with the disjunctive term "or"; thus, a court may base a termination of parental rights upon a finding that a parent engaged in conduct described in any one of the alleged grounds, such as constructive abandonment, plus a finding that termination is in the best interest of the children."

Constructive Abandonment: There is sufficient evidence to support the finding of constructive abandonment. Because it is undisputed that DFPS had been the temporary managing conservator of Girl & Boy for well over the six months required under the constructive-abandonment section, we need to analyze only the remaining statutory requirements: (1) whether DFPS made reasonable efforts to return the children to appellants, (2) whether appellants did not regularly visit or maintain significant contact with the children; & (3) whether appellants demonstrated an inability to provide the children with a safe environment. *See* TFC § 161.001(1)(N). If no evidence exists for one or more of the above-mentioned elements, then the implied finding of constructive abandonment fails.

Reasonable Efforts: TDFPS provided a Family Service Plan in which appellants agreed to complete certain requirements in order to get their children back. These requirements included providing necessities for the children & completing psychological testing, drug & alcohol evaluations, & parenting assessments. In order to help the family reach the goal of reunification, DFPS authorized free services & even extended the free services authorization after F had failed to take advantage of some of them. The parents failed to communicate with the Department & to provide information where they could be reached. The Department changed the goal from reunification to termination when the parents failed to show up for a court hearing. The evidence shows that DFPS made reasonable efforts to return the children to the appellants.

Regular & Significant Contact: As a part of the Family Service Plan, appellants agreed to visit Girl & Boy regularly, & the court order, which formalized the Family Service Plan, specified that they could visit their children once a month at the CPS office & could additionally visit for any amount of time that had been mutually agreed on with the relative with whom the children were placed. CPS initially attempted to place both children with relatives to facilitate more frequent contact. Appellants did have contact with the children after they were first taken away; however, F's visits became less frequent by December 2002, and, after February 2003, both he & M completely stopped visiting the children at his mother's home. Moreover, appellants failed to show up at the CPS visits scheduled in April & May of 2003 & did not visit their children in June or July of 2003. Appellants did visit the children in early August 2003, but, during their only September 2003 visit with the children at the CPS office, appellants left one hour early. Moreover, appellants were aware that Girl was in the hospital for a few days in September, but they never visited her. Appellants visited their children three times in October 2003, but not in November 2003. They also left the December 23, 2003 visit with the children 45 minutes early. In total, during the 10-month period preceding trial, appellants had visited the children only six times at the CPS arranged meetings, twice leaving early. Viewing the evidence in the light most favorable to the verdict, we hold that the jury reasonably could have formed a belief that appellants did not regularly visit or

maintain contact with the children. The minimal number of visits that appellants made to the children is legally sufficient for the finding of termination of parental rights.

Inability to Provide a Safe Environment: DFPS was also required to prove that appellants failed to provide a safe environment for the children. At the time of trial, M & F were living with individuals whom they had known for a very short period of time. They had also moved several times since July 2002. M also testified that she did not recall with whom she & F had lived prior to moving into their apartment. She further testified that they had lived in a hotel for two months after having lived with another individual for five months & they knew her only one month before they moved in. Another individual testified that he was currently supporting M & F financially. This individual also testified that he had been on probation for burglary & that he had recently been arrested for making terroristic threats. When viewing the evidence in a light most favorable to the verdict, the jury reasonably could have found that appellants were unable to provide the children with a safe environment.

Best Interest: It was also in the children's best interests to terminate because Appellant failed to provide proper medical attention for the children, one who had very special medical needs. DFPS correctly notes that failure to provide medical care, alone, has been found to support termination. Moreover, inability or failure to provide medical attention to the child, much like food deprivation, could sustain a charge of parental neglect. The parents neglected the medical needs of Girl, & they did not know that M was pregnant with Boy. Boy was born on the bathroom floor of a relative's home & he did not receive prenatal care.

Denial of Motion to Strike Rebuttal Witness' Testimony: Appellants also contend that the trial court erred in allowing a rebuttal witness to testify to matters that allegedly had not been brought up previously in trial. Rebuttal evidence is evidence given to disprove evidence presented by an adverse party or evidence that directly answers or disproves the last round of the adverse party's evidence. The trial court has sound discretion to admit evidence that is cumulative, & we review such admission under an abuse-of-discretion standard. The test for abuse of discretion is whether the court acted without reference to any guiding rules & principles, or whether the act was arbitrary or unreasonable. Appellants argue that Yolanda Rowe's testimony should not have been admitted because, although she was called as a rebuttal witness, she testified to several new matters that allegedly had not been brought up by appellants in prior testimony.

Specifically, appellants contend that Rowe's testimony regarding the following facts should not have been allowed: (1) Karla's confession to Rowe about Keith's stated intent to kill someone named "Poochy," (2) Rowe's witnessing Karla smoke while she was pregnant, & (3) Keith's statements regarding trips to the Hotel Galvez. Appellants argue that these issues were outside the scope of cross-examination & that the trial court abused its discretion by allowing this evidence into the record. The first issue, the rebuttal testimony concerning F's statement that he planned to kill Poochy, was in direct response to the last round of M's testimony. Rowe's testimony rebutted M's testimony that she had never had a conversation with Rowe. With regard to the second issue, F testified previously that M had never smoked while she was pregnant. Consequently, Rowe's testimony that she saw M smoking during her pregnancy rebutted F's testimony. With regard to the third issue in question, Rowe's testimony that M & F would go to the Hotel Galvez & charge food to other persons' rooms directly rebuts F's testimony that he had visited the hotel only as a guest. In all three of the above instances of alleged introduction of new information on rebuttal, Rowe's testimony rebutted some evidence already presented by appellants. As appellants themselves correctly point out, rebuttal evidence is limited to the purpose of disproving facts already presented into evidence by an adverse party. Because Rowe's testimony rebutted F's & M's previous testimony, the trial court was within its discretion to admit Rowe's testimony.

4. TFC § 104.002 & § 104.006 - Prerecorded Statement of Child & Hearsay Statement of Child Abuse Victim

In the Interest of S.P., et al., No. 05-03-00905-CV, 2005 Tex. App. LEXIS 4072 (Tex. App.--Dallas, May 26, 2005, no pet.)

Involving: Reversed & remanded, erroneous admission of videotaped statement in lieu of testimony pursuant to 104.002 (prerecorded statement of child) & 104.006 (hearsay statement of child abuse victim), constitutionality of these statutes & the Confrontation Clause, sexual abuse of child.

Factual/Procedural History: M & F challenge the trial court's admission of the videotape interview of their niece, D.H., & its refusal to require the Department to produce D.J. for cross-examination. In the videotaped interview, D.H., who was seven years old at the time, stated that her uncle (F) would "get on top of her" when he was "touching on her"& she stated these were "bad touches". She stated this happened more than one time & that she told M who got angry with F. D.H. also said she saw F touching

S.P. the same night he touched her but then said she did not see it because the lights were off.

Holding: TFC 104.006 allows admission of a statement of a child twelve years old or younger describing alleged abuse of the child if the trial court finds the statement reliable & the child testifies or is available to testify or if the court finds that use of the statement in lieu of the child's testimony is necessary to protect the child's welfare. Section 104.002 allows admission of a video-recorded oral statement of a child twelve years old or younger who is alleged in a suit affecting the parent-child relationship to have been abused if certain conditions are satisfied. M & F challenge the constitutionality of these statutes based on the right of a criminal defendant to confront the witnesses against him. The U.S. Supreme Ct. recently revised its confrontation clause jurisprudence in *Crawford v. Washington*, 541 U.S. 36 (2004). The Court found that it need not reach the constitutional issue of whether the right of confrontation or to cross-examination applies in a parental termination case & whether TFC 104.002 & 104.006 violate that right. The Court held that "because there was no evidence that use of D.H.'s videotaped interview in lieu of her testimony was necessary to protect D.H.'s welfare. Thus, the trial court abused its discretion in overruling the objections and admitting the videotape in lieu of the child's testimony". *See* TFC 104.006(2). Moreover, the trial court conducted a hearing outside the presence of the jury regarding the parent's objections to the videotape & the Department indicated that the whereabouts of D.JH. were known, but did not offer to make her available to testify. M & F asked that the child be made available for cross-examination, but the trial court noted that 104.006 allows the use of the statement in lieu of testimony if doing so is necessary to protect the child's welfare. The Department argued that it had no evidence except that it would be detrimental to the child's welfare to have to in open court face the man who allegedly abused here. If the child had been available to testify, the trial court could have admitted the statement without a finding that using the statement was necessary to protect her welfare. The record does not support such a finding. "Here the trial court failed to hear such evidence. Thus, we conclude that the trial court abused its discretion in admitting the videotape under section 104.006. The Department argued that 104.002 is an alternative basis for admitting the child's videotaped statement, and this section does not require a finding that use of the statement is necessary to protect the child's welfare. We conclude that this section is not an alternative basis for the trial court's ruling in this case. Unlike section 104.005, 104.002 does not authorize the trial court to use the statement *in lieu of* testimony. Both parents requested that D.H. be made available and suggested that her testimony could be taken by alternative means, such as closed circuit television pursuant to 104.002. The trial court refused these requests. Section 104.002 does not authorize the trial court to admit D.H.'s videotaped statement in lieu of her testimony at trial without requiring the Department to make the child available to testify. This error was harmful error because the allegation of child abuse against F and M's knowledge of it were central to the termination case. Moreover, the powerful impact of videotape on jurors has been recognized. Points sustained and case reversed and remanded".

5. TRE 803(6) - Hearsay Exception/Records of Regularly Conducted Activity

In the Interest of K.C.P. & J.D.P., 142 S.W.3d 574 (Tex. App.--Texarkana 2004, no pet.)

Involving: TRE 803(6), TRE 902(10), drug tests improperly admitted as business records, proper predicate.

Factual/Procedural History: Jury terminated parent-child relationship between M & her two children. A major portion of the trial concerned M's alleged drug abuse. The first issue concerned admission of records of drug tests. Exhibit 14 was a record from Dr. Kyle Jones revealing the result of drug tests. Exhibits 15 through 17 are records of drug tests from the Texas Alcohol & Drug Testing Services. Attached to each of these records was an affidavit from the custodian stating the records were business records. The first complaint is that a proper predicate was not laid for the introduction of the records.

Holding: The appellate court found that the trial court abused its discretion in admitting the drug tests because there was not a sufficient indicia of trustworthiness or reliability to bring them within an exception to the hearsay rule. The error was harmless, however, because other properly admitted evidence established that M had a history of drug abuse. There is a distinction in the treatment of the admissibility of business records based on whether the case is civil or criminal in nature. Since this is a termination of parental rights case, we believe the test for admissibility of these records should comply with the rule as stated in criminal cases. TRE 803(6) allows the admission of records kept in the course of regularly conducted business activities. Under TRE 902(10), the predicate for admission of a business record may be established by an affidavit that complies with TRE 902(10). Rule 902(10)(b) provides a sample form of an affidavit that complies with the rule & states that "an affidavit which substantially complies with the provisions of this rule shall suffice." The affidavit

provided here is substantially the same as the form provided in the rule.

Clearly, the exhibits complained of are business records from Dr. Jones & the Texas Alcohol & Drug Testing Services. On appeal, M is complaining that the drug tests were not actually conducted by the entities that provided the records, that the custodian could not testify the tests were standard for the field, that he had personal knowledge of the tests & results, & that there was an insufficient chain of custody to show the tests were actually of M's hair or urine. Counsel argues that the trial court abused its discretion by admitting the evidence when the State failed to provide any evidence showing either the types of tests administered or whether they were properly administered. Counsel's factual assertions are accurate. We are now left to address the question of whether a court could conclude over objection that drug test results are admissible--when there is nothing proffered beyond the bare results themselves. The critical question is whether the statements (the drug test results) showed sufficient indicia of trustworthiness or reliability to bring them within an exception to the hearsay rule.

There is a distinction in the treatment of this issue based on whether the case is civil or criminal in nature. Some civil cases have found business records containing laboratory tests are admissible by showing where the specimen was drawn, that it was sent to a laboratory, & that a medical doctor analyzed it & reported the results. Criminal cases require more. Test results are admissible as business records when the testifying witness is able to testify that the tests were standard tests for a particular substance, made by a person who had personal knowledge of the test & test results, & that the results of the tests were recorded on records kept in the usual course of business of the laboratory. Intoxilyzer test results are admissible when it is shown that they were performed in accordance with statutory guidelines. We have previously recognized the need to show, not merely that the test results had been properly preserved or generated, but also that they were produced by the use of proper procedures & methods. In this case, none of those requirements were met. Here, there is no evidence to show that the sponsoring witness had personal knowledge of how the tests were conducted, or even to clearly show which variation of drug test was used. There is nothing to show whether there were devices used in conducting the tests, or whether they were properly supervised or maintained, whether they were operated by a person who was competent to do so, or whether these were standard tests for the substance. There is no evidence about the types of machines used to conduct the tests or the methods used by the independent laboratories that conducted the tests. The representatives of the business entities who held the records admitted that they had no knowledge of these matters, & there was no effort made to provide any such information to the court through any other method. In *Philpot v. State*, 897 S.W.2d 848 (Tex. App.--Dallas 1995, pet. ref'd), the State introduced a parole file containing laboratory tests, which were sponsored only by the parole officer. In holding the tests inadmissible, the court found that there was no evidence establishing reliability of the tests from the laboratory. Specifically, there was no evidence that the tests were standard tests for this controlled substance. The Dallas court cited this Court's opinion in *Strickland v. State*, 784 S.W.2d 549 (Tex. App.--Texarkana 1990, pet. ref'd), where we held that one predicate for admission of laboratory tests was that the tests were standard tests for a particular substance. In *Strickland*, the witness, a qualified chemist, testified that standard procedures were followed in analyzing the substance, as well as meeting the business record requirements. This showed compliance with the Rule 803(6) requirement & an adequate indicia of trustworthiness. In this case, this requirement is not met.

Since this is a termination of parental rights case, we believe the test for admissibility of these records should comply with the rule as stated in criminal cases. The rights involved in a termination of parental rights case are "more [important] than any property right." When judging the sufficiency of the evidence, courts must apply a more stringent standard than in other civil cases. In light of these distinguishing features of termination of parental rights cases to other civil cases, we deem it inappropriate to apply the more relaxed standard in determining the admissibility of these records. It is uncontradicted that no evidence was presented regarding the qualifications of the persons who tested the specimens, the types of tests administered, or whether such tests were standard for the particular substance. We believe that admitting drug tests in a termination of parental rights case with no information as to the qualifications of the person or equipment used, the method of administering the test, & whether the test was a standard one for the particular substance indicates a lack of trustworthiness of the tests & that admission of such evidence is an abuse of discretion.

6. 42 U.S.C.A. § 290dd-2

In the Interest of K.C.P. & J.D.P., 142 S.W.3d 574 (Tex. App.--Texarkana 2004, no pet.)

Involving: 42 U.S.C.A. § 290dd-2, drug treatment records.

Factual/Procedural History: Jury terminated parent-child relationship between M & her two

children. A major portion of the trial concerned M's alleged drug abuse. M contended the trial court erred by admitting into evidence a 245-page file produced by the Northeast Texas Council on Alcohol & Drug Abuse. M argues on appeal that the file was protected & made confidential by federal law & that the court erred by admitting it into evidence. She relies on 42 U.S.C.A. § 290dd-2 as authority for her position. The file was the complete record of the results of M's therapy & drug treatment program with the representatives of that agency. It includes psychological tests & their results, drug tests, counselors' notes regarding M's treatment program & her progress, medical evaluations, & letters & other writings made by M at the request of the counselors as part of the treatment program.

Holding: We conclude the court adequately engaged in the requisite balancing test, as requested by counsel & required by the statute. We find the evidence supports that determination, & thus the court did not abuse its discretion by admitting the documents into evidence.

We first address the State's contention that the policy interests protecting children controls to the exclusion of the mother's interest in confidential drug treatment. We acknowledge that, in situations involving termination of parental rights, evidence of this type would typically be of considerable importance to a fact-finder charged with the duty of determining whether a child should be permanently removed from the parent's custody. We also acknowledge this would normally provide the "good cause" required by the statute. We are not, however, willing to ignore the plain language of the federal statute & allow the unfettered introduction of such evidence without the judicial determination required by the statute.

The statute requires an application to an appropriate court, showing good cause, & provides that, if good cause is shown, the court shall order disclosure only to the extent that disclosure of all or part of the record is necessary, along with imposing safeguards against unauthorized disclosure. In the course of an extensive discussion of the objections, the State asked the court to go forward with an order under the federal statute & argued that good cause existed for the release of the documents because of the need for disclosure as compared to the potential for injury to M. There is no written order, or specific oral order by the court finding that there was good cause for the admission of the evidence. We do not find that the court was statutorily required to enter a written or specific oral order.

The "good cause" requirement, in this context, is essentially a balancing test. The court is to balance the right to rely on confidentiality on the part of the parent against the needs of the children, & the potential dangers to them, in light of the public policies designed to protect children. We therefore find it appropriate to review the trial court's decision in the form of a review of that balancing action. The context of such a review is more familiar when dealing with unfair prejudice versus probative value analysis. *See* TRE 403. The general rules for review provide that, when admitting evidence, the trial court does not sua sponte engage in balancing the probative value against the prejudice, but does so only on sufficient objection invoking Rule 403 by the party opposing admission of the evidence. Once the rule is invoked, however, the trial court has no discretion as to whether to engage in the balancing process. In this case, the objection was sufficient & the matter was clearly brought to the trial court's attention. In that context, unless the record shows the trial court did not perform the balancing test, courts find no error when the trial court simply listened to the defendant's objections, then overruled them. One of the multitudes of reasons that may justify termination of parental rights includes the parent's use of a controlled substance in a manner that endangered the health or safety of the child, combined with a failure to complete a substance abuse treatment program. Further, the information contained within the documents in question provides insight as to the nature, mindset, & behavior of the parent that would be of considerable use to a fact-finder in determining whether M's parental rights should be terminated. As with most evidentiary decisions, a trial court's ruling applying a balancing test is only reversed for abuse of discretion. We conclude the court adequately engaged in the requisite balancing test, as requested by counsel & required by the statute. We find the evidence supports that determination, & thus the court did not abuse its discretion by admitting the documents into evidence.

M. Motion For Continuance

In The Interest Of B.S.W., NO. 14-04-00496-CV, 2004 Tex. App. LEXIS 11695 (Tex. App.--Houston [14th Dist], December 23, 2004, no pet.)

Involving: Motion for continuance, TEX. R. CIV. P. 251, subpoenas, witness testimony.

Factual/Procedural History: M urged on appeal that the trial court erred in denying her oral motion for continuance to secure the testimony of her substance abuse counselor. Shortly after the start of the second day of testimony, M's counsel requested the continuance, explaining that two subpoenas issued earlier had not been served. The court did not grant the continuance & instructed counsel to question M & to proffer testimony concerning what the counselor might have said had she appeared. M testified that the

counselor was optimistic about her progress & her prospects for continued sobriety. On appeal, M argues that the counselor's testimony was "extremely relevant" to her case & would have been more effective than M's own "self-serving" testimony.

Holding: The trial court did not err in denying mother's motion for continuance because it was made orally & did not comply with Texas Rule of Civil Procedure 251. Rule 251 provides that a motion for continuance shall not be granted except for sufficient cause supported by an affidavit, consent of the parties, or by operation of law. The record does not contain a written motion for continuance or an affidavit.

VIII. POST-JUDGMENT ISSUES[13]

A. Appellate Jurisdiction[14]

1. Request For An "Out-Of-Time Appeal"

a. *In re Ruben DeLeon*, 04-04-434-CV, 2004 Tex. App. LEXIS 5731 (Tex. App.--San Antonio, June 30, 2004, original proceeding)

Involving: Request for an "out of time appeal", writ of habeas corpus, TEX. GOV'T CODE ANN. § 22.221(d).

Factual/Procedural History: F filed a petition for writ of habeas corpus seeking an out-of-time appeal from the termination of his parental rights.

Holding: This court has limited jurisdiction to issue writs of habeas corpus. Our jurisdiction extends only to those situations where "a person is restrained in his liberty . . . by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case". TEX. GOV'T CODE ANN. § 22.221(d). F's petition does not seek relief from such an order, process, or commitment. Accordingly, DeLeon's petition for writ of habeas corpus is dismissed for lack of jurisdiction. We are unaware of an instance where the Texas Supreme Court has granted an out-of-time appeal in a parental termination case.

b. *In the Interest of W.J.B.*, 11-03-407-CV, 2004 Tex. App. LEXIS 4798 (Tex. App.--Eastland, May 27, 2004, no pet.)

Involving: "Out-of-Time Appeal". Also 109.002, 263.405(a)&(c), TRAP 26.1(b), 26.3, 201.015(a), 201.016(b).

Factual/Procedural History: On September 3, 2003, the associate judge signed a report recommending the termination of Ant's parental rights. The district court signed an order adopting the A.J.'s report on September 5, 2003.

Holding: Dismissed for lack of jurisdiction. Pursuant to TFC 201.016(b), September 5, 2003, was the controlling date with respect to appellate deadlines. The appeal of an order terminating parental rights is an accelerated appeal. In an accelerated appeal, an Ant must file his notice of appeal within 20 days of the date the order was signed. The filing of a motion for new trial, a request for findings of fact & conclusions of law, or any other post-trial motion does not extend the deadline for filing a notice of appeal in a termination case. TFC § 263.405(c). Ant did not file his notice of appeal until December 2, 2003. This court issued a letter to Ant's counsel on January 7, 2004, advising counsel of the court's concern that the appeal was untimely. Counsel responded in a letter dated January 14, 2004. Counsel's letter referenced a hearing conducted by the district court on November 7, 2003. Among other things, counsel asserted that the deadline for filing the notice of appeal did not begin until after the hearing conducted on November 7, 2003. This court entered an order on January 30, 2004, directing the district court to conduct a hearing to address the matters raised in counsel's letter with respect to the hearing on November 7, 2003.

At the hearing, the court considered Ant's attempt to obtain a de novo appeal of the A.J.'s recommendations. The court also considered Ant's motion for new trial. With respect to the appeal to the district court, Ant filed an appeal of the A.J.'s recommendations on September 9, 2003. A different attorney filed Ant's appeal of the A.J.'s recommendations than the attorney that represented him at trial. Ant's trial counsel testified at the November 7th hearing that he intended to appeal the A.J.'s recommendations directly to this court rather than pursuing a de novo appeal in the district court based on his belief that insufficient evidence was presented to the A.J. to support the termination of Ant's parental rights. The district court determined at the hearing conducted on November 7th that Ant's appeal to the district court was not timely filed because it was filed more than three days after the trial court signed an order approving the A.J.'s recommendations. Accordingly, the district court denied Ant's request for

[13] *See In The Interest of S.A.W.* under section on best interest discussing findings of fact & conclusions of law.

[14] *See also In the Interest of K.A.F.* & *In The Interest of J.L.* under Section II, Texas Supreme Court Cases, *Brice v. Denton* under ineffective assistance section.

a de novo appeal of the A.J.'s rulings. The district court also denied Ant's motion for new trial at the November 7th hearing.

The district court conducted a subsequent hearing on March 15, 2004, pursuant to this Court's order of January 30, 2004. The district court filed findings of fact & conclusions of law regarding the matters determined at the March 15th hearing. With respect to the hearing conducted on November 7th, the district court determined that Ant's request for a de novo appeal & motion for new trial were denied at the hearing. The district court also found that Ant had continuously expressed his desire to appeal the A.J.'s recommendations since the date of trial (August 4, 2003) & that all of the attorneys involved in the proceedings believed that his appellate rights remained intact at the time of the hearing conducted on November 7th. The district court further found that none of the attorneys were aware that an appeal in a termination case is accelerated & that a motion for new trial is ineffectual to extend the appellate deadline.

The circumstances of this proceeding present a compelling case for permitting Ant to pursue an out-of-time appeal of the A.J.'s recommendations. We liberally construe the rules of appellate procedure to protect a party's right to appeal. However, we may not enlarge the time for perfecting appeals. A party can seek an extension of time to file a notice of appeal, but the motion for extension of time cannot be filed more than 15 days after the deadline for filing the notice of appeal. "Once the period for granting a motion for extension of time under TRAP 26.3 has passed, a party can no longer invoke the appellate court's jurisdiction." Ant's notice of appeal was filed well beyond the 20-day deadline & the further 15-day grace period for seeking an extension of time for filing a notice of appeal. We have not found an instance where the Texas Supreme Court has granted an out-of-time appeal in a parental rights termination case. Accordingly, we have no discretion but to dismiss appellant's appeal for lack of jurisdiction.

c. *In The Interest of M.E.P.,* No. 01-03-796-CV, 2004 Tex. App. LEXIS 2312 (Tex. App.--Houston [1st Dist.], March 11, 2004, no pet.)

Involving: "Motion for Out-0f-Time Appeal". Also *Verburgt v. Dorner*, 959 S.W.2d 615 (Tex. 1997), TRAP 26.1, 109.002(a), 263.405(a).

Factual/Procedural History: Termination judgment signed May 18, 2001. Appellant filed motion for "out-of-time" appeal saying that on July 31, 2001 & August 23, 2001, the trial court appointed counsel to represent M but appointed counsel never received notice because of Tropical Storm Allison & therefore counsel did not prosecute the appeal. TDPRS filed a response in opposition to permitting an out-of-time appeal & TDPRS' brief on the merits included a motion to dismiss M's appeal for lack of jurisdiction. Trial court conducted an indigence hearing on July 29, 2003, found M indigent & appointed her appellate counsel. On July 28, 2003, appointed counsel filed a notice of appeal to challenge the May 18, 2001 decree.

Holding: Court found that it lacked jurisdiction. Appeal dismissed for lack of jurisdiction & motion for out-of-time appeal denied. The appeal is not timely under either the timetable pre-263.405(a) enactment, or the version of 109.002 that was in effect when the trial court signed the decree.

2. *In the Interest of J.C., & D.C.*, 04-04-175-CV, 2004 Tex. App. LEXIS 4449 (Tex. App.--San Antonio, May 19, 2004, pet. denied)

Involving: Interlocutory appeals, appellate jurisdiction, 262.112 (expedited appeals).

Factual/Procedural History: On December 5, 2003, TDPRS filed an Original Petition & asked for conservatorship & termination. On the same day, the trial court signed an order naming TDPRS as TMC of J.C. & D.C. until January 7, 2004. On January 7, 2004, the trial court held a full adversary hearing pursuant to sections 262.201 & 262.205. After the hearing, the trial court entered an order appointing TDPRS as TMC of J.C. & D.C.

Holding: Dismissed for lack of jurisdiction. On March 12, 2004, appellant filed a notice of interlocutory appeal, stating that she seeks to appeal from the December 5, 2003 order. This order is now moot as it was replaced by the January 7, 2004 order. And, even assuming that appellant is appealing from the January 7, 2004 order, we do not have jurisdiction over this appeal. TFC 262.112 entitles TDPRS, parent, guardian, or other party "to an expedited appeal on a ruling by a court that the child may not be removed from the child's home." Here, the trial court did not rule that J.C. & D.C. may not be removed from their home. Instead, it ruled that J.C. & D.C. should be removed from their home & appointed the TDPRS as sole TMC. The January 7, 2004 order is, therefore, not an appealable order & we do not have jurisdiction over this appeal.

3. *In the Interest of T.L.S. & R.L.P.*, 143 S.W.3d 284 (Tex. App.--Waco 2004, no pet.)

Involving: Interlocutory & final appealable orders, timely accelerated appeals, TRAP 26.1(b), 109.002(b), final order defined in 263.401(d).

Factual/Procedural History: Trial court signed an "Interlocutory Final Order" terminating M's

parental rights but not adjudicating the parental rights of other parties to the proceeding.

Holding: Appeal dismissed. No appeal may be taken from an interlocutory order unless authorized by law. An order is generally considered interlocutory if it does not dispose of all parties or claims in a case. Here the decree is interlocutory because it does not purport to adjudicate the parental rights of the father of R.L.P. or the father of T.L.S. Therefore, M may not appeal the order unless a statute permits her to. Notwithstanding the "interlocutory" label, an order which terminates the parent-child relationship & appoints TDFPS or some other person as the child's managing conservator is a "final order" for purpose of appeal under TFC 109.002(b) & 263.401(d). However, because M's notice of appeal was untimely under section 263.405 & TRAP 26.1(b), we dismiss the appeal for want of jurisdiction.

B. Preservation Of Error[15]

In the Interest of S.G.S., S.A.S., & S.L.L., 130 S.W.3d 223 (Tex. App.--Beaumont 2004, no pet.).

Involving: Whether the criminal rule for preservation of sufficiency issues should apply in parental termination cases.

Holding: Ants argue that the criminal rule for preservation of sufficiency issues should apply to parental termination cases. We rejected that argument in *M.S.*; the Supreme Court considered the appellant's complaint regarding our ruling only in conjunction with the issue related to ineffective assistance of counsel. Ants do not raise an issue of ineffective assistance of counsel.

In our state jurisprudence, legal & factual sufficiency in criminal cases has been held to be an absolute requirement not subject to procedural default. The sufficiency exception to the general error preservation rule in criminal cases is certainly well entrenched, but our state precedent is not necessarily compelled by federal constitutional due process. For instance, the Fifth Circuit has repeatedly held that when a challenge to the sufficiency of the evidence is not presented at the trial level, the appellate court's review will be limited to determining whether the record is so devoid of evidence pointing to guilt that a manifest miscarriage of justice will result.

The scope of appellate review is limited by well-established rules regarding preservation & assignment of error. Therefore, we must decide whether applying those rules will deprive the appellants of procedural due process. The Texas Supreme Court has held that, as a general rule, due process does not mandate that appellate courts review unpreserved complaints of charge error in termination cases. On the same day, the Supreme Court recognized in *M.S.* that counsel's unjustifiable failure to preserve a factual sufficiency point for appellate review could amount to a due process violation. This case exists somewhere between these two precedents.

Relying on *Mathews v. Eldridge*, in *M.S.* the Supreme Court considered three factors: (1) the private interests at stake; (2) the government's interest in the proceeding; & (3) the risk of erroneous deprivation of parental rights. The net result of those three factors is balanced against the presumption that the procedural rule comports with constitutional due process requirements. We follow our procedural rules, which bar review of this complaint, unless a recognized exception exists. While the interests involved are similar in *M.S.* & the case at bar, the risk of erroneous deprivation is lessened for sufficiency issues because a competently acting counsel will preserve those issues that present reversible error. Our confidence in the outcome would be too seriously eroded by a trial in which counsel did not perform competently. *M.S.* states, "That a motion for new trial is required for appellate review of a factual sufficiency issue is something that competent trial counsel in Texas should know." As applied to the generality of cases, the risk of an erroneous legal or factual sufficiency determination, *in the absence of ineffective assistance of counsel*, is not so great that the procedural rule must yield in all cases where the rights of a parent have been terminated. Our holding is consistent with *B.L.D.*, in which the court implicitly declined to apply the fundamental error doctrine such that 'core' jury charge issues in termination cases should be reviewed even when not preserved. Further, we cannot see any reasonable, practical, & consistent way of reviewing unpreserved complaints of charge error in termination cases that satisfies our narrow fundamental-error doctrine." Therefore, we will review only the properly presented legal sufficiency issues. Ants do not suggest that any particular facts attendant to their case render an otherwise constitutional procedure unconstitutional as applied to them.

C. Statement Of Points

The Texas Family Code requires an appellant parent to file a statement of points on which the party intends to appeal. The Family Code provides that the statement may be combined with a motion for new trial. It also provides that the statement must be filed "not later than the 15th day after the date a final order is signed by the trial judge". *See* TFC 263.405(b). The intent is that the statement of points will be used by the

[15] *See In the Interest of K.A.F.* under Section II, Texas Supreme Court Cases.

trial judge during a 263.405(d) hearing to determine whether "the appeal is frivolous". *See Id.* at 263.405(d).

Heretofore, the intermediate appellate courts have issued opinions on the issue of the failure to file a statement of points. Most of the courts had found that the absolute failure to file a statement of points did not constitute a waiver of non-jurisdictional issues on appeal, and that the failure to file the statement did not deprive the appellate court of jurisdiction. In *T.C.*, the Amarillo Court of Appeals found that the failure to raise a point in a filed statement of points operated to waive that issue on appeal. *See In the Interest of T.C.*, No. 07-03-0077-CV, 2003 Tex. App. LEXIS 6012 (Tex. App.--Amarillo, July 15, 2003, no pet.).

The issue of the penalty for failing to file a statement of points, or for failing to raise a particular issue in the statement, has been settled by the Texas Legislature with the passage of H.B. 409 during this last legislative session. This Bill amends 263.405 by adding subsection (i). It provides:

> (i) The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the party intends to appeal or in a statement combined with a motion for new trial. For purposes of this subsection, a claim that a judicial decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue on appeal.

D. Procedures on Appeal – Includes Remanding to Trial Court For Determination of Issues[16]

The intermediate appellate courts have been abating appellate proceedings in parental termination cases. The courts have been abating the termination appeals in order to have the trial court comply with TFC 263.405 procedures; specifically procedures under 263.405(d). *See* TFC 263.405(d). This section of the Family Code mandates that the trial court "shall" hold a hearing "not later than the 30th day after the date the final order is signed to determine whether: (1) a new trial should be granted; (2) a party's claim of indigence, if any should be sustained; (3) and the appeal is frivolous as provided by Section 13.003(b), Civil Practice and Remedies Code". Cases involving these remands to the trial court have been briefed in this section of the paper and in other sections of this paper. Most of these cases involve the issue of indigence. The case of *Brice v. Denton* involves Justice Gray's dissent on the issue of remanding to the trial court and is instructive on this issue.[17] The San Antonio, Beaumont, Amarillo, and Austin Courts have all remanded parental termination cases to the trial court to determine 263.405 issues while termination appeals were pending.

1. *Hydi Wall v. Texas Dep't of Family & Protective Services*, 173 S.W.3d 178, 2005 Tex. App. LEXIS 7046 (Tex. App. Austin 2005, no pet.)

Involving: Abatement of appeal, failure to have a 263.405(d) 30-day hearing on Appellant's motion for new trial. Also, affidavit of relinquishment and whether obtained by duress, fraud, undue influence, or coercion.

Holding: In four appellate issues, the appellant contends that the trial court erred by failing to strictly construe the language of her affidavit relinquishing her parental rights in a manner that would permit her to revoke the relinquishment; by refusing to hear evidence that her affidavit was obtained by fraud, duress, undue influence, or coercions; and by failing to set a hearing on her motion for new trial. Because the district court erred by failing to conduct a hearing pursuant to TFC 263.405(d), we abate the appeal and instruct the district court to conduct a hearing consistent with the statute and our opinion. Because we hold that M designated the department as MC in her affidavit, she effectively waived her right to revoke the relinquishment of her parental rights. With regard to the trial court's failure to hold a hearing on her motion for new trial, we first note that the failure to comply with section 23.405 does not deprive this court of jurisdiction over the appeal. The language in 263.405(d) makes a hearing on a motion for new trial mandatory in a termination case. However, the statute does not say what should happen when a trial court fails to comply with this mandatory provision. We hold that the hearing was mandatory and that the trial court erred by failing to hold a hearing. M asserts that we must reverse the judgment and order a new trial. Our opinion in an analogous criminal appeal provides some guidance. The appropriate remedy is to abate the appeal and order the district court to hold a hearing on appellant's motion for new trial.

[16] *See Mendoza v. Texas Department Of Protective & Regulatory Services* with *In The Interest Of K.M* under section discussing indigence, & *In the Interest of J.A.L* under section on ineffective assistance. *See also In The Interest of J.E.C.* under the miscellaneous section on the Indian Child Welfare Act.

[17] *See Brice v. Denton* under section on ineffective assistance.

2. ***In the Interest of K.D.,*** 02-04-349-CV, 2005 Tex. App. LEXIS 5677 (Tex. App.--Fort Worth July 21, 2005, no pet.), *withdrawn*, 2005 Tex. App. LEXIS 6811 (Tex. App.--Fort Worth August 18, 2005)

Editorial Comment: On August 18, 2005, the Court, on its own motion, withdrew its opinion and judgment of July 21, 2005 and ordered that this case shall be resubmitted to the court en banc at a later date to be determined by the court. As of January 17, 2006, the Court had not set a resubmission date.

Involving: Whether TFC 263.405 violates the equal protection and due process guarantees of the United States and Texas constitutions by denying an indigent appellant the right to a free record of the underlying parental rights termination trial. Also 263.405(d) hearing, frivolous appeal, motion for new trial, affidavit of indigency, statement of points.

Factual/Procedural History: After a jury trial and finding of termination, trial court appointed new counsel for post-trial motions and the appeal. M filed her statement of points and rather than file points, M argued that her appellate counsel could not definitely state the points on appeal until the reporter's record was prepared. M also stated "sufficiency of the evidence" and "best interest" and "[i]neffective assistance of counsel may be alleged" and "[a]ny other reasonable appealable issue". M then filed a notice of appeal, a motion for new trial, an affidavit of inability to pay costs, and motions for a free clerk's and reporter's record on appeal. The trial court conducted an evidentiary hearing under 263.405(d), denied the motion for new trial, and found that M's appeal was frivolous. The clerk and court reporter filed records from the 263.405 hearing without advanced payment.

Holding: Affirmed and finding of frivolousness sustained. In her first point M argues that TFC 263.405 violates the constitutions of the U.S. and Texas. Her argument is essentially that this section denies an indigent appellant the right to a meaningful review of the trial court's determination that her appeal is frivolous because the frivolous finding also denies the indigent appellant the right to a free record of the underlying trial. Without a record, M argues that appellate review is meaningless, if not impossible. A non-indigent party can obtain meaningful review by paying for the record. This disparity she argues violates the indigent party's right to equal protection. Section 263.405(d) provides that a trial court shall hold a hearing not later than 30 days after the signing of the final termination order to determine the issues of indigence, frivolousness, and whether a new trial should be granted. Subsection (f) of that same section requires that the appellate record be filed 60 days after the date of the order unless the court grants a new trial or denies a request for a trial court record at no cost. Subsection (g) provides for an appeal of the denial of a claim of indigence or finding of frivolous appeal by filing with the appellate court the reporter's and clerk's record of the underlying hearing. TCPRS 13.003 provides that a court reporter shall provide without cost a statement of facts and a clerk of the court shall prepare a transcript for appealing only if the trial court finds that the appeal is not frivolous.

Equal Protection: A trial court's finding of frivolousness limits the scope of appellate review to the issue of frivolousness. This obtains regardless of the issue of indigence. It also denies a free record and applies where an appellant is indigent. This disparate impact is what gives rise to M's equal protection argument. However, there is nothing in 263.405(g) suggest that a non-indigent appellant has the right to file any record with an appellate court other than the reporters and clerks record of the frivolous hearing, and nothing suggests that an appellate court may consider anything other than those limited records in the review of a frivolous finding. Therefore, an appellant is guaranteed the same limited review regardless of the issue of indigence.

Due process: An appellant who seeks review of a frivolous finding is "'entitled to a 'record of sufficient completeness to enable [her] to attempt to make a showing [of reversible error] as a matter of the due process and equal protection guarantees of the United States Constitution'". "'As the [United States Supreme] Court made clear in *Coppedge*, while the federal Constitution does not guarantee an appellant a free record to pursue a frivolous appeal, it does require that she receive a sufficient record, without charge, to establish the trial court erred in finding that her appeal is frivolous'". (quoting *De La Vega*). The *De La Vega* court held that the required was a record of the hearing at which the trial court determined that the appeal was frivolous. This is precisely the process codified in 263.405(g) and is what the due process guarantee of the Constitution requires. Point overruled.

3. ***In the Interest of S.D.S., G.R.R., J.R.R., & E.M.R.***, No. 07-04-0261-CV, 2004 Tex. App. LEXIS 7581 (Tex. App.--Amarillo Aug. 23, 2004, no pet.)

Involving: 263.405(d).

Factual/Procedural History: Parents filed notice of appeal in parental termination case. The clerk's record was filed on June 2, 2004, & the reporter's record was filed on June 22, 2004. Parents' briefs were due on July 12, 2004 because this is an accelerated case. However, no brief or extension of time to file appellants' briefs was filed on that date. The Court notified counsel for the parents, by letter on August 16, 2004, that neither the brief nor an extension

of time to file same had been filed. No briefs have been filed.

Holding: We abate this appeal & remand the cause to the 223rd District Court of Gray County. Upon remand, the trial court shall immediately cause notice of a hearing to be given and, thereafter, conduct a hearing to determine the following: (1) whether appellants desire to prosecute the appeal; (2) whether appellants are indigent & entitled to appointed counsel; and, (3) whether appellants have been denied the effective assistance of counsel due to appellate counsel's failure to timely file an appellate brief. Should the trial court find that appellants desire to pursue this appeal, are indigent, & have been denied effective assistance of counsel, then we further direct it to appoint new counsel to assist them in the prosecution of the appeal. We further direct the trial court to issue findings of fact & conclusions of law addressing the foregoing subjects. The name, address, phone number, telefax number, & state bar number of the new counsel who will represent appellants on appeal must also be included in the trial court's findings of fact & conclusions of law. Furthermore, the trial court shall also cause to be developed 1) a supplemental clerk's record containing the findings of fact & conclusions of law & 2) a reporter's record transcribing the evidence & argument presented at the aforementioned hearing. Additionally, the trial court shall cause the supplemental clerk's record to be filed with the clerk of this court on or before September 22, 2004. Should additional time be needed to perform these tasks, the trial court may request same on or before September 22, 2004.

4. ***In the Interest of T.A.C.W.***, 143 S.W.3d 249 (Tex. App.--San Antonio, July 9, 2004, no pet.)

Involving: 263.405(b) statement of points; 263.405(d) hearing to determine indigence, frivolousness, & motions for new trial, 263.405(a).

Factual/Procedural History: Termination under constructive abandonment grounds & best interest. Judgment Jan. 15, 2004. Motion for new trial filed on Jan. 28th & the notice of appeal was timely filed on Feb. 3rd. The statement of points was not filed until Feb. 26th after expiration of the 263.405(b) time period. F also filed an affidavit of inability to pay costs on appeal. On March 12th, the trial court held a hearing on F's motion for new trial but did not rule on whether a new trial should be granted, whether the indigence claim should be sustained, or whether his appeal is frivolous as required by 263.405(d).

Holding: TFC 263.405(b) provides that "[n]ot later than the 15th day after the date a final order is signed by the trial judge, a party intending to appeal the order must file with the trial court a statement of the point or points on which the party intends to appeal". The trial court questioned its jurisdiction to make any ruling under 263.405(d) because of the untimeliness of F's statement of points. We have not previously addressed the issue of whether we have jurisdiction when an appellant files a timely notice of appeal, but then files a late statement of points on appeal. We join our sister courts in holding that an appeal from a termination order is perfected by the timely filing of a notice of appeal, a late-filed statement of points on appeal does not deprive the appellate court of jurisdiction. The purpose of the statutory requirement of a statement of points on appeal is to provide the trial court with a mechanism to determine whether an appeal is frivolous & reduces unmeritorious appeals. Construing a failure to timely file a statement of points on appeal as a waiver of all non-jurisdictional appellate issues does not accomplish the statutory goals of reducing frivolous appeals & post-judgment delays. F timely filed his notice of appeal so our jurisdiction has been properly invoked. However, appeal is abated & remanded to trial court for a hearing & ruling on whether F's appeal is frivolous in accordance with 263.405(d)(3). TFC 263.405(a) makes termination appeals subject to the procedures in 263.405.

5. ***In the Interest of L.L., T.Y. & D.C.,*** 07-03-463-CV, 2004 Tex. App. LEXIS 5808 (Tex. App.--San Antonio, June 30, 2004, no pet.)

Involving: Procedures on appeal; abatement of appeal.

Factual/Procedural History: Notice of appeal filed but filing fee was not paid. The appellate court abated the appeal pending payment of the filing fee & determination of appellate jurisdiction. Appellant filed another motion & the court reporter & clerk records were filed. The clerk's record included an order by the district court determining that M was indigent, & a subsequent order by the associate judge presiding over the jury trial, that M was not indigent.

Holding: Based on the record, we find that the notice of appeal is sufficient to invoke appellate jurisdiction. Pursuant to M's motion, appellate court remanded the case to the trial court to conduct a hearing on whether M desires to prosecute this appeal; if so, whether she is indigent, if indigent, whether present counsel should continue to represent her pursuant to the prior court's order appointing counsel; & what orders if any should be entered to assure the filing of appropriate notices & documentation to dismiss the appeal if M does not wish to prosecute it. Trial court is also directed to conduct any necessary hearings, make & file appropriate findings of fact, conclusions of law & recommendations & include

these in a supplemental record, cause the hearing to be transcribed into a supplemental reporter's record, have the records sent to the court, & make any appropriate orders & clarify the indigent or non-indigent status of M, & the status of appointed counsel.

E. Indigence Issues

1. *In The Interest Of K.M.*, NO. 07-04-0442-CV, 2004 Tex. App. LEXIS 11108 (Tex. App.--Amarillo, December 8, 2004, no pet.)

Involving: Section 263.405 hearing, final order & 263.401, accelerated appeal & timely notice of appeal, 263.405, entitlement to counsel on appeal, TEX. R. APP. P. 4.2, affidavit of indigence & TEX. R. APP. P. 20.1, TEX. CIV. PRAC. REM. CODE ANN. 13.003(b), statement of points & 263.405(b).

Editorial Comment: This case contains a good discussion of post-judgment procedures & 263.405 hearings & the citation to the authority that governs them. The case also involves the issue of indigence where termination has not been pled by the State.

Holding: Appeal abated, motion to dismiss F's appeal denied, & remanded to the trial court to conduct a hearing & make determinations as to the father's entitlement to a free record, F's request for appellate counsel denied because there was no statutory authority to allow entitlement to counsel on appeal in cases in which termination is not sought. A final order is defined by TFC 263.401(d) as an order that requires a child to be returned to the child's parent, appoints the department as MC of the child with or without terminating the parent-child relationship, or names a relative of the child or another person as the child's MC. Here, the department filed suit, was named TMC of the child & continued as a party to the suit until the final order dismissed it from the suit. A final order was entered naming the child's paternal grandmother as MC of the child without termination of the parent-child relationship of either parent. The order signed by the court on June 28, 2004, was a final order as defined by section 263.401. The appeal of that order meets the criteria for an accelerated appeal under 263.405. In an accelerated appeal an appellant has twenty days after the trial court signs its order to file a notice of appeal. The Rules of Appellate Procedure allow this court to extend the time to file a notice of appeal for 15 days following the deadline, if the party also files a motion for extension that reasonably explains the need for the extension. A motion for extension of time is implied when a notice of appeal is filed in good faith within the 15-day window following the deadline. It is still necessary, however, for an appellant to reasonably explain the need for an extension. A reasonable explanation includes any plausible statement of circumstances indicating that failure to file within the required period was not deliberate or intentional. Further, we are instructed to construe the Rules of Appellate Procedure "reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule." The judgment appealed here was signed on June 28, 2004. F's notice of appeal was filed with the trial court on July 28, 2004, 30 days after the judgment was signed. Because a motion for extension is implied when a notice of appeal is filed in good faith within fifteen days following the deadline, Fs notice of appeal would be timely, if he has a reasonable explanation for the delay. F filed a response to the motion to dismiss explaining that he believed Rule of Appellate Procedure 4.2 allowed him twenty days from the date he received notice of the order, to file his notice of appeal. He received notice of the order on July 6, 2004, & mailed his notice of appeal on July 22, 2004. Rule 4.2 applies only if the appellant did not receive notice of the judgment within 20 days of the date it was signed. F acknowledges he received notice of the order eight days after it was signed, & as a result Rule 4.2 does not apply. But, because his failure to file within the required period was not deliberate or intentional we find F had a reasonable explanation for the delay.

The department next argues that F's affidavit of indigence & request for appointment of counsel are untimely. An affidavit of indigence must be filed in the trial court with or before the notice of appeal. Tex. R. App. P. 20.1(c)(1). We have determined F's notice of appeal to be timely & because the affidavit of indigence was filed with the notice of appeal, it was also timely filed. TDPRS also contends that because F failed to file a statement of points, the appeal should be dismissed. TFC 263.405(b) provides that a party intending to appeal the order subject to Subchapter E must file with the trial court a statement of the point or points on which the party intends to appeal. Failure to file a statement of points does not deprive the appellate court of jurisdiction. Moreover, although F did not file a statement of points, he did include in his notice of appeal a statement of the issues he plans to raise in his appeal. The purpose of the requirement that an appellant file a statement of points on appeal is to provide the trial court with the information needed to determine whether an appeal is frivolous, thereby allowing rapid disposition of frivolous appeals. We will not dismiss the appeal because of a failure to file a separate statement of points. TDPRS's motion to dismiss is denied.

We next consider F's request for appointment of appellate counsel. The Family Code did not require appointment of counsel for F at trial, even assuming his indigency. An attorney ad litem must be appointed

to represent an indigent parent in a suit filed by the department in which termination of the parent-child relationship is requested if the parent responds in opposition to the termination. *See* TFC §107.013(a). Nothing in the record before us indicates the department requested termination of parental rights at any stage of the proceedings. TFC 263.405(e) contains language concerning appointment of counsel, but we do not read that language as providing an additional right to counsel on appeal of cases not involving termination of parental rights. There remains F's request for a free reporter's record of the trial court proceedings. Under TRAP Rule 20.1(j), a party whose indigence has been established is entitled to preparation of the appellate record without prepayment. By express reference to Civil Practice & Remedies Code §13.003(b), TFC 263.405(d) further conditions a party's entitlement to a free record in cases under Subchapter E to the trial court's determination the appeal is not frivolous. Accordingly, we abate the appeal & remand it to the trial court. The trial court shall conduct the hearing & make the determinations required by 263.405(d). The trial court shall cause the record of the section 263.405 hearing & its determinations following the hearing to be filed with the clerk of this court no later than January 7, 2005.

2. ***Mendoza v. Texas Department Of Protective & Regulatory Services***, No. 07-03-554-CV, 2004 Tex. App. LEXIS 2139 (Tex. App.--Amarillo, March 4, 2004, no pet.)

Discussing: 263.405(e), (g) (indigence on appeal).

Factual/Procedural History: Appellant/M filed a *pro se* notice of appeal appealing a judgment terminating her parental rights. Her notice of appeal included a statement that she was indigent.

Holding: Appeal abated & remanded to trial court for hearing to determine indigence. If the Court finds Appellant indigent, then counsel must be appointed for the appellant for appeal. Upon remand, the trial court is directed to determine whether M is indigent. If M is found to be indigent, the Court is directed to provide the attorney's name, address, phone & state bar numbers in the order appointing appellate counsel. If the trial court finds Appellant not indigent, it must do so only after an evidentiary hearing. If held, a supplemental clerk's record & reporter's record of the hearing of the matter of indigence is to be filed with the appellate court.

Subsequent History: Appeal was dismissed on July 21st (2004 Tex. App. LEXIS 6494). The trial court found M not indigent but mother never paid the filing fee.

3. ***In the Interest of E.E.R.,*** No. 04-03-593-CV, 2004 Tex. App. LEXIS 2209 (Tex. App.--San Antonio, March 10, 2004, no pet.)

Discussing: 263.405(c), (g) (hearing on indigence, appeal from denial of indigence claim).

Factual/Procedural History: Termination. F filed a notice of appeal & an affidavit of indigence. The trial court conducted a hearing on the indigence claim & found F not indigent. Pursuant to 263.405(g), F appealed the denial of indigence & moved for appointment of appellate counsel. Clerk's & reporter's records containing items material to the indigence issue were filed.

Holding: Standard of review is abuse of discretion. Under this standard "we will reverse the trial court's decision on factual issues only if it established it 'could reasonably have reached only one decision' and it failed to do so". "The trial court's legal conclusions will be reversed if the court failed to analyze or apply the law correctly". The F's indigence affidavit stated he was incarcerated & had no income. However, the affidavit contains no information regarding other income, assets, debts, or expenses. TDPRS presented evidence that F receives approximately $1500.00 a month in military retirement benefits but $83.75 is deducted for child support. F's attorney did not present any evidence of other deductions, either through witnesses or through an affidavit from the F. On appeal, F contends his former wife receives half of his military retirement benefits but this evidence was not before the trial court. Trial court did not abuse its discretion because F failed to establish he was indigent. We affirm & deny F's motion for appointment of counsel.

F. Frivolous Appeal Issues

Texas Family Code section 263.405(g) provides that a parent may appeal a trial court's finding that the appeal is frivolous or its denial of a claim of indigence. *See* TFC 263.405(g). There have been twenty or more appeals of a trial court's findings that an appeal would be frivolous.[18] The author has been unable to find any cases where the intermediate appellate court reversed a trial court's finding that an appeal would be frivolous.

[18] *See also Salinas v. Texas Dep't of Protective & Regulatory Services*, No. 03-04-00065-CV, 2004 Tex. App. LEXIS 7640 (Tex. App.--Austin, Aug. 26, 2004, no pet.), *In the Interest of T.A.C.W.*, No. 04-04-00195-CV, 2004 Tex. App. LEXIS 7396 (Tex. App.--San Antonio Aug. 18, 2004, no pet.), *In The Interest Of M.R.R.*, No. 04-04-00723-CV, 2004 Tex. App. LEXIS 10239 (Tex App.--San Antonio, November 17, 2004, no pet.) & *In the Interest of C.P.*, No. 04-03-00790-CV, 2004 Tex. App. LEXIS 9193 (Tex. App.--San Antonio October 20, 2004, no pet.).

1. *In the Interest of F.P., A.P., A.P. & M.L.*, 04-03-918-CV, 2004 Tex. App. LEXIS 6460 (Tex. App.--San Antonio, July 21, 2004, no pet.)

Affirmed trial court's finding pursuant to 263.405 (d) that appeal would frivolous.

2. *In the Interest of K.M., J.B.M., J.M.P., & P.G.P.*, 04-04-259-CV, 2004 Tex. App. LEXIS 6799 (Tex. App.--San Antonio, July 28, 2004, no pet.)

Affirmed finding that appellate points were frivolous. An appeal is frivolous when it "lacks an arguable basis either in law or in fact".

G. Anders Briefs

Although the Texas Supreme Court has yet to rule on the issue of the propriety of the use of Anders Briefs in parental termination cases, there has been a steady increase in their use by parent's counsel. *See Anders v. California*, 386 U.S. 738 (1967).[19]

In *Anders*, the Court noted that indigent criminal defendants have a right to legal representation on appeal and attorneys have an ethical obligation to zealously represent their clients. *Id* at 744-45. The Court held that a defendant's right to appellate counsel does not include the right to require counsel to present frivolous arguments. *Id.* The Court recognized that counsel should be allowed to withdraw if an appeal is wholly frivolous. *Id.* The Court held that an attorney may file an appellate brief to demonstrate that no non-frivolous points exist for appeal. *Id.*

Under the procedure set out by the Court in *Anders*, appointed counsel must make a thorough review of the record to determine if any meritorious ground for appeal exists. *Id.* If after review, the attorney concludes that the appeal is wholly frivolous, the attorney must file a motion to withdraw in the appellate court. *Id.* The attorney must also file a brief "referring to anything in the record that might arguably support the appeal" and he must provide the appellant with a copy of the brief. *Id.* If appointed counsel files a motion to withdraw and a sufficient brief, the appellate court must give the appellant time to file a *pro se* brief. The appellant may "raise any points he chooses". *Id.*

After the appellate court has given the appellant an opportunity to file a *pro se* brief, the court then conducts a "full examination of all of the proceedings" to decide whether a meritorious ground for appeal exists or whether the appeal "is wholly frivolous". *Id.* In its review, the appellate court must examine the Anders brief, the record on appeal, and any *pro se* brief filed by the appellant. *Id.* If the review establishes that the appeal is wholly frivolous, counsel's motion to withdraw will be granted and the judgment will be affirmed. However, if the court should find "legal points arguable on their merits, and therefore not wholly frivolous", the court must either deny the motion to withdraw, or appoint new appellate counsel. *Id.* These procedures have been applied to civil termination cases by the intermediate courts of appeal.

In re A.K.W., No. 02-03-129-CV, 2004 Tex. App. LEXIS 1938 (Tex. App.--Fort Worth, February 26, 2004, no pet.)

Involving: Anders briefing.

Factual/Procedural History: M appeals termination of her parental rights. Appellate counsel for M filed a motion to withdraw & an Anders brief stating that after a thorough examination of the record, he believed that an appeal would be frivolous.

Holding: Termination affirmed & motion to withdraw granted. The brief meets the requirement for an Anders brief. Counsel also delivered a copy of the motion & brief to appellant advising her of her right to contest the motion, review the record, & file a *pro se* brief. The time for filing the brief had expired & we have not received a *pro se* brief. "As the reviewing court, we are required to undertake an independent evaluation of the record for reversible error, and having done so, we have found none".

H. Briefing Requirements

In the Interest of J.S., 136 S.W.3d 716 (Tex. App.--San Antonio, 2004, no pet.)

Involving: Briefing requirements on accelerated appeals from termination cases, TRAP 28.3.

Factual/Procedural History: Appellate court contacted appellant's counsel to inform her that the brief was past due. Counsel sent the Court a letter stating that the appeal was an accelerated appeal & did not require a brief & that a sworn record would suffice.

Holding: Counsel ordered to file a motion for extension of time to file brief. Counsel bases her belief on an erroneous interpretation of TRAP 28.3. This rule provides that an appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn & uncontroverted copies of those papers. It also provides that the appellate court

[19] *See In the Interest of C.P.*, No. 04-03-00790-CV, 2004 Tex. App. LEXIS 9193 (Tex. App.--San Antonio October 20, 2004, no pet.) & *In The Interest Of M.M. & T.M.*, No. 07-03-0256-CV, 2004 Tex. App. LEXIS 11294 (Tex. App.--Amarillo, December 15, 2004, no pet.).

may allow the case to be submitted without briefs. The purpose of the rule is to grant appellate courts flexibility to expedite appeals by dispensing with the necessity of a formal record or briefing. The rule gives the court, not the appellant, the discretion to dispense with briefing. Moreover, an appellant who believes that briefing is unnecessary must file a motion & demonstrate why briefs are not required. When a court does not have the benefit of briefing or argument, it must step out of its appropriate role as neutral arbiter & into the unnatural role of advocate. Therefore, we will exercise our discretion to dispense with briefing only in extraordinary circumstances. Counsel did not file a motion. Counsel is ordered to file a motion for extension of time to file the brief within ten days of this opinion. If no motion is filed within ten days, this appeal may be dismissed for want of prosecution without further notice.

Subsequent History: The Court dismissed the case on July 29 because the appellant never filed a brief (2004 Tex. App. LEXIS 6911).

I. Record On Appeal

In the Interest of K.B.A., B.W.A., & D.J.A., 145 S.W.3d 685 (Tex. App.--Fort Worth 2004, no pet.)

Involving: TRAP 34.6(f), record on appeal.

Factual/Procedural History: Trial court terminated F's parental rights. F complains that the trial court erred by terminating his parental rights because no reporter's record of the hearing exists. F requested that the reporter's record be made a part of the record on appeal, & the trial court's judgment states that a record of the testimony during the termination hearing was reported by the court reporter. However, through no fault of F, the court reporter was unable to locate any record recorded in the matter heard on December 18, 2003.

Holding: Appellate court reversed termination on ground that the reporter's record had been lost or destroyed. F is entitled to a new trial when he timely requests the reporter's record, & by no fault of F, the reporter's record has been lost or destroyed, is necessary for the appeal, & cannot be reconstructed. TRAP 34.6(f). Various courts of appeals have held that lack of a reporter's record in a post-answer default judgment context requires reversal. Unlike a no-answer default judgment where a defendant admits the petition's allegations by his failure to answer, a post-answer default judgment constitutes neither an abandonment of defendant's answer nor an implied confession. Therefore, judgment cannot be entered on the pleadings & the petitioner in such a case must offer evidence & prove his case. The judgment of the trial court stated that a reporter was present & that the proceedings were duly recorded. F requested that the reporter's record be made a part of the record on appeal. The reporter contacted this court & stated that F had requested the record that the reporter's files showed that the case was heard on December 18, 2003, but that no recorded transcript could be found.

IX MISCELLANEOUS CASES

A. Adoptions

In the Interest of M.P.J., II., 14-03-746-CV, 2004 6j-4f i(I73.76317 73.7654.8 10.5890.0 trial 4.,)5& t(f).

Therefore, a continuance was not required by section 161.2011(a). Ant's argued that 161.2011(a) applied because he is an "equitable parent" whose rights were effectively terminated when AEEs adopted M.P.J. However, he cites no Texas authority entitling an "equitable parent" to be considered a parent under the Family Code.

Ant also contended the trial court erred in admitting the testimony of a TDPRS representative. Ant argued that the representative's testimony should have been automatically excluded under TRCP 193.6 because TDPRS did not disclose her as a witness in response to Ant's discovery requests. Rule 193.6 provides that "[a] party who fails to make, amend, or supplement a discovery response in a timely manner may not. . .offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds. . .good cause for the failure. . .or the failure. . .will not unfairly surprise or unfairly prejudice the other parties". However, Rule 193.6 exempts a "named party" from the mandatory exclusion. TDPRS was a "named party," & the Representative testified she was employed by TDPRS as a "foster adoption worker" & was responsible for consummating M.P.J.'s adoption. Ant also complained that AEEs failed to disclose the representative. However, at trial, Ant complained only of TDPRS' failure to disclose her & has waived any objection concerning AEEs' lack of disclosure. Ant also waived his complaint that she was not a reliable witness.

Ant also contends the trial court erred in finding TDPRS had good cause to refuse consent to adoption by Ant. TFC 162.010(a) provides that "[u]nless the managing conservator is the petitioner, the written consent of a managing conservator to the adoption must be filed. The court may waive the requirement of consent by the managing conservator if the court finds that the consent is being refused or has been revoked without good cause. A hearing on the issue of consent shall be conducted by the court without a jury. A managing conservator has good cause to refuse consent when it has a good faith reason to believe the best interest of the child requires that it withhold consent. The party seeking waiver of the consent requirement bears the burden to prove the managing conservator's lack of good cause. There is evidence that TDPRS had a good faith reason to believe that refusing consent was in M.P.J.'s best interest. Ant had a previous CPS history which was "validated with disposition of, reason to believe" physical abuse had occurred. There was also an aggravated sexual assault of a child charge that was also validated with "disposition of, reason to believe". Ant argues TDPRS lacked good cause because it refused to investigate the validity of the charge. TDPRS testimony was that it does not investigate criminal charges. TDPRS also informed Ant it was against CPS' policy to consider his request until the charge was resolved. The incident with the physical abuse supported the good cause finding irrespective of the pending criminal charge. TDPRS refused Ant's request because it had determined adoption by AEEs was in M.P.J.'s best interest. TDPRS also explained to Ant that TDPRS had selected a family & could not work with him due to his history. Ant notes TDPRS did not review a social study in which the investigator stated it is difficult to see how Ant would be a risk to M.P.J., his references indicate he is an exceptional parent to B.Jr., & all references are supportive of adoption. However, the social study was submitted a year after TDPRS refused Ant's request. Further, the investigator specifically made no recommendation on Ant's request to adopt M.P.J.

Ant also challenges the adoption by AEEs. TFC 162.016(b) provides that "[i]f the court finds that the requirements for adoption have been met and the adoption is in the best interest of the child, the court shall grant the adoption". The decision to grant an adoption is within the discretion of the trial court, & we may not set aside the decision except for abuse of discretion. Ant contends the trial court abused its discretion by concluding adoption by AEEs was in M.P.J.'s best interest. However, there is ample evidence supporting the trial court's decision. Ant does not contest that the requirements for adoption have been met. The AEEs have been married for 22 years, their other children are mentally & physically healthy, CPS has never been called to their home, M.P.J. was eight months old when he went to live with AEEs & had lived with them for almost three years at the time of trial. AEEs testified they love M.P.J & consider him their child. M.P.J. calls them "Mommy" & "Daddy" & loves them. Their other children love M.P.J. & consider him their "little brother," & M.P.J. loves them. Mr. AEE provides financially for his family, & Mrs. AEE is a housewife. AEEs believe M.P.J. would be severely traumatized if he were "ripped away" from them. Further, AEEs' home study was quite positive & recommended they be approved to adopt M.P.J. Finally, TDPRS representative determined it was in M.P.J.'s best interest to be adopted by AEEs, AEEs met his needs, & it would be detrimental to remove him from their home. Ant does not challenge the evidence favorable to adoption by AEEs. Instead, he again complains that TDPRS & M.P.J.'s guardian ad litem refused to discuss the case with him or consider his qualifications to adopt M.P.J. We reject these complaints by concluding the trial court did not abuse its discretion in finding TDPRS had good cause to refuse consent to adoption by Ant. Further, these complaints are not relevant to whether adoption by AEEs was in M.P.J.'s best interest. Once the trial court found TDPRS had good cause to refuse Ant's request,

the trial court could not grant Ant's petition. Therefore, the only decision remaining was whether adoption by AEEs was in M.P.J.'s best interest.

Ant also contends it was in M.P.J.'s best interest to be placed in the same home as his half-brother, B.Jr. He cites TFC 162.302(e) that provides "[i]t is the intent of the legislature that [TDPRS] in providing adoption services, when it is in the children's best interest, keep siblings together and whenever possible place siblings in the same adoptive home." However, section 162.302(e) is appropriately applied when both siblings are being placed for adoption. Regardless, the intent that siblings be kept together does not override the best interest requirement. Because there is evidence that adoption by AEEs was in M.P.J.'s best interest, the trial court did not abuse its discretion in granting their petition. Ant also cites cases holding that siblings should not be separated absent clear & compelling reasons; however, this standard has been applied when splitting custody of children of the same marriage. This standard does not apply to an adoption case.

Ant also complains that the trial court failed to file findings of fact & conclusions of law. If findings of fact & conclusions of law are properly requested, the trial court must prepare them. The trial court's failure to do so is presumed harmful unless the record affirmatively shows no harm resulted to the requesting party. The test for harm is whether the circumstances of a case require an Ant to guess the reason for the court's ruling. In other words, the issue is whether the Ant was prevented from properly presenting his case on appeal. Ant was not required to guess the reasons for the court's ruling on either adoption petition. The court had to deny Ant's petition unless it found TDPRS refused consent without good cause. The trial court had to grant AEEs' petition if it found adoption by AEEs was in M.P.J.'s best interest. Further, because there is a complete reporter's record, Ant was able to fully brief, & we were able to fully review, whether some evidence supported the trial court's rulings. Therefore, Ant has not been harmed by the trial court's failure to file findings of fact & conclusions of law.

B. Standing[20]

1. *In The Interest Of SSJ-J,* 153 S.W.3d 132 (Tex. App.--San Antonio 2004, no pet.)

Involving: Standing, 102.003(a)(9) & (11), 153.131(a), grandparents, *Troxel v. Granville*, 530 U.S. 57 (2000), reverse & remand.

Editorial Comment: This case does a good job of setting out the history of & amendments to, & purpose of amendments, to Family Code standing statutes.

Factual/Procedural History: Trial court granted F/appellee's motion to dismiss for lack of standing. Appellant grandparents ("GPs") had brought action to be appointed MCs of their grandson after the death of the child's mother. Maternal step-GF & natural GM filed suit against SSJ-J's biological father seeking to be appointed MC. Although M & F never married, there is a court order establishing paternity. The order also appointed M & F JMC of SSJ-J, with M having the right to establish SSJ-J's primary residence.

Holding: GPs have standing pursuant to 102.003(a)(9). Reversed & remanded to the trial court for further proceedings in accordance with this opinion. Section 102.003, entitled "General Standing to File Suit," is the general standing provision for filing an original SAPCR. Section 102.003(a)(9) provides that an original suit may be filed at any time by "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition". GPs have met section 102.003(a)(9)'s standing requirement by pleading that they had actual care, control, & possession of SSJ-J for the requisite period of time. Despite this fact, F contends that, in addition to meeting sections 102.003(a)(9)'s standing requirement, GPS must also meet the requirement of TFC 153.131. That section, entitled "Presumption That Parent to be Appointed Managing Conservator," provides that "unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child". *See* TFC 153.131(a). Thus, according to F, GPS do not have standing because they did not plead that appointment of F would significantly impair SSJ-J's physical health or emotional development. We note, however, that the GPs did, in fact, include allegations in GF's amended pleading, GM's plea in intervention, & their affidavits that appointment of F as SMC or as JMC with the right to establish residency would significantly impair the child's physical health or emotional development.

Moreover, the El Paso Court of Appeals in *Doncer* was specifically called upon to interpret section 102.003(a)(11), which was "designed as a 'stepparent' statute, affording standing to, among others, a stepparent who helps raise a child when the stepparent's spouse-one of the child's parents-dies." The court of appeals, however, looked no further than

[20] *See Brazoria County Children's Protective Services v. Kenneth Frederick* under 161.001(1)(Q). *See also In the Interest of T.N. & M.N.*, under section on ineffective assistance.

the general standing statute to determine standing. Likewise, in interpreting section 102.003(a)(9), we see no reason & have found no authority that would require going beyond the general standing statute. There is simply nothing in the Family Code, or in cases interpreting the standing provision, that requires a petitioner under section 102.003(a)(9) to allege facts showing that the appointment of the parent would significantly impair the child's physical health or emotional development in order to have standing. This is an issue that goes to the merits; GPs must still overcome the parental presumption in a trial on the merits. According to F, however, *Troxel v. Granville* invalidates *Doncer*. There is nothing, however, in *Troxel* that would affect the decision in *Doncer*. Similarly, there is nothing in *Troxel* that would affect whether GPs have standing in this case. *Troxel* involved the constitutionality of a grandparent visitation statute that allowed any person to petition the court for visitation rights at any time & allowed the court to grant such rights based on the best interest of the child. The Supreme Court in *Troxel* held that the statute was unconstitutional because it infringed on a parent's fundamental right to make decisions concerning the care, custody, & control of her children. *Troxel* does not, however, affect the standing issue presented by the case before us. Again, the GPS will have to overcome the parental presumption during the trial on the merits.

2. *In The Interest of Z.J.*, 153 S.W.3d 535 (Tex. App.--Amarillo 2004, no pet.)

Involving: Standing of parent to complain of ad litem's representation of child; findings of fact & conclusions of law, duties of ad litems, TFC 107.014 (repealed effective September 1, 2003). Also endangerment ground & best interest, criminal history, drug addiction.

Factual/Procedural History: Bench trial. No findings of fact or conclusions of law were requested or signed & filed. M brought error on appeal alleging that the trial court committed reversible error by not assuring that the court appointed attorney ad litem for the child performed her duties according to TFC 107.014 & the American Bar Association Standards of Practice for Attorneys Who Represent Children in Abuse & Neglect Cases. M contended that the record did not demonstrate that the ad litem ever reviewed the medical, psychological or school records, or that she interviewed the child or any of the parties prior to trial. She also asserted that there was insufficient evidence to support termination under 161.001(1)(D) & (E) & best interest.

Holding: The Court overruled M's point complaining that the trial court erred in not assuring that the court appointed attorney performed her duties according to 107.014. The Court held that although section 107.014 prescribes seven specific duties to be performed by the ad litem, it does not require that evidence be presented so the record will show that the ad litem performed the duties, & it does not authorize or direct the trial court to supervise or monitor the ad litem's services. Further, the statute does not authorize either a parent or another party to present any challenge to the services rendered by the ad litem or provide that the failure of an ad litem to perform the duties constitutes reversible error of a judgment terminating parental rights. M has no standing to challenge an order of termination on the ground that the ad litem did not comply with section 107.014.

Findings of Fact & Conclusions of Law: "Where as here, findings of fact or conclusions of law were not requested & none were filed, we must presume that every disputed fact issue was found by the trial court in support of the judgment rendered".

Endangerment & best interest affirmed where M's history of drug abuse & addiction, criminal activity, & placement of Z.J. in an environment with a known drug dealer with a criminal record, is evidence of endangerment warranting termination. Moreover, considering that Z.J.'s father is deceased, his relatives were unable to abide by the service plans, & M's lifestyle, the evidence is sufficient to support that termination was in the child's best interest.

3. *Sharon Babcock v. TDPRS*, 08-03-136-CV, 2004 Tex. App. LEXIS 5996 (Tex. App.--El Paso, July 2, 2004, no pet.)

Involving: Standing of grandparent to challenge termination of daughter's parental rights.

Factual/Procedural History: Appellant, Sharon Babcock, is the mother of Pamela Babcock King. TDPRS initiated a suit to terminate the parental rights of King to her four children. At trial, Babcock sought to be appointed sole managing conservator of King's children. After a jury trial, King's parental rights were terminated & the jury determined that TDPRS should be appointed sole managing conservator of the four children.

Holding: Babcock presents two issues attacking the legal & factual sufficiency of the evidence to support the termination of King's parental rights. She does not allege error in failing to appoint her sole managing conservator of the children. Babcock does not have standing to assert on appeal that the trial court erred in terminating her daughter's parental rights.

As a general rule, a litigant can only assert his own legal rights. However, a litigant may assert the rights of a third party if three criteria are met: first, the litigant must allege "injury in fact," which is, a

"sufficiently concrete interest" in the resolution of the disputed issue; second, a close relationship must exist between the litigant & the third party; &, finally, there must exist a "genuine obstacle" or hindrance to the third party's assertion of his own right. In this case the close relationship is one of mother & daughter. However, Babcock does not allege "injury in fact," nor is there a "genuine obstacle" to King's assertion of her own rights. In fact, King brings her own appeal. While Babcock could have appealed the jury's verdict in failing to appoint her sole managing conservator, she did not. We need not address the issues Babcock raises, as she does not have the right to assert such issues on King's behalf.

4. *Margie Breaux v. TDPRS*, 03-03-392-CV, 2004 Tex. App. LEXIS 4713 (Tex. App.--Austin, May 27, 2004, pet. denied)

Involving: Standing, settlement agreements, intervention.

Factual/Procedural History: Child's aunt & grandmother intervened in termination case. M & F executed affidavits of relinquishment & their parental rights were terminated on that basis. Aunt & husband were appointed MCs with GM as PC. The jury heard the conservatorship issue but was unable to reach a verdict. Rather than have the court declare a mistrial, the aunt & GM adopted the decision of the nine jurors who were in agreement as to which party should be MC as a settlement. They did so without knowing whom the nine jurors had selected. The settlement agreement was recited into the record & was incorporated into the judgment. GM appealed pro se.

Holding: Affirmed. GM complains that she should have been appointed MC. GM does not have standing to appeal the termination of F's parental rights. Moreover, F has not appealed & he voluntarily relinquished his rights & was represented by counsel. In general, a party does not have standing to complain on appeal of errors that do not injuriously affect them or that merely affects the rights of others. GM has not demonstrated how the termination of her daughter's parental rights has any relationship to her issues on appeal concerning her status as possessory conservator. With regard to her complaint that she should have been appointed managing conservator, GM entered into a settlement agreement. GM does not complain that the agreed judgment does not accurately reflect the settlement. A party may not appeal from or attack a judgment to which she has agreed, absent an allegation & proof of fraud, collusion, or misrepresentation. GM does not raise these issues. We have reviewed the record & find no fraud, collusion, or misrepresentation. GM participated in the agreement & was adamant that her daughter have supervised visitation & this was incorporated into the agreement. Having entered into the agreement, she cannot now complain on appeal concerning its terms.

C. TFC § 161.211 - Direct Or Collateral Attack On Termination Order

In The Interest Of J.H., NO. 14-03-00110-CV, 2004 Tex. App. LEXIS 10537 (Tex. App.--Houston [14th Dist.], November 24, 2004, no pet.)

Involving: 161.211, effective date of statute, bill of review proceeding.

Factual/Procedural History: Trial court terminated M's parental rights on May 26, 1998. M filed a motion for new trial. Although the trial court

D. Administrative Rules Governing TDFPS

In the Interest of T.H.L.D., 02-03-372-CV, 2004 Tex. App. LEXIS 5862 (Tex. App.--Fort Worth, July 1, 2004, no pet.)

Involving: 40 TAC 700.1341(1)(A).

Factual/Procedural History: In her sole point on appeal, M contends TDPRS violated her constitutional right to be a parent by failing to follow its administrative rules for seeking the termination of her parental rights. M argues that prior to seeking termination of her parental rights, TDPRS failed to make any investigation to determine whether M was unwilling or unable to make the changes needed to reduce the risk of abuse or neglect, as required by 700.1341(1)(A) of the Texas Administrative Code.

Holding: TAC 700.1341(1)(A) provides that "[TDPRS] does not ask the court to terminate the parental rights of a child's parents until all three of the following conditions are satisfied: (1) the child's worker has determined that: (A) the parents are unwilling or unable to make the changes needed to reduce the risk of abuse or neglect; (B) it is neither in the child's best interest nor feasible to transfer conservatorship to relatives; & (C) it is in the child's best interest to: (i) sever the parent-child relationship; & (ii) either place the child for adoption or pursue another permanency plan that entails termination of parental rights; (2) one or more of the conditions for terminating parental rights under Chapter 161 of the Texas Family Code are satisfied; (3) if the child has two legal parents, it is feasible to terminate the rights of both.

M did not raise this challenge in the trial court, & TDPRS urges that this argument is therefore waived. To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. If a party fails to do this, error is not preserved, & the complaint is waived. We need not decide in this case, however, whether a section 700.1341 objection must be raised at trial because the record affirmatively reflects that TDPRS satisfied the subsection 1(A) requisite.

Section 700.1341 provides certain requirements TDPRS must comply with before filing a termination suit. This section is not the equivalent of TFC 161.001 which requires TDPRS to assume the burden of proof at trial to establish by clear & convincing evidence that termination is appropriate. Therefore, pre-suit violations very well may not present any basis for post-trial remedies in situations like the present case. Again, however, we need not decide this issue because the record before us affirmatively establishes that the State met the prerequisites to filing suit established in section 700.1341(1)(A). TDPRS has been involved with M since 1988, conducting investigations before M's pregnancy & during the period of time between T.H.L.D.'s birth & the filing of the petition for termination. The record supports TDPRS' contention that since the termination of M's rights to her other children, she did not show progress toward reducing or eliminating the risk of abuse or neglect of T.H.L.D. We overrule M's sole point & affirm the termination order.

E. Equitable Estoppel[21]

In the Interest of J.M. & L.M., 156 S.W.3d 696 (Tex. App.--Dallas 2005, no pet.)

Involving: Equitable estoppel against Department.

Factual/Procedural History: F argued that the Department was equitably estopped from terminating his parental rights because the Department caseworkers falsely misrepresented to him that if he completed the required services, then his children would be returned to him. F also asserted that the Department concealed from him the material fact that after a meeting in January of 2003, it changed its goal from reunification to termination & adoption, while knowing that F would continue to seek the return of his children. F argued that he detrimentally relied by continuing to attend the various services required by the Department. The Department asserted it never represented to F that if he simply completed the services, the children would be returned to him. The Department argued that the record shows F was repeatedly advised that if he could not provide a safe environment for his children, even with the assistance of the service plan, his rights could be terminated. F admitted that he had not pled estoppel but urged that the issue had been tried by consent. F also contested the best interest finding, but not the underlying termination.

Holding: F's estoppel argument waived because he did not plead it, & it was not tried by consent. During trial, F never referred to the issue of equitable estoppel so the issue was never tried. Moreover, any evidence that would have been relevant to the issue of estoppel, would have been relevant to the issue of best interest. Best interest finding affirmed.

[21] *See In the Interest of S.A.P.* under Section II, Texas Supreme Court Cases.

F. Effect Of Bankruptcy On Termination Proceedings

In the Interest of N.P.T. & S.E.T., No. 05-05-00746-CV, 2005 Tex. App. LEXIS 4509 (Tex. App.--Dallas, June 13, 2005, no pet.)

Involving: Effect of bankruptcy on termination proceedings.

Factual/Procedural History: M argued that her bankruptcy automatically stayed all proceedings in her parental termination case & thus any actions including the severance order & subsequent termination proceeding taken after that time were void.

Holding: Point overruled. M has not shown how proceeding with the termination case violated the purposes of the stay, or how any of the exceptions to the general rule that the stay operates against only the debtor apply. Thus, we cannot conclude the automatic stay affected the termination proceeding against her. When a defendant files a bankruptcy petition, an automatic stay goes into effect & abates any judicial proceeding against that party. The stay provides protection by giving the debtor a breathing spell from creditors & granting time to repay or reorganize. The stay also protects the creditor. The stay thus generally operates against only the debtor, & does not operate against non-debtors, co-tortfeasors, or co-defendants.

G. Placement With Relatives

In the Interest of C.C., C.C., C.C., C.C. & K.B., No. 2-04-206-CV, 2005 Tex. App. LEXIS 4096 (Tex. App.--Fort Worth, May 26, 2005, no pet.)

Involving: TFC 262.201(e), motion for continuance, & placement with relatives, home study, TFC 263.306(a)(6), 42 U.S.C.A. 671(a)(15)(B), (19).

Factual/Procedural History: Ants argue that the trial court erred by denying their motion for continuance. Ants jointly filed the motion & asked that the trial be continued in order for home studies to be conducted on relatives who could potentially keep the children. Ants argue that pending the results of these home studies, the children could have been placed with relatives prior to termination of their parental rights & that by denying the continuance, the trial court denied them of the right to use relative placement as a method of defending the termination procedure.

Holding: Point overruled. TFC 262.201(e) provides that a court shall place a child removed from a child's custodial parent with a noncustodial parent, or with a relative if placement with the no custodial parent is inappropriate, unless placement with the no custodial parent or relative is not in the child's best interest. Reasonable efforts should be made with respect to a child to be placed in foster care to preserve & reunify families & to give preference to an adult relative over a nonrelated caregiver in determining placement. Pursuant to 263.306(a)(6), the trial court evaluates the efforts of the agency to identify relative who could provide the child with a safe environment if the child is not returned to the parent. Ants provide no authority to suggest that there is either a statutory or common duty imposed on the Department to make such a placement or to investigate such a placement before a parent's rights may be terminated. "The determination of where a child will be placed is a factor in evaluation the child's best interest, but it is not a bar to termination that placement plans are not final or that placement will be with a nonrelative. Accordingly, we hold that the trial court did not abuse its discretion by denying [Ant's] motion for continuance."

H. Indian Child Welfare Act

In the Interest of J.E.C., 06-05-00099-CV, 2005 Tex. App. LEXIS 10636 (Tex. App.--Texarkana, Decembe44.8 0.

the child's extended family or Indian foster home, or other agency included within the ICWA with which J.E.C. would have been properly placed. M appears to suggest that the child should have been placed with the paternal GM but the trial court found that the GM did not qualify as an extended family member under the ICWA. M has not provided this Court with any argument, citation to the record, or authority that would allow us to render an informed judgment. Thus, we will not consider the complaint.

I. Conduct of Judge

In the Interest of C.J.P., E.P. and T.I.P., 04-04-770-CV, ____ Tex. LEXIS ____ (Tex. App.--San Antonio, October 12, 2005, _____)

Involving: Conduct of judge and judicial impropriety, due process and right to a fair trial. Also admission of hearsay statements and documents (caseworker affidavits and drug test results) but only as it related to the alleged impropriety of the trial judge. Appellate review of these evidentiary rulings.

Factual/Procedural History: M argues that the manner in which the trial court conducted the trial, and by admitting hearsay statements and documents, denied her due process right to a fair trial.

Holding: M argues that the manner in which the trial court conducted the trial denied her due process rights to a fair trial. To reverse a judgment on the ground of judicial impropriety, we must find both the impropriety and probably prejudice. M complained that the trial court improperly assumed the role of State's advocate by directing the course of trial and questioning of State's witnesses, relied upon caseworker affidavits and drug test results that contained inadmissible hearsay, and improperly assumed. Error in the admission of the statements and test results were only assigned as it relates to the alleged impropriety of the judge's conduct. Judicial rulings alone almost never rise to a valid argument for a bias or partiality motion. A "'trial court has the inherent power to control the disposition of cases 'with economy of time and effort for itself, for counsel, and for litigants'. "And, the trial judge may intervene to maintain control of the courtroom, expedite the proceedings, and prevent a possible waste of time." Further, M fails to point out specifically which statements in the affidavits constitute hearsay. The contents of the affidavits were also proven by other testimony. The record also shows favorable rulings by the judge. With regard to the drug test results, M admitted she had tested positive for drugs on two occasions. Thus, if the court erred in admitting the evidence, it was not harmful. Moreover, although M has pointed to some places in the record in which the court admitted hearsay evidence, there has been no demonstration that the judgment turned on these admissions or that they harmed M. Issue overruled.