Termination Case Law Update

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I. PRE-TRIAL ISSUES

A. Standing

1. Care, Control, and Possession Defined

Mother filed a mandamus action to vacate an agreed temporary order granting stepfather temporary joint managing conservatorship. Mother challenged stepfather's standing asserted under subsections 102.003(a)(9) and (11). Stepfather contended that he had actual care, control, and possession of the child for six months ending within ninety days preceding the date of the filing of the petition, which gave him standing under subsection 102.003(a)(9). Mother and stepfather lived together for seven years, during which time they both provided financial support for, and discipline of, the child. Stepfather had no documents allowing or authorizing him to make legal decisions for the child until he secured the temporary orders after the suit was filed. Mother lived with the child and did not relinquish to stepfather her parental rights, duties, and responsibilities. Because stepfather had no legal right to assert control over the child, he could not establish standing under subsection 102.003(a)(9). Standing also failed under subsection 102.003(a)(11) because the child's parent was not deceased at the time of the filing of the petition. Mandamus was conditionally granted. *In re K.K.C.*, 292 S.W.3d 788 (Tex. App.–Beaumont 2009, orig. proceeding).

2. Standing Under 102.003(a)(10) and 102.004

The Department filed an original petition for termination of parental rights in June 2008. In February 2009, the foster parents filed a petition in intervention seeking adoption. One month later, the maternal great aunt and uncle filed a petition in intervention. Over the next few weeks, five relatives filed petitions in intervention. The trial court granted the foster parents' intervention but denied all other relatives the right to intervene. In July 2009, the five relatives filed an original petition requesting their appointment as permanent managing conservator. Great aunt and uncle, Dolores and Lupe, alleged standing under subsection 102.003(a)(10), and the other relatives under section 102.004. The original petition was supported by the affidavit of relinquishment of father, James, in which James requested the child be adopted by Dolores and Lupe. The Department filed a plea to the jurisdiction challenging the standing of Dolores and Lupe on the grounds that the affidavit of relinquishment was not "valid and/or voluntary" because it was executed without James' counsel or attorney/guardian *ad litem*, and it did not comply with section 161.003. The Department challenged the other relatives on the grounds that they failed to allege that: (1) the child's present circumstances would significantly impair his physical health or emotional development; (2) both parents had consented to the suit; or (3) they are related to the child within the third degree of consanguinity. The trial court granted the Department's plea to the jurisdiction, finding that Dolores and Lupe failed to establish that James voluntarily consented to their suit because James did not understand that by executing the affidavit of relinquishment he would not have the right to continue to see his child. Regarding the other relatives, the trial court found that they failed to establish the child's present circumstances would significantly impair his physical health or emotional development, or that the mother, Ophelia, was competent to consent to the suit.

The five relatives filed a petition for writ of mandamus requesting that the Waco Court grant an immediate stay and vacate the order striking their intervention. Their petition was plagued with defects. They failed to provide a certification in compliance with TRAP 52.3(j), they did not provide record references, and they failed to provide a reporter's record of the hearing on the plea in intervention. Nevertheless, the Waco Court issued an immediate stay. Thereafter, the Department and foster parents filed a response complaining of the defects which resulted in the Waco Court denying the petition and lifting the stay. The relatives then filed a supplemental petition with record references and reporter's record contemporaneously with a motion for rehearing but failed to correct the certification. The Waco Court granted their request to supplement under the *unusual circumstances doctrine* because of the interests at stake and deadlines imposed in Department-initiated termination proceedings.

The Waco Court confirmed that standing is reviewed *de novo*. The standard of review of a trial court's determination of standing is to construe the pleadings in favor of petitioner and look to petitioner's intent. The trial court must take as true all evidence favorable to petitioner and indulge every reasonable inference in their favor. In reviewing James' affidavit of relinquishment, the Waco Court, relying on *Lumbis v. Tex. Dep't. of Protective and Regulatory Servs.*, 65 S.W.3d 844 (Tex. App.–Austin 2002, pet. denied), found that evidence that James believed that he should or would be allowed to maintain contact does not render his affidavit involuntary, certainly for the purposes of whether he consented to Dolores and Lupe being appointed managing conservators in the event his parental rights are terminated.

The court then reviewed the standing of the other relatives under section 102.004. First, the court considered whether both parents consented to the suit under subsection 102.002(a)(4). The court considered evidence that James orally consented to the other relatives' petition for managing conservatorship, found that oral consent was sufficient,

and that the trial court could not disbelieve James' testimony on consent. Next, it reviewed Ophelia's testimony which was preserved by an offer of proof. Although Ophelia had been found not guilty of an offense involving dangerous conduct by reason of insanity, two days before the intervention hearing, Ophelia's counsel visited with her and discussed at length her termination case and the relatives' efforts to intervene. Ophelia's counsel represented to the trial court that based upon their conversation, she was of the opinion that Ophelia was competent and understood the statement consenting to the other relatives' intervention. The Waco Court concluded that Ophelia's statement of consent should also be taken as true. Further, the court found that the other relatives were within the third degree of consanguinity, thus satisfying two of the three disjunctive avenues for standing under 102.004. The mandamus was conditionally granted. *In re Cervantes*, 300 S.W.3d 865 (Tex. App.–Waco 2009, orig. proceeding).

NOTE: Chief Justice Gray wrote a strong dissent criticizing the plurality for ignoring the appellate rules and the unequal treatment of the litigants in the proceeding.

3. Standing under 102.006

The parent's rights were terminated on October 18, 2007. Appellants, maternal aunt and maternal grandmother, had contact with the children through the Department; however, neither had continuing possession of the children under a court order. Additionally, neither appellant filed suit within ninety days of the termination of parental rights. Appellants sought adoption of the children after the ninety-day period, but failed to obtain the consent of the Department, the children's managing conservator. The court held: "Under a plain reading of section 102.006, the Appellants lacked standing to initiate a suit for adoption."

Appellants argued that the Department's actions in encouraging the aunt to perform services and engage with the children should estop the Department from raising its lack of consent to the adoption and the ninety-day bar to the adoption.

The court framed the issue regarding consent as follows: "We must determine whether section 102.006(b)(2) should be read in conjunction with Texas Family Code section 162.0121 governing adoptions." The court held: "the Family Code explicitly provides that chapter 162 is '[s]ubject to the requirements for standing to sue in Chapter 102.' [Internal citations omitted]. Consequently, section 162.010's provision that the managing conservator's consent may not be refused absent good cause does not apply until ***after*** the movant has established standing under Chapter 102." (Emphasis in original). The court continued: "Unlike the language of section 162.010, section 102.006 does not require the managing conservator to consent to adoption nor is there any requirement that a refusal to consent must be made in good faith." The court concluded: "There simply is no statutory basis for an inquiry into the motivation of a managing conservator's refusal to consent to an adoption in section 102.006, and we cannot import section 162.010 to provide such a basis."

Appellants argued that equity demands the Department be estopped from arguing that appellants lack standing based on the ninety-day deadline in section 102.006(c). The court held: "Much like our analysis under section 102.006(b)(2), there is no requirement under section 102.006(c) that the Department notify the appellants of either the ninety-day deadline or its intention to withhold its consent to adopt. [Internal citations omitted]. The legislature did not impose such a burden on the Department, and we cannot." The court reiterated its prior holding in *In re H.G.*, 267 S.W.3d 120 (Tex. App.–San Antonio 2008, no pet.): "'[W]hile equity may estop a party from relying on a mere statutory bar to recovery, it cannot confer jurisdiction where none exists.'" *In re A.M., A.M., and B.M.*, 212 S.W.3d 76 (Tex. App.–San Antonio 2010, pet. denied) (mem. op.). *See also In re J.T.E.E., J.T.E., and D.T.E.*, No 2-10-073-CV (Tex. App.–Fort Worth Apr. 22, 2010, no pet.) (mem. op.) (Grandparents did not file their petition within ninety days from the date of the termination order, thus they lacked standing under subsection 102.006(c)).

B. Indispensable Party

The Department filed a termination case which resulted in an agreed order appointing the Department permanent managing conservator of C.M. and N.M. and kept the children their current foster care placement. The foster parents were appointed joint sole managing conservators of J.M.F., Jr., and the Department was dismissed as a party in reference to J.M.F., Jr. Thereafter, the foster parents and the Department filed a *First Amended Joint Petition To Modify The Parent-Child Relationship* regarding all three children. Later, the Department and the foster parents filed a *Third Amended Joint Petition To Modify And To Terminate The Parent-Child Relationship* between C.M., N.M., and J.M.F., Jr. and the mother, and between J.M.F., Jr. and his father, J.M.F., Sr. After a jury trial, the trial court found by clear and convincing evidence that both the mother and J.M.F., Sr. engaged in acts or conduct that satisfied one or more of the statutory grounds for termination and that termination was in the best interest of the children and ordered that their parental rights be terminated. Mother filed a motion for appointment of appellate counsel and a notice of appeal and was appointed appellate counsel.

On appeal, mother argues: (1) the order of termination is

void because an indispensable party (C.M.'s and N.M.'s father) was not served and therefore not properly joined; (2) the evidence is factually insufficient to terminate mother's parental rights to the children; and (3) the trial court abused its discretion by appointing the Department as possessory conservator of C.M. and N.M. because the Department did not ask for that relief.

The Department argued: (1) that mother does not have standing to challenge service on a father and, even if she does, the father was properly served; (2) even if mother could have challenged the father's allegedly improper service, defects in joinder must be raised at the trial court by a sworn plea alleging the defect, which mother failed to do; and (3) having failed to files a sworn plea alleging the defect and having failed to object at trial, the mother waived this complaint. Finally, the Department contended that a judgment is not rendered invalid solely because it was entered in the absence of an indispensable party. *In re E.M., N.M., and J.M.F., Jr.*, No. 12-09-00092-CV (Tex. App.–Tyler Sept. 23, 2010, pet denied).

C. Intervention under 102.004(b)

Maternal grandmother intervened in mother's and father's custody suit under subsection 102.004(b). To intervene, grandmother had to show substantial past contact with the child and that appointment of one or both of the parents would significantly impair the child's physical or emotional development. Because there was no evidentiary record on standing, the appellate court construed grandmother's pleadings in her favor and looked to her intent. The court of appeals found grandmother's affidavit attached to her petition sufficient to establish substantial past contact with the child because it recited that grandmother had regularly seen the child on weekends and a few nights a week and that mother and the child had lived with her for several months beginning when the child was two years old. Grandmother's affidavit also alleged that mother only began denying her access when mother began dating mother's current husband and that father had attempted to allow grandmother access during the pendency of the case. Grandmother's affidavit also established that appointing mother as the child's managing conservator would significantly impair the child's physical or emotional development because it recited: (1) mother had taken drugs in the past in and out of the child's presence; (2) mother's withholding access to the child was causing the child emotional trauma; (3) grandmother was the only stable individual in the child's life because mother was drinking and taking Xanax; and (4) mother used the television and computer to entertain the child and mother had no interaction with the child at all. The court of appeals found that grandmother had pled sufficient facts to intervene under section 102.004(b). *In re K.N.M.*, No. 2-08-308-CV (Tex. App.–Fort Worth July 23, 2009, no pet.) (mem. op.).

D. Mandatory Transfer under TFC 155.201 Not Automatic

The mandatory transfer provision of subsection 155.201(b) is not automatic. The trial court is only required to transfer a case "*on the timely motion of a party*". *In re B.G.M. and B.M.M.*, No. 01-08-00018-CV (Tex. App.–Houston [1st Dist.] May 7, 2009, no pet.) (mem. op.) (emphasis in original).

E. Service of Process Waived by Answer

Father complained that his attorney was ineffective for failing to move for a dismissal because he was not served until fifteen days before trial. Further, the return of service reflecting personal service on father was not filed until three months after his parental rights had been terminated. Father alleged that his attorney should have objected to the trial court's personal jurisdiction over him. The court of appeals disagreed. TRCP 120 allows an attorney to enter an appearance in open court. After the trial court appointed father's attorney, she made general appearances at various hearings, including representing father at the final hearing. "Because counsel made a general appearance on behalf of [father], [father] waived service of process as well as any claim that the court lacked personal jurisdiction over [him]." *In re R.M.R., R.G.R., R.R., and J.J.R.*, No. 04-09-00253-CV (Tex. App.–San Antonio Dec. 9, 2009, pet. denied) (mem. op.).

F. Exchange of Benches Doctrine

The 313th Judicial District Court of Harris County, Texas, terminated the parental rights of the biological parents to the subject children and appointed the Department as managing conservator on August 29, 2006. Five-and-a-half months later, a maternal aunt to two of the children filed a petition to end the Department's conservatorship and to adopt the subject children. For an unknown reason, the aunt's petition for adoption came before the 309th Judicial District Court. On August 25, 2008, the 309th District Court entered an order of dismissal for want of prosecution as to the aunt's petition. Despite this dismissal, the 313th Judicial District Court held a hearing on the aunt's adoption petition on October 1, 2008. Without explanation, the 313th District Court entered an order dismissing the aunt's petition and denied her motion for new trial.

In the court of appeals, aunt argued that the 313th District Court erred in dismissing her petition based on the dismissal of her petition by the 309th District Court. Aunt argued that the order of dismissal issued by the 309th District Court was void for lack of subject matter jurisdiction. The

court agreed. The Texas Constitution and Government Code give district courts broad latitude to exchange benches and enter orders on other cases in the same county. Although the Family Code contains a provision for continuing, exclusive jurisdiction over matters involving the welfare of a child in a SAPCR suit, this does not preclude the exchange of benches doctrine. Thus, the issue before the court was whether the judge of the 309th District Court was acting on behalf of the 313th District Court when he issued the dismissal order.

The court looked to the totality of the facts in determining that the judge of the 309th District Court was not acting on behalf of the 313th District Court. The court considered that: 1) the order's caption was styled as pending in the 309th District Court; 2) the docket sheet indicates that aunt's adoption petition might have been mistakenly assigned to the 313th District Court; and 3) the 313th District Court continued docketing activities in aunt's case under the termination suit cause number. Further, the parties proceeded before the 313th District Court as if no dismissal had been rendered by the 309th District Court. The 313th District Court scheduled a hearing on aunt's petition over a month after the 309th District Court dismissed her petition and no party mentioned the dismissal at the hearing or at the motion for new trial.

Having determined that the judge of the 309th District Court was not acting on behalf of the 313th District Court when he signed the dismissal order, the final question before the court was whether the 313th District Court's continuing, exclusive jurisdiction deprived the 309th District Court of jurisdiction. After noting that the appellate courts were split on the issue of whether the Family Code's continuing and exclusive jurisdiction is truly jurisdictional or merely a matter of dominant jurisdiction, thus rendering it invulnerable to a collateral attack, the Houston Fourteenth Court determined that the 309th District Court was indeed without jurisdiction. The court held: "After reviewing the cases and arguments supporting both sides of the issue, we determine that the Family Code's continuing, exclusive jurisdiction provision is a matter of true jurisdiction. Thus, when one court has continuing and exclusive jurisdiction over a matter, any order or judgment issued by another court pertaining to the same matter is void." "Accordingly, we determine that the 309th District Court did not have jurisdiction when it dismissed [aunt's] petition for adoption because the 313th District Court had continuing and exclusive jurisdiction over the children." *Celestine v. Tex. Dep't of Family and Protective Servs*., 321 S.W.3d 222 (Tex. App.–Houston [1st Dist.] 2010, no pet.).

G. Temporary Orders

In 2003, mother pleaded guilty to knowing or intentional serious injury to a child, M.S., a first degree felony. One condition of her community supervision was that she have "no association of any kind" with father. Yet, B.W.B. was born to them in December 2006. On appeal, the parents argued, and the appellate court agreed, that the removal of B.W.B. from father's home and the appointment of the Department as temporary managing conservator were largely based on the perceived risks to the B.W.B. from the 2002 injuries to M.S. B.W.B., then six months old, was healthy, current on doctor visits and vaccinations, free of injuries and bruises, and residing in appropriate surroundings. The appellate court noted that the trial court's consideration of the circumstances surrounding the injuries to M.S. was expressly authorized by statute. In determining whether the evidence showed a continuing danger to the physical health or safety of B.W.B., the Family Code authorized the trial court to consider whether the child's household included a person who had abused or neglected another child in a manner that caused serious injury to the other child. *See* 262.201(d). The evidence established that mother was routinely present in the home in which B.W.B. was living with his father.

The appellate court distinguished *In re Cochran*, 151 S.W.3d 275 (Tex. App.–Texarkana 2004, orig. proceeding). In *Cochran*, there was no indication the parent's prior history included a plea of guilty to a felony offense of injury to a child or other comparable conduct which, by statute, may be considered in future determinations of parental suitability.

Under subsection 262.201(b)(3), evidence of mother's plea of guilty to serious injury to a child supports the trial court's finding that there was a substantial risk of continuing danger if B.W.B. was returned home. The parents argued that the trial court heard no evidence at the adversary hearing from which it could have concluded that the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal. The appellate court disagreed, finding that the parents' disregard of the court-ordered terms of mother's community supervision and both parents' initial efforts to hide their parentage of B.W.B from the Department's investigation is evidence supporting the trial court's finding. *In re B.W.B.*, No. 07-08-0487-CV (Tex. App.–Amarillo Oct. 29, 2009, pet. denied) (mem. op.).

H. Appointment of Counsel in Termination Case

After mother's and father's retained counsel was permitted to withdraw four months before trial, father filed an affi-

davit of indigency for him and mother. The affidavit requested appointment of counsel and listed the value of their property and assets and the amount and source of their income. Mother and father contested the termination of their parental rights. The clerk's record did not contain an order denying the request for appointment of counsel and did not contain any indication that a hearing was held on the indigency claim. The Department conceded error. The court of appeals reversed and remanded the case for a new trial, holding: "The trial court erred in failing to conduct a hearing on [mother's and father's] claim of indigence and their request for an attorney to represent them at trial, and in failing to appoint an attorney to represent them in the termination of parental rights suit. We sustain [mother's and father's] issues concerning the failure to appoint counsel to represent them at trial." *In re J.S., B.I., and Y.C.*, No. 09-08-00536-CV (Tex. App.–Beaumont July 16, 2009, no pet.) (mem. op.).

I. Appointment of Counsel Not Required in Private Termination Case

"It is well-settled that the United States Constitution does not require the appointment of counsel in every termination proceeding. [Internal citations omitted]. Whether due process calls for the appointment of counsel for indigent parents in termination proceedings is left to the sound discretion of the trial court." The court held: "there is no such mandatory requirement [of appointment of an attorney in a termination suit] when, as here the termination suit is brought by the other parent." *In re R.J.C.*, No. 04-09-00106-CV (Tex. App.–San Antonio Mar. 10, 2010, no pet.) (mem. op.).

J. Designation of Expert Witnesses

The Department became involved with the family amid concerns that the children were at risk because mother suffered from Munchausen Syndrome by Proxy. In March 2007, M.H, S.H., and G.H. were brought into care. S.H. and G.H. were placed in foster care, and M.H. was placed with her maternal grandparents, Bradley and Paula. After extensive discovery, the case was tried before a jury. Mother, Bradley, and Paula appealed from a decree terminating mother's parental rights, appointing father as managing conservator of S.H., and appointing the Department as managing conservator of M.H. and G.H. On appeal, Bradley and Paula complain that the trial court erred by failing to exclude the testimony of the Department's expert witnesses for failure to properly designate their mental impressions and opinions before trial. Mother also appealed, adopting Bradley's and Paula's arguments.

The Waco Court considered the issue regarding failure to exclude the testimony of eight expert witnesses. The court noted that the three components to this complaint were: (1) whether the experts are retained or non-retained; (2) whether the Department disclosed the mental impressions and opinions of the experts; and (3) if not, whether appellants were unfairly surprised or prejudiced. TRCP 192.2(f)(3) requires disclosure of the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them if the expert is retained. If the expert is not retained, the responding party need only provide documents reflecting the general substance of the expert's mental impressions. Regarding expert Matthew Cox, the court found that he was a retained expert, but the Department's response failed to comply with TRCP 192.2(f)(3). The court found that appellants were not unfairly surprised. Cox testified at both the adversary hearing and at trial that S.H. and G.H suffered from "abuse by pediatric condition falsification." Regarding M.H., Cox testified at the adversary hearing that "there was a history" which led to unnecessary diagnostic tests. He testified at trial that he had concerns but did not testify that M.H. suffered from abuse by pediatric condition falsification. Regarding expert Dunn, the court found that appellants were unfairly surprised because he testified at the adversary hearing that mother had a depressive personality disorder but testified at trial that mother more likely had factitious disorder. Because his testimony was cumulative, it did not result in the rendition of an improper judgment. Complaints about the other six experts were dismissed due to a failure to make a proper objection or argument. *In re M.H., S.H., and G.H.*, 319 S.W.3d 137 (Tex. App.–Waco 2010, no pet.).

K. Denial of Bench Warrant

Father argued that the trial court's denial of his bench warrant violated his due process rights. Through his attorney, father submitted four letters at trial. The letters provided the trial court with his contentions, past history, and the matters he wished it to consider in reaching its decision. Father's letters essentially mirrored the evidence presented at trial. The court found that the trial court could have concluded that father's presence at trial would result in testimony similar to his letters. Further, father was represented by an attorney who tested the Department's evidence through cross-examination and argument. The trial court stated its reasons on the record (various *Z.L.T.* factors) for denying father's bench warrant. The court of appeals determined that the trial court did not abuse its discretion in denying father a bench warrant. *In re D.H., S.H., and B.H.*, No. 11-08-00294-CV (Tex. App.–Eastland July 30, 2009, pet. denied) (mem. op.).

L. Denial of Motion for Continuance

Father argued that the trial court erred in denying his motion for continuance because he did not have contact with

his court-appointed attorney until shortly before trial and was unable to contact witnesses to testify in his favor. "An application for continuance may only be granted for sufficient cause supported by affidavit, consent of the parties, or operation of law." Because the ground for the motion was want of testimony, father was required to file an affidavit demonstrating that the testimony would be material, that he had used diligence to procure the testimony, and that the testimony could not be procured from another source. Father was also required to state the name, residence, and expected testimony of each witness. Father's motion failed because it was unsupported by an affidavit, was filed on the day of trial, and did not list the names of potential witnesses and their expected testimony. *In re R.A.L.*, 291 S.W.3d 438 (Tex. App.–Texarkana 2009, no pet.).

M. Denial of Motion for Continuance after Parent Chooses to Proceed *Pro Se*

Father sought to discharge his counsel on the day of trial. The trial court denied father's continuance, but permitted him to proceed *pro se* after warning him of his right to appointed counsel. "Just as in [case omitted], the trial court did not permit [father] to proceed pro se until after [father] confirmed he understood the trial was moving forward without a continuance, the trial court would not appoint [father] another attorney, and [father] would be proceeding pro se. Like the [case omitted] court, we conclude the trial court did not abuse its discretion in denying the request for continuance." *In re R.M.R., R.G.R., R.R., and J.J.R.*, No. 04-09-00253-CV (Tex. App.–San Antonio Dec. 9, 2009, pet. denied) (mem. op.).

N. Denial of TFC 263.401 Extension

Mother complained on appeal that the trial court erred in not granting her trial counsel's request at trial for a six-month extension under subsection 264.401(b) because mother's parent had recently died and it was a hardship on her. The Fort Worth Court held that the trial court did not err in denying her request for an extension because mother did not appear at trial to offer testimony in support of her request. Nor did she provide an affidavit showing extraordinary circumstances. *In re D.K., A.S., J.K., A.H., and F.H.*, No. 2-09-117-CV (Tex. App.–Fort Worth Dec. 31, 2009, no pet.) (mem. op.).

O. Trial Notice

1. Inadequate Trial Notice

Father was noticed for a trial date of February 2, 2009; he failed to appear. Thereafter, his attorney's request to withdraw was granted. The trial date was reset for April 13, 2009. Father showed up for the April 13th trial setting after receiving a phone call from the caseworker on the morning of trial. Father urged that the case be reset because he claimed he did not receive notice of the April 13th setting and thought that he was being represented by counsel. The trial court denied his request and proceeded with the trial. Father was appointed counsel, who filed a motion for new trial complaining that his client never received notice of the April 13th trial date. The trial court denied his motion for new trial, found father indigent, and his appeal frivolous. The Department argued that father received the April 13th trial notice at a March 6th permanency hearing. The San Antonio Court reversed and remanded for a new trial, finding that there was nothing in the record to establish that father received notice of the April 13th trial setting and that notice the day of trial was unreasonable. *In re B.G.H.*, No. 04-09-00241-CV (Tex. App.–San Antonio Oct. 14, 2009, no pet.) (mem. op.).

2. Adequate Trial Notice

Mother complained that she did not receive notice of the trial. The Fort Worth Court dismissed her claim because the record established that mother's attorney had received proper notice of the trial setting under TRCP 21a. Knowledge of the setting was therefore imputed to mother. Further, mother's attorney stated at trial that she had mailed a copy of the trial setting to mother *via* certified mail return receipt requested, and had received the green card confirming delivery. *In re D.K., A.S., J.K., A.H., and F.H.*, 2-09-117-CV (Tex. App.–Fort Worth Dec. 31, 2009, no pet.) (mem. op.).

II. TRIAL PRACTICE

A. Judicial Notice

Mother's parental rights were terminated under subsection 161.001(1)(O). On appeal, mother argued that the Department offered no evidence to support three of the four elements of (O). The Department contended that the trial court had the necessary evidence on the elements because it took judicial notice of its file and relied on the contents of the case file to find the challenged elements. The court reversed the case, finding that the record did not affirmatively indicate that the trial court took judicial notice of its records in the case. The trial court may *sua sponte* take judicial notice of appropriate matters; however, when it does so, it must give the parties an opportunity to challenge that decision. "Here, the Department did not ask the trial court to take judicial notice of any prior orders in its file or of any other matters. The court did not announce in open court that it was taking judicial notice, nor did it recite in the termination decree that it had done so. Thus, we hold that the court did not take judicial notice." Since there was no evidence establishing the challenged elements, the case was reversed. *In re C.L. and I.L.*, 304 S.W.3d 512 (Tex. App.–Waco 2009, no pet.).

B. Trial Amendment

Although the Department had not pled for termination under subsection (O), it only presented evidence on that ground at trial. After mother moved for a directed verdict, the Department sought a trial amendment, which the trial court granted. On appeal, mother argued that the trial court erred in granting the trial amendment. "However, to preserve such a complaint, the party opposing the trial amendment must request a continuance." Mother did not request a continuance. Consequently, the issue was overruled. *In re C.L. and I.L.*, 304 S.W.3d 512 (Tex. App.–Waco 2009, no pet.).

C. Jury Waiver

1. Failure to Timely Appear

When the case was called for jury trial, two associates of mother's attorney were present, but neither entered a formal appearance nor was prepared to move forward with the jury trial. Four hours after the jury had been dismissed, counsel appeared with mother and announced ready. The case proceeded as a bench trial. Mother complained about being denied a jury trial. The court held: because neither attorney nor mother appeared timely to object to the bench trial, the jury was properly waived. *In re T.K.*, No. 09-09-00472-CV (Tex. App.–Beaumont March 11, 2010, no pet.) (mem. op.). *Compare In re W.B.W., Jr.*, 2 S.W.3d 421 (Tex. App.–San Antonio 1999, no pet.) (attorney's timely appearance and objection to bench trial preserved right to jury trial under TRCP 220).

2. No Material Question of Fact

Father appealed a frivolous determination, contending that the trial court erred by denying his request for a jury trial and rendering a post-answer default judgment against him. He also complained that the evidence was insufficient to support termination, and that section 263.405 is unconstitutional. The Waco Court found that because father perfected his jury demand and appeared at trial through counsel, the trial court erred in removing his case from the jury docket. However, the Waco Court held that the denial of a jury trial was not reversible error because the case did not contain a material fact question. Specifically, father failed to challenge the termination of his parental rights under subsection (D), which left no material fact question on appeal as to this predicate termination ground. *In re M.V.G.*, 285 S.W.3d 573 (Tex. App.–Waco Mar. 3, 2010, no pet.) (mem. op.).

D. *Batson* Challenge

Batson challenges are reviewed for abuse of discretion. The Texas Supreme Court has recognized that the entirety of the situation is to be reviewed in determining a *Batson* challenge. The court, in following both the United States Supreme Court and the Texas Supreme Court, enumerated the following factors to be included in an analysis of a *Batson* challenge: (1) an analysis of statistical data about the prosecution's use of its peremptory strikes; and (2) a side-by-side comparison of the reasons given to strike black panelists and white panelists who were allowed to serve despite similar situations.

The court states that the Texas Supreme Court "noted that a *Batson* challenge does not call for a 'mere exercise in thinking up any rational basis' and that the prosecutor either stands or falls on the plausibility of the reasons he or she gives—not on the basis of reasons substituted by the appellate court."

Mother argued the record indicates that other venire members gave similar answers and were treated differently than the African American. The court reasoned: "'Disparate treatment,' as such, cannot automatically be imputed in every situation where one of the [Department's] reasons for striking a venireperson would technically apply to another venireperson whom the [Department] found acceptable. [Internal citations omitted]. It is unlikely that two venirepersons on one panel will possess the same objectionable attribute or character trait in precisely the same degree. Such qualitative distinctions may cause a prosecutor to challenge one venireperson and not the other. [Internal citations omitted]. Furthermore, we give great deference to the trial court's decision on the issue of purposeful discrimination because it requires an assessment of the credibility and content of the prosecutor's reasons and all other relevant facts and circumstances." *In re J.A.W. and S.P.W.*, No. 06-09-00068-CV (Tex. App.–Texarkana Apr. 1, 2010, pet. denied) (mem. op.).

E. Jury Charge and Instructions

1. Defective Jury Charge Harmless Error

Father complained, *inter alia*, that the jury charge was defective because it failed to charge the jury separately regarding father's termination as to each child. The Fort Worth Court agreed that the charge was defective for this reason. However, the court held that the error was harmless because the record established that father's endangerment of one child could be used to prove endangerment of the other child. *In re A.M.S. and L.N.S.*, No 2-08-333-CV (Tex. App.–Fort Worth Dec. 10. 2009, no pet.) (mem. op.).

2. Requested Jury Instruction

Mother and father argued that the trial court erred in failing to instruct the jury that incarceration alone is not sufficient to support termination of parental rights. At the charge conference, mother and father "objected by merely stating that incarceration alone is not sufficient to support

termination, a fact pointed out by the statutory conjunctive wording requiring 'confinement or imprisonment *and* inability to care for the child for not less than two years from the date of filing the petition.'" (Emphasis in original). The court of appeals overruled the complaint. "A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge." "We decline to interpret the above objection as a request for instruction." The court further found that even if the above "was an oral request for an omitted instruction, no such error would have been preserved since counsel failed to submit a written instruction to the trial court." *In re R.A.L.*, 291 S.W.3d 438 (Tex. App.–Texarkana 2009, no pet.).

F. Default Judgment

Regarding a post-answer default judgment, the Waco Court held that the trial court erred in rendering the judgment because father appeared at trial through counsel. Trial counsel participated throughout the trial by making objections, cross-examining witnesses, and admitting evidence. Counsel was not permitted to call any witnesses at trial, but did not identify a single witness in his motion for new trial or on appeal that he would have called. Despite the trial court's error in granting the default judgment, this point was overruled since no harm was shown by the error. *In re M.V.G.*, 285 S.W.3d 573 (Tex. App.–Waco 2010, no pet.).

G. Rule 11 Agreement and Withdrawal of Consent

Mother, father, and maternal grandmother entered into a Rule 11 Agreement regarding conservatorship and access. After the parties finished putting their settlement agreement on the record, the trial court stated: "the court will approve the agreements as they have been stated for the record, and I will make it the written order of the court when it is submitted." Almost two months later, mother attempted to withdraw her consent to the Rule 11 Agreement. Mother argued that her withdrawal of consent was valid because it occurred before the trial court had rendered judgment. After motions and argument, the trial court entered a written order conforming to the parties' agreement.

The court of appeals held that mother had not timely withdrawn her consent. A rule 11 agreement is not valid if a party withdraws his or her consent before the trial court has rendered judgment unless the other party successfully sues to enforce the agreement as a contract. Judgment is officially "rendered" when the trial court officially announces its decision on the matter submitted in open court or by written memorandum filed with the clerk. Here, the issues to be resolved by the trial court – conservatorship, child support, and other issues related to the SAPCR – were addressed. No issues were left open to resolution and the trial court's language at the conclusion of the hearing at which the parties entered their Rule 11 Agreement on the record indicated a present intent to orally render judgment. The trial court's docket sheet entry further supports this position. Mother's issue was overruled. *In re K.N.M.*, No. 2-08-308-CV (Tex. App.–Fort Worth July 23, 2009, no pet.) (mem. op.).

H. Mediated Settlement Agreement

The Department filed to terminate mother's parental rights to S.A.D.S. based on prior terminations of parental rights involving mother and her other children, and allegations that mother previously used illegal drugs, was often homeless, and she occasionally resided with a sex offender.

Although the mother completed her service plan, she failed to demonstrate the ability to provide S.A.D.S. with a stable living environment. Eventually, the trial court ordered that the case be referred to mediation.

At mediation, the Department and mother entered into a mediated settlement agreement whereby S.A.D.S.'s maternal grandfather would be appointed sole managing conservator and mother would be appointed possessory conservator of the children. The agreement reads "MEDIATED SETTLEMENT AGREEMENT" across the top of the first page, and it is signed by mother, a Department representative, and the attorneys who attended the mediation, including the child's attorney *ad litem*. The agreement was filed with the trial court. The agreement provides, "The Parties, by their signatures to this agreement, hereby waive their right to have the issues resolved herein tried to the court or to a jury, save and except for any motion for entry of the order of enforcement of this agreement." The mediated settlement agreement covers possession, conservatorship, and child support.

Following the execution of the mediated settlement agreement, the trial court held a hearing for the purpose of entering an order based on the agreement. At the hearing, the Department asked the trial court to sign an order that included a finding that appointing mother as managing conservator would not be in child's best interest because it would significantly impair the child's physical health or emotional development. This provision is not found anywhere within the mediated settlement agreement. The Department alleged that the trial court was required to make the finding pursuant to Texas Family Code 153.131., which the Department argued is required any time a trial court appoints a non-parent as managing conservator.

The trial court entered an order contained the finding under section 153.131. The mother appealed, contending

that the 153.131 should not have been in the order since it was not agreed to as part of the mediated settlement agreement.

The Fort Worth Court agreed with mother, holding that under that rule of statutory construction, the more specific provisions for mediated settlement agreements provided in Family Code section 153.007 should prevail over the more general provisions in section 153.131. The Fort Worth also reasoned that failure to include the section 153.131 language in the final order did not render it void. The judgment of the trial court was modified to exclude the 153.131 language. *In re S.A.D.S.*, No. 02-09-302-CV (Tex. App.–Fort Worth Aug. 12, 2010, no pet.) (mem. op.).

I. ICWA

1. Preservation of Error

Mother appealed a judgment terminating her parental rights to the children. Mother's four complaints all hinged on the issue of whether the Indian Child Welfare Act of 1978's protections should have been applied to the termination case. The appellate court found that the Department knew the children were possibly Indian children and the trial court had reason to believe the children were Indian children. The appellate court abated the appeal and remanded to the trial court so that proper notice could be sent to the proper individuals, and after proper notice, for a hearing to determine whether J.J.C. and A.M.C. are Indian children as defined in the ICWA.

The Department contends that mother waived her issue in several ways. She did not object to the failure to apply the ICWA at the trial court, nor did she object to the charge as containing improper standards of review and incorrect questions regarding the findings necessary for termination of her parental rights. Mother did not raise the trial court's failure to apply the ICWA in her statement of points of error on appeal in accordance with 263.405. The issue is whether the ICWA preempts state law in these regards. *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

2. Federal Preemption

Federal law preempts state law when: (1) Congress has expressly preempted state law; (2) Congress has installed a comprehensive regulatory scheme in the area, removing the entire field from the state realm; or (3) state law directly conflicts with the force or purpose of federal law. The appellate court looked at the third prong, conflict preemption. Texas state rules require preservation of error by the complaining party at the trial court to raise an issue on appeal. Section 263.405 requires a statement of points by the parent for the appellate court to consider an issue in a termination case when the Department is involved. Section 1912 of the ICWA places the burden of determining the issue of whether the ICWA applies on the Department and the trial court, which is in conflict with the state rules regarding preservation of error by the parent. Additionally, section 1914 of the ICWA regarding post-judgment attacks on involuntary terminations for violations of the notice requirements in ICWA are in conflict with subsections 263.405(d) and (i) requirements of bringing complaints in a statement of points. The appellate court held that the provisions of the ICWA allowing post-judgment challenges to involuntary termination proceedings preempt Texas rules and statutes regarding preservation of error. Accordingly, the protections enumerated in the ICWA are mandatory as to the trial court and the Department, they preempt state law, and the failure to follow the ICWA may be raised for the first time on appeal. *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

3. ICWA Guidelines

The ICWA applies to all state child custody proceedings involving an Indian child when the court knows or has reason to know an Indian child is involved. An Indian child is defined by the ICWA as an "unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. The ICWA does not define what constitutes being a "member" or "being eligible for membership." Each tribe has its own criteria for determining tribe membership. The Bureau of Indian Affairs ("BIA") Guidelines for State Courts; Indian Child Custody Proceedings, state: "Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences." The burden is placed on the trial court to seek verification of the child's status through either the BIA or the child's tribe. Circumstances under which a state court has reason to believe a child involved in a court proceeding is an Indian include (i) any party to the case … informs the court that the child is an Indian child; or (ii) any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child. *See* BIA Guidelines for State Courts; Indian Child Custody Proceedings. It is the trial court's and the petitioner's burden to make inquiry sufficient to affirmatively determine whether the child is an Indian child. *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

4. Notice under the ICWA

It is the duty of the trial court and the Department to send notice in an involuntary proceeding "where the court knows or has reason to know that an Indian child is involved." The notice must be sent to the "appropriate Area Director" and the Secretary of the Interior. Upon receiving the notice, the Secretary of the Interior or his designee is obliged to make reasonable documented efforts to locate and notify the tribe within fifteen days or to notify the trial court how much time is needed to complete the search for the child's tribe. In this case, an attorney for the Department sent a notice under the ICWA and filed a copy with the trial court. The appellate court found that the trial court had reason to believe that A.M.C. and J.J.C. are Indian children because the Department discovered information that the children's maternal grandmother was alleged to be a member of the Chippewa Indian Nation. Once the trial court had reason to believe that the children were Indian children, the notice provisions of the ICWA were triggered and became mandatory. The Department's notice did not contain all the required information. Left out of the notice were the child's birthplace; mother's maiden name and prior addresses; and mother's place of birth. No additional notice was sent regarding a different court date than the one listed, nor notification that the cause had been transferred prior to the date listed in the notice for the next hearing. It is undisputed that notice was not sent to any person at any time regarding J.J.C. It is undisputed that there was no compliance with the other requirements of the ICWA at the trial, such as the requirements of experts in Indian cultural issues or a finding beyond a reasonable doubt at the termination hearing that the "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

5. The Remedy

A violation of the ICWA notice provisions may be a cause for invalidating the termination proceedings at some future point in time. The appellate court sustained mother's first issue that the trial court erred in failing to properly notify the tribe as required by the ICWA. The proper remedy in this situation is to remand the case so that proper notice can be provided; the appellate court will conditionally affirm the termination judgment in the event it is determined that A.M.C. and J.J.C. are not Indian children. The appellate court abated the appeal and remanded the case to the trial court. The trial court was required to ensure that proper notice that complies with the statutory notice requisites may be provided. The trial court shall then conduct a hearing to determine whether A.M.C. and J.J.C. are Indian children under the ICWA. If, after proper notice and a hearing, the trial court has determined that A.M.C. and J.J.C. are not Indian children, then the appellate court will issue a judgment affirming the trial court's termination judgment. If, after notice and hearing, the trial court determines that A.M.C. and J.J.C. are Indian children, then the appellate court will issue a judgment reversing the trial court's termination judgment and the trial court shall conduct a new trial applying the ICWA. *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

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

"Although a trial court should evaluate the reasonable efforts of the Department to identify relatives who could provide the child with a safe environment if the child is not returned to a parent, the Department's placement of the child with a non-relative does not preclude termination: 'The determination of where a child will be placed is a factor in evaluating 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 non-relatives.' [Internal citations omitted]. [Father] provides no authority, and we have found none, that suggests that there is either a statutory or a common-law duty imposed on the Department to make a placement with a relative before a party's parental rights may be terminated." *Frank R. v. Tex. Dep't of Family and Protective Servs.*, No. 03-09-00436-CV (Tex. App–Austin Apr. 13, 2010, no pet.) (mem. op.).

III. EVIDENTIARY ISSUES

A. Admission of Evidence

1. Telephone Calls

Father complains that the trial court erred in admitting the recordings of his phone calls from jail on the night of R.F.'s death. The phone calls were relevant to whether father was responsible for R.F.'s death. Through the recorded conversations, the jury was able to hear father's explanations for the injuries, which ranged from R.F. having fallen off a chair to father admitting that he hurt R.F., as well as father's complaints about R.F.'s tendency to "run around all day" and his frustrations with trying to care for both R.F. and N.M. at the same time. This evidence tends to show that father grew frustrated with R.F., lost his temper, and abused R.F., causing the fatal injuries. The phone calls also are relevant to the evaluation of N.M.'s best interest. In the calls, father expresses no remorse for R.F.'s death, nor any concern for N.M. Rather, father spent most of the phone calls complaining about his own perceived mistreatment by his mother and grandmother. This raises questions about father's ability to meet N.M.'s physical and emotional needs. *Murray v. Tex. Dep't of Family & Protective Servs.*, 294 S.W.3d 360 (Tex. App.–Austin

2009, no pet.).

2. Prior Criminal Convictions

Father complains that the trial court erred in admitting his prior criminal convictions. At trial, father based his objections on the fact that the convictions were not violent acts and that some were more than ten years old. Father's objections were grounded in TRE 609, which applies only to convictions offered for purposes of impeachment. Here, the Department offered father's convictions as evidence regarding the best interest of N.M. Father's use of illegal drugs and his prior convictions are relevant to several of the *Holley* factors used to determine the best interest of the child. Nor does the fact that several of the convictions were more than ten years old render the evidence more prejudicial than probative. The appellate court notes "it is highly unlikely that evidence of these misdemeanor convictions would inflame a jury that heard disturbing and detailed medical evidence regarding the severe and brutal injuries R.F. suffered while in father's care, nor that the jury's verdict turned on the misdemeanor convictions". *Murray v. Tex. Dep't of Family & Protective Servs.*, 294 S.W.3d 360 (Tex. App.–Austin 2009, no pet.).

3. Child Hearsay Statements under TFC 104.006

Seventh Court of Appeals rejected father's complaint that the trial court abused its discretion in admitting evidence of the children's statements. Father argued the children's statement were obtained through the use of leading questions and were the result of coaching by the children's foster parents. Father asserts the statements are unreliable because the children are functioning at less than their age levels. The children's licensed professional counselor ("LPC") testified that the children's statements were reliable and accurate because their accounts of sexual abuse were consistent when told on multiple occasions. And the children had not seen each other for extended periods of time. Each child was telling the same story, and the stories continued to come out over time. The children's statements were consistent with what the LPC had learned about the children while counseling them. The children's accounts of sexual abuse disclosed information related to sex that children of their ages would not normally know. The LPC was not troubled that current statements were inconsistent with statements following a prior incident because it is not uncommon for children who have endured such abuse to open up later when they are less afraid. The children's statements were corroborated by a SANE nurse who examined the two girls. Both girls suffered from acute trauma to their sexual organs and each had immediate dilation of the anus indicating that multiple sexual assaults had occurred. The children acted out sexually after removal and exhibited predatory behavior, which corroborates their testimony. There is no evidence that either child had a history of telling falsehoods or that either child was motivated to not tell the truth. The LPC testified that, in her opinion, the children's statements were not coached and the foster parents had complied with requests on how to follow up on the children's statements with questions that were not leading. *In re D.D.D.K., C.E.K., Jr., and C.E.K.*, No. 07-09-0101-CV (Tex. App.–Amarillo Dec. 1, 2009, no pet.) (mem. op.).

B. Privilege Against Self-Incrimination

In a civil case, there is no right to make a blanket assertion of privilege and refuse to answer any questions. Instead, the privilege must be asserted on a question-by-question basis. Thus, the trial court did not abuse its discretion in requiring father to take the stand and assert the privilege in front of the jury on a question-by-question basis. Further, in a civil case, the factfinder may "draw reasonable inferences from a party's assertion of the privilege against self-incrimination." Thus, the jury was free to draw a negative inference from father's refusal to answer questions about R.F.'s death or father's ability to care for N.M. The purpose of terminating a parent's rights is not to punish the parent for past conduct, but to protect the child and ensure that her best interests are served going forward. Thus, a termination proceeding is a civil proceeding for purposes of the privilege against self-incrimination. *Murray v. Tex. Dep't of Family & Protective Servs.*, 294 S.W.3d 360 (Tex. App.–Austin 2009, no pet.).

C. TFC 161.004 Permits Use of Evidence Occurring Prior to an Agreed Final Order

Mother and father entered into a mediated settlement agreement naming paternal great aunt and uncle permanent managing conservators of the children with the parents maintaining possessory conservatorship. The trial court entered an agreed final order consistent with the terms of the mediated settlement. Due to conflicts between the parents and the managing conservators, the managing conservators relinquished custody of the children to the Department. The Department filed a petition to terminate the parents' parental rights to the children. The trial court, in accordance with the jury's verdict, entered an order terminating the parent-child relationship of both parents to all children. On appeal, mother and father argue that *res judicata* prevents the Department from offering evidence of misconduct that occurred prior to the agreed final order. The court stated: "Although there was not a previous order denying termination of [the parents'] parental rights, there was an agreed final order in response to a petition to terminate their parental rights." The court held: "Section 161.004 allows the trial court to consider evidence pre-

sented in a previous hearing in a suit for termination, and we follow that reasoning and find that the trial court could consider evidence of conduct prior to the agreed final order." Mother's and father's issue was overruled. *In re M.F., C.B.F., & E.F.*, No. 11-08-00276-CV (Tex. App.–Eastland May 13, 2010, no pet.) (mem. op.).

D. Disclosure of Confidential DFPS Records

In accordance with 261.201, if, after a hearing and *in camera* review of the requested documents, the court determines that the disclosure of the information is essential to the administration of justice and not likely to endanger the life or safety of the child, a person reporting alleged abuse, or any person participating in the investigation, the court may order the documents to be disclosed. The Court held: "The statute does not require the trial court to make specific findings either that the disclosure of the records is 'essential to the administration of justice' or that disclosure is 'not likely to endanger' the persons listed in the statute. [Internal citations omitted]. Absent such a specific requirement, we will not impose one." *In re Agers*, No. 06-10-00020-CV (Tex. App.–Texarkana May 5, 2010, mandamus denied) (mem. op.).

IV. CHILD CUSTODY

A. The Hague Convention and *Ne Exeat* Rights

Mother and father of the subject child were divorced in Chile, a signatory to the Hague Convention. Mother was awarded daily care and control and father was granted regular visitation with the child. Chilean law conferred upon father a *ne exeat* right: the right to consent before mother could remove the child from Chile. While further proceedings were pending before the Chilean court, mother moved to Texas with the child and instituted a custody action in Texas state court seeking to limit father to supervised visitation.

The Texas trial court granted father liberal periods of access, so long as he remained in Texas. Father brought suit in federal district court seeking a return of the child to Chile under the Hague Convention. The federal district court determined that father's *ne exeat* right did not constitute a right of custody under the Convention, and as a result, the return remedy was not authorized. The U.S. Fifth Circuit Court of Appeals agreed, concluding that father's *ne exeat* right was only "a veto right over [the child's] departure from Chile."

The United States Supreme Court reviewed the case to address the split in the federal appellate courts as to whether a *ne exeat* right constitutes a "right of custody." The issue of "right of custody" is of extreme import because the Hague Convention requires a remedy of return to a child's home country, absent certain exceptions, if a child has been "wrongfully" removed. A removal is "wrongful" when the child is removed in violation of "rights of custody." Since the United States is a signatory to the Hague Convention, if the subject child had been "wrongfully removed or retained within the meaning of the Convention," the child should be "promptly returned," unless an exception applies.

In deciding that Chilean law provides father a joint right to determine the child's residence, the Court looked to Chilean law which interprets a *ne exeat* right as a "right to authorize the minors' exit" from Chile. The Supreme Court determined that father's *ne exeat* right is best described as a joint right of custody. The Court determined that the court of appeals' conclusion of no return after a *ne exeat* right is breached would render the Convention meaningless in cases when it is needed most – *i.e.* a parent flees a country in violation of the other parent's right to determine residence. "The Convention should not be interpreted to permit a parent to select which country will adjudicate these questions by bringing the child to a different county, in violation of a *ne exeat* right." Further, the State Department's view (which is accorded "great weight" as it is aware of the diplomatic consequences of the interpretation of *ne exeat* rights), as well as that of most other signatory countries to examine the question, is that a *ne exeat* right is a "right of custody."

Despite the foregoing, a remedy of return is not automatic and can be avoided if a Convention exception applies. These include whether the child would be subject to harm if returned and whether the child is of sufficient age to object to the return. The Supreme Court reversed the court of appeals and remanded the case to the trial court for a determination on those issues. *Abbott v. Abbott*, ___ U.S. ___ (U.S. May 17, 2010).

B. The UCCJEA

Father brought this appeal from an order terminating his parental rights to L.R.J. and granting the adoption of L.R.J. by her stepfather. In April 2007, the initial custody determination granting mother and father joint custody was entered in Michigan pursuant to the UCCJEA. Michigan was the home state of all parties. Mother, stepfather, and L.R.J. moved to Texas in early 2007. In August 2007, the Michigan court entered a consent order regarding grandparent visitation. On November 9, 2007, nine months after moving to Texas, mother filed a petition to terminate father's parental rights since Texas was now the child's home state of residence. Father and grandparents filed special appearances, pleas to the jurisdiction, and requests for the court to decline jurisdiction because the Michigan court retained jurisdiction over issues relating to L.R.J.'s custody.

Jurisdiction is predicated on the UCCJEA. The question of jurisdiction under the UCCJEA is one of subject-matter jurisdiction. Section 152.203 prohibits a Texas court from modifying a child custody determination made by a court of another state unless the Texas court has jurisdiction to make an initial determination under subsection 152.201(a)(1) or (2) and: (1) the court of the other state determines it no longer has exclusive continuing jurisdiction under 152.202 or that a Texas court would be a more convenient forum under 152.207; or (2) a Texas court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not currently reside in the other state.

The record showed: (1) the Michigan court continued to exercise jurisdiction after the petition was filed in Texas (Michigan court entered a contempt order against mother for her failure to comply with the grandparent visitation order); and (2) neither trial court made a determination that father no longer resided in Michigan. Under 152.203, the Texas trial court had no jurisdiction to modify the child custody determination made by the Michigan court. The order terminating father's parental rights and granting adoption were vacated and the appellate court rendered judgment dismissing the cause for lack of subject-matter jurisdiction. *In re L.R.J.*, No. 11-08-00279-CV (Tex. App.–Eastland Feb. 18, 2010, no pet.) (mem. op.).

C. Possessory Conservatorship

1. Section 153.191 Inapplicable

Mother argues that the trial court erred by not appointing her as a joint co-possessory conservator in accordance with 153.191 because the trial court did not find that "her parental possession of access would endanger the physical or emotional welfare of the children." Mother's parental rights were terminated by court order divesting her of "all legal [parental] rights and duties." The term "parent", as defined by the Family Code, "does not include a parent to whom the parent-child relationship has been terminated." Thus, 153.191 is inapplicable because mother's parental rights were terminated. *In re H.M.P. and B.R.P.*, No. 13-08-00643-CV (Tex. App.–Corpus Christi Jan. 7, 2010, no pet.) (mem. op.).

2. Possessory Conservatorship Granted

The Tyler Court rejected mother's claim that the trial court abused its discretion in appointing the Department as possessory conservator of C.M. and N.M. because the Department did not ask for that relief. The Court reasoned that a suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with powers in all relevant custody, control, possession, and visitation matters involving the child. Since the child's best interest is paramount in SAPRC suits, the trial court has broad discretion in appointment of conservators. *In re E.M., N.M., and J.M.F., Jr.*, No. 12-09-00092-CV (Tex. App.–Tyler Sept. 23, 2010, pet. denied).

D. Unrestricted Right to Determine Domicile

Second Court of Appeals rejected father's contention that the trial court erred by failing to restrict the child's domicile to a specific geographic area because mother testified at trial she wanted to move to California, where she was born and where her parents live. Texas does not have any specific statute regarding residency restrictions in custody cases. However, unless limited by court order, a sole managing conservator has the exclusive right to designate the primary residence of a child. It is the public policy of this state to assure that a child will have frequent and continuing contact with parents who have shown the ability to act in the child's best interest; to provide a safe, stable, and nonviolent environment for the child; and to encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage. *See* 153.001(a).

The trial court did not abuse its discretion by declining to include a geographic restriction in its order because there is evidence to favor allowing mother to move with the child to California. Specifically, father's history of assaulting mother, including that father had earnestly threatened mother's life, is evidence that the trial court acted reasonably by allowing mother and child to move so they could avoid a violent environment. Father's failure to support the child financially and failure to complete any of his service plan showed father did not have the ability to act in the child's best interest; thus, father was not entitled to frequent and continuing contact with her. Mother's increased support structure in California enabled her to better provide for the child's needs. *In re M.M.M.*, No. 2-09-203-CV (Tex. App.–Fort Worth Mar. 4, 2010, no pet.) (mem. op.).

E. Supervised Visitation

Considering father's history of assaulting mother and his threat to kill mother, the trial court did not act unreasonably because supervised visitation at a visitation center is one of the trial court's options granted by the Legislature. *See* 153.004(d)(2)(A). Father's threat to abscond out of state with the child further supports the trial court's order of supervised visitation to be in the child's best interest. *In re M.M.M.*, No. 2-09-203-CV (Tex. App.–Fort Worth Mar. 4, 2010, no pet.) (mem. op.).

F. Rebuttal of Presumption of Paternity

On April 3, 2007, the Department filed a petition for protection after two children were born positive for cocaine. Appellant Brown requested genetic testing to determine his paternity relative to the three oldest children. Paternity testing was ordered on the same day the Department was appointed temporary managing conservator of the children. The three oldest children were placed with Brown on the condition that they have no contact with the mother except through supervised visitation at the Department. Brown violated the conditions of placement by allowing mother to accompany him and the children to visit the aunt. During the visit, the children witnessed mother being stabbed by the aunt. The children were removed from Brown. On April 3, 2008, mother was found deceased. On June 16, 2008, Brown was dismissed from the suit because he was excluded as being the father of the children. On July 9, 2008, Brown filed an intervention seeking appointment as sole managing conservator of the children. At trial, Brown's relief was denied because the court found that Brown could not provide the children with a safe, stable, and non-violent environment. On appeal, Brown argued that the trial court erred in permitting the Department to remove the youngest child, and the Department lacked standing to challenge his paternity. The Houston Fourteenth Court rejected those claims because: (1) Brown could not appeal from an interlocutory order, and (2) Brown agreed to the paternity testing so that issue was moot. Brown next argued that the appointment of the Department as sole managing conservator of the children was contrary to the parental presumption. Brown asserted that he was the common-law husband of the deceased mother which entitled him to the parental presumption under subsection 160.204(1). The Houston Court stated that the parental presumption could be rebutted by genetic testing excluding him as the father under section 160.631, and that presumption had been rebutted. *In re X.C.B. AKA. X.C., I.C.B. AKA I.C., S.B.C., and J.W.C. AKA J.W.W.*, No. 14-08-00851-CV (Tex. App.–Houston [14th Dist.] July 30, 2009, pet. denied) (mem. op.).

G. Agreement Not Enforceable if Not in Child's Best Interest

An agreement on conservatorship issues that is not in the child's best interest violates public policy and is unenforceable. *In re K.N.M.*, No. 2-08-308-CV (Tex. App.–Fort Worth July 23, 2009, no pet.) (mem. op.).

V. GRANDPARENT ACCESS

A. No Evidence Regarding Parental Unfitness or Significant Impairment of Development

Paternal grandmother filed an original petition seeking grandparent visitation with D.K.B. Grandmother admitted that her main objective in filing the suit was to have unsupervised visits with D.K.B. The trial court granted the petition and ordered mother to allow grandmother possession and access to D.K.B. for one weekend day per month until the time the child reached three years of age, at which point the visits would extend to one weekend per month, including one overnight period. Mother appealed, arguing the trial court abused its discretion.

Section 153.433 requires the trial court to presume that a parent acts in the best interest of the parent's child, and that a grandparent must overcome that presumption in order to obtain a possession order. The standard of review in reviewing a trial court's determination of grandparent access or possession under 153.433 is abuse of discretion. A trial court abuses its discretion when it grants access to a grandparent who fails to meet the statutory requirements of 153.433.

There was no evidence presented at trial that mother was an unfit mother or that she would have completely denied grandmother's access to D.K.B. Grandmother's own testimony established that mother is a fit parent and that mother had facilitated grandmother's visits with D.K.B. in the past. Additionally, grandmother did not produce any evidence indicating that D.K.B.'s physical health or emotional well-being would be significantly impaired if grandmother continued to have visits with D.K.B. supervised by mother. The court held: "[w]ithout any such evidence, the trial court had no discretion to disregard [mother's] decisions regarding when and under what circumstances [grandmother] may visit with [D.K.B.]." The court reversed and rendered. *In re D.K.B.*, No. 13-08-00177-CV (Tex. App.–Corpus Christi Aug. 13, 2009, no pet.) (mem. op.).

B. Non-Specific Testimony of Grandparent Insufficient

Second Court of Appeals reversed trial court's granting of grandparents' petition to modify for grandparent access. Mother contends on appeal that grandparents did not show by a preponderance of the evidence that mother's denial of grandparents' access to the children would significantly impair the children's physical health or emotional well-being. The high threshold a grandparent must prove that denial of access would "significantly impair" the child's physical or emotional well-being exists so that a trial court will refrain from interfering with child-rearing decisions made by a parent simply because the court believes that a "better decision" could have been made.

Evidence that: (1) children know grandparents and have been around them while growing up; and (2) when D.K.G. is with grandparents he wants to hug and be close to them,

he expresses how much he misses them, and he indicates that there is too much time between visits is *not* evidence that denying grandparents access to the children would significantly impair the children's physical health or emotional well-being. Rather, it is merely evidence that grandparents are accustomed to spending time with the children and that D.K.G. misses his grandparents and wants to see them – circumstances that, in general, are not uncommon amongst grandparents and grandchildren. A grandparent's answer of "Yes" to a question inquiring whether denial of access to the children would significantly impair them does not, by itself, constitute evidence overcoming the parental presumption. Testimony from grandparent that it would be good for the children to spend time with her because it would "help them" and testimony that grandparent helps children with homework when they visit is not evidence demonstrating significant impairment. Grandparents offered no testimony that mother is an unfit parent and they presented no probative evidence to support their contention that denial of access would significantly impair the children. *In re A.N.G. and D.K.G.*, No. 2-09-006-CV (Tex. App.–Fort Worth Jan. 21, 2010, no pet.) (mem. op.).

VI. TERMINATION GROUNDS

A. TFC 161.001(1)(C)

In a private termination action, father's parental rights were terminated by mother. The evidence established that father had drug and alcohol problems at the time of the parties' divorce. At the time of trial, father had not seen the children in six years and had made only one child support payment during that time. Father was incarcerated at the time of trial.

The trial court terminated father's parental rights under subsection (C). That ground requires that a parent "voluntarily left the children alone or in the possession of another without providing adequate support of the children and remained away for a period of at least six months." On appeal, father argued the evidence was insufficient to support subsection (C) because there was no specification of the six-month period relied on and because there was insufficient evidence that he voluntarily abandoned the children without providing adequate support. The court of appeals reversed father's termination. The court noted that although the six-month period of abandonment was not specified, the evidence established that father had not had contact with the children for several years. The evidence was insufficient, however, to establish that father "voluntarily" left the children. Father did not leave the children with mother voluntarily; rather, he left the children with mother due to a court order. As father was a possessory conservator, he was only granted supervised visitation. After considering the plain meaning of the word "voluntary", the court reasoned that father did not leave the children with mother of his own volition, but rather due to a court order. "As in *Wetzel*, we cannot see how [father's] leaving the children with their mother, as required by a divorce decree, can be considered a voluntary act." *In re J.K.H. and B.D.M.*, No. 06-09-00035-CV (Tex. App.–Texarkana Sept. 16, 2009, no pet.) (mem. op.).

B. TFC 161.001(1)(D)

1. Sexual Abuse and Drug Abuse

Inappropriate, abusive, or unlawful conduct by persons who live in the child's home *or with whom the child is compelled to associate on a regular basis in his or her home* represents a part of the "conditions and surroundings" of the child's home under subsection (D). Evidence of sexual abuse of one child is sufficient to support a finding of endangerment with respect to other children. Thus, D.D.D.K.'s and C.E.K.'s outcries of repeated sexual abuse by strange men in the presence of their parents established surroundings which endangered the children, including C.E.K., Jr. Drug use also may establish evidence of an unstable home environment. Father testified the drugs he used dulled his senses and affected mother's ability to care for the children. The Department need not prove that sexual abuse occurred as a result of mother's drug use. The Department need not prove mother's actions were directed at the children or that the children *actually* suffered injury as a result of her conduct. *In re D.D.D.K., C.E.K., Jr., and C.E.K.*, No. 07-09-0101-CV (Tex. App.–Amarillo Dec. 1, 2009, no pet.) (mem. op.).

2. Father's Failure to Stop Mother's Drug Use During Pregnancy

Tenth Court of Appeals affirmed termination of father's parental rights to infant under subsection (D). Father admitted that he knew mother was using drugs while she was pregnant with S.K.A. Although father stated he thought drug use during pregnancy was "stupid," father did nothing to stop mother from using. In fact, father admitted he was also using marijuana and cocaine during mother's pregnancy with S.K.A. Father's failure to take any action to protect S.K.A. from mother's drug abuse is sufficient to establish that he knowingly allowed the child to remain in conditions or surrounding that endangered her physical well-being. *In re S.K.A.*, No. 10-08-00347-CV (Tex. App.–Waco Aug. 19, 2009, no pet.) (mem. op.).

C. TFC 161.001(1)(E)

1. Conduct Prior to Knowledge and Establishment of Paternity

Tenth Court of Appeals rejected father's complaint that the

trial court erred in determining he had engaged in conduct that endangered the child because father was incarcerated when he found out that mother was pregnant. Father's contention is that because he was incarcerated when he found out mother was pregnant, there is legally and factually insufficient evidence he engaged in any conduct prior to his knowledge of his potential paternity that endangered the child and that father's present environment in prison did not endanger the child. The appellate court rejected father's assertion. Knowledge of paternity is not a prerequisite to a showing of a parental course of conduct which endangers a child under subsection (E). Father's significant history of drug use, extensive criminal history, and history of incarceration prior to the birth of the child constitutes a course of conduct that endangers the emotional and physical well-being of the child. *In re D.W.*, No. 10-09-00188-CV (Tex. App.–Waco Dec. 30, 2009, no pet.) (mem. op.).

2. Knowledge of Endangering Conduct

Mother argued that her knowledge of undesirable facts about father did not rise to the level necessary to establish "endangering" conduct. The court of appeals disagreed. During therapy, mother revealed that father had physically abused her on several occasions, associated with drug dealers, and used drugs, particularly cocaine. They had separated several times due to father's drug use, irritability, anger, and failure to hold a job. Mother stated that father would discipline the child by "thumping" him on the head. Mother's therapist concluded that mother did not make good decisions as a parent by leaving her children with their father, knowing his tendencies to be abusive and use drugs. Mother testified that when she noticed a handprint on the child's face, she assumed that father had hit the child. The court held: "[Mother's] knowledge of [father's] unlawful and abusive conduct inherently created conditions or surroundings which endangered the physical or emotional well-being of her children to support termination under section 161.001(1)(D)." "[Mother's] knowledge of [father's] abusive conduct and drug dealing placed her children in the care of someone who engaged in conduct which endangered their physical or emotional well-being." *In re D.R.J.*, No. 07-08-0410-CV (Tex. App.–Amarillo July 8, 2009, pet. denied) (mem. op.).

3. Domestic Violence

Evidence established that mother exposed the children to domestic violence, both before and after the children were removed from her care. Citing *Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990), mother argued that "being a victim of domestic violence [] is not, in [and] of itself, grounds for a parent to lo[se her] children." *Lewelling*, 796 S.W.2d at 167 (Texas Supreme Court held that "evidence that a parent is a victim of spousal abuse, by itself, is no evidence that awarding custody to that parent would significantly impair the child."). The court of appeals disagreed, writing: "numerous Texas courts of appeals have held that exposing children to domestic violence – a matter extending beyond the fact that a parent has been the victim of abuse – may be considered in determining endangerment in the context of a termination proceeding." The court ultimately held the evidence sufficient to support mother's termination under subsection (E). *L.B. v. Tex. Dep't of Family and Protective Servs*., No. 03-09-00429-CV (Tex. App.–Austin Apr. 9, 2010, no pet.) (mem. op).

4. Drug Use and Criminal History

In reviewing father's complaint about the sufficiency of the evidence under subsections (D) and (E), the Fort Worth Court, in affirming the termination, considered evidence that father: (1) had an extensive criminal history involving incarcerations; (2) had four convictions related to methamphetamine; (3) used methamphetamine with mother and possibly used when she was pregnant with K.W.; (4) knew two months into pregnancy that she was pregnant with his child; (5) took no action to ensure K.W.'s safety in mother's womb; and (6) testified mother did not need drug abuse treatment. *In re K.W.*, No. 2-09-041-CV (Tex. App.–Fort Worth Jan. 14, 2010, no pet.) (mem. op.).

5. Drug Use and Imprisonment

Drug addiction and its effect on a parent's life and ability to parent may establish an endangering course of conduct. This is particularly so where drug use continues even though the parent is aware that his or her parental rights are in jeopardy. Although mere imprisonment may not be conduct that endangers the emotional and physical well-being of a child, imprisonment as a result of a detrimental course of conduct endangering the child, such as using illegal drugs, will establish facts sufficient to meet the requirement of subsection (E). Mother continued to use cocaine, and only four months prior to the final hearing, pled guilty to possession of cocaine and was imprisoned. Mother's drug use is directly related to her incarceration and subsequent inability to care for the children. *In re D.D.D.K., C.E.K., Jr., and C.E.K.*, No. 07-09-0101-CV (Tex. App.–Amarillo Dec. 1, 2009, no pet.) (mem. op.).

6. Exposure to Sexual Abuse

A parent's refusal to acknowledge responsibility for the child and protect him or her from a situation that exposes the child to the risk of sexual abuse is grounds for termination of parental rights under subsection (E). *In re D.D.D.K., C.E.K., Jr., and C.E.K.*, No. 07-09-0101-CV (Tex. App.–Amarillo Dec. 1, 2009, no pet.) (mem. op.).

7. Failure to Protect Children from Sex Abuse

Father and mother had three children. Mother had two older daughters, K.W. and R.B., from a prior relationship. The Department sought termination of father's and mother's parental rights to the three younger children and mother's parental rights to K.W., but not R.B. In a termination trial, the jury heard evidence that father had exposed himself to K.W. and R.B. between six to ten times, forced K.W. to touch his sexual organ, and inappropriately touched K.W.'s sexual organ. Additionally, the jury heard evidence that father was physically abusive to his stepson and "threw things" at mother and his stepdaughters. Expert testimony established that father was a perpetrator of sexual abuse, lacked self-control, and had a propensity for violence. Regarding mother, the Department presented evidence that she knew that father had exposed himself on at least two occasions to R.B., refused to believe K.W.'s sexual outcry, and did nothing to protect the children. Further, mother repeatedly admitted in therapy that she did not believe her daughters and was unable to even consider the possibility that they were telling the truth. Mother admitted that after the allegations were made, she married Father and continued to cohabit with him. There was evidence that mother had a "dependent personality disorder," and that she put her need to stay with father above the needs of her children. The jury found that father's and mother's parental rights should be terminated under (D), (E), and best interest. On appeal, the Austin Court rejected father's argument that the only evidence against him was the testimony of K.W. and R.B., and that both of them were motivated to lie about the sexual abuse allegation. The Austin Court also rejected mother's argument that supporting her husband and not separating from him is insufficient to terminate her parental rights. *Sylvia v. Tex. Dep't of Family and Protective Servs.*, No. 03-09-00427-CV (Tex. App.–Austin Apr. 15, 2010, no pet.) (mem. op.).

8. Drug Use, Incarceration, and Criminal History

On September 12, 2007, the Department conducted a section 262.104 removal (without an order) resulting from a referral in which the fire department had to break down the door of a smoke-filled apartment to find mother passed out on the bed with two children with the smoke detector sounding. The apartment was filthy with trash on the floor where the children were sleeping. Mother admitted to cooking rice and beans and going to sleep with the children while under the influence of Xanax. The Department was appointed temporary managing conservator of the children on September 27, 2007. A hair follicle test on mother indicated she was positive for cocaine and cocaine metabolites. In drug treatment, mother admitted to a six-month period of illegal drug use that "had caused an accident or danger to herself or others." On February 11, 2008, mother's third child, N.S., was born. Both mother and the N.S. tested positive for benzodiazepines which were not physician prescribed. At a bench trial, mother's parental rights were terminated under (E), (O), and best interest. On appeal, mother characterized the fire as an isolated incident and thus insufficient to support a continuing course of conduct under subsection (E). In rejecting this argument, the Houston First Court found that her drug abuse, criminal history, and current incarceration supported a course of continuing conduct sufficient to support termination under subsection (E). *Smith v. Tex. Dep't of Family and Protective Servs.*, No. 01-09-00173-CV and No. 01-09-00390-CV (Tex. App.–Houston [1st Dist.] Dec. 3, 2009, no pet.) (mem. op.).

9. Failure to Obtain Prenatal Care Insufficient

Houston First Court of Appeals reversed mother's termination under subsection (E). The court states it could not find any caselaw in which failure to obtain prenatal care was held to be evidence of endangering conduct under subsection (E). The court further states that mother took prenatal vitamins prior to obtaining prenatal care, which "weakens" the Department's argument that mother engaged in a course of conduct that endangered C.M. under subsection (E). *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.–Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.). ***But see*** *In re J.J.O.*, No. 2-03-267-CV (Tex. App.–Fort Worth May 6, 2004, no pet.) (mem. op.) (Mother's "failure to get adequate prenatal care" supported trial court finding that mother engaged in conduct that endangered child's physical and emotional well-being under subsection (E)); *Rochelle v. Dep't of Family & Protective Servs.*, No. 01-05-00311-CV, No. 01-05-00312-CV (Tex. App.–Houston [1st Dist.] Feb. 9, 2006, no pet.) (mem. op.) (Mother received almost no prenatal care during her pregnancy; this failure constitutes endangerment and no causal connection is required between mother's conduct and any resultant injury or adverse effect to the child.). NOTE: It seems that the court reversed its position regarding prenatal care. *See Jordan v. Dossey*, No. 01-09-00618-CV (Tex. App.–Houston [1st Dist.] May 13, 2010, no pet.) (mem. op.) ("[Mother] endangered [child] when he was a fetus" "[a]lthough she obtained prenatal care in the latter half of her pregnancy, [mother] did not receive proper nutrition for most of her pregnancy"); *Smith v. Tex. Dep't of Family and Protective Servs.*, No. 01-09-00173-CV, No. 01-09-00390-CV, (Tex. App.–Houston [1st Dist.] Dec. 3, 2009, no pet.) (mem. op.) (Smith's failure to receive prenatal care indicates endangerment of the child.).

10. Single Incident of Abusive Conduct toward Sibling Insufficient

The *Mann* court states, "the manner in which a parent treats other children in the family can be considered in deciding whether that parent engaged in a course of conduct that endangered the physical or emotional well-being of a child." The *Mann* court admits mother's admission to CASA that she "told [A.S., C.M.'s older sibling] to 'shut the fuck up' and grabbed [A.S.] around her torso and squeezed her" supports the trial court's finding that mother engaged in physically abusive conduct toward A.S. "on one occasion", thereby endangering the physical or emotional well-being of C.M. The court determined that this was endangering conduct, but not "course" of endangering conduct. *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.–Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.).

11. Underage Drinking Insufficient

The Houston First Court of Appeals notes that a parent's engaging in illegal conduct despite knowing that his or her parental rights are in jeopardy is evidence of endangering conduct under subsection (E). Mother's testimony and pictures from mother's MySpace page indicate that mother, a minor, drank alcohol in violation of the court order that she refrain from criminal activity. The evidence established that mother engaged in underage drinking on at least two occasions despite knowing that she was under the legal drinking age. The appellate court then reasons, "although the evidence indicates that [mother] engaged in criminal conduct knowing that her parental rights were in jeopardy, it does not demonstrate that [mother] engaged in illegal activities of the degree or frequency that we have previously held to be endangering under" subsection (E). *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.–Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.).

12. Failure to Secure Housing Insufficient

Mother admitted that she failed to maintain stable housing for a period of at least six months, and that she lived in four separate residences in one year alone. The *Mann* court states that a parent's failure to maintain stable housing *when she has care, custody, and control of her children* is relevant to the determination of whether the parent engaged in conduct which endangers her children under subsection (E). The *Mann* court cites *In re M.N.G.*, 147 S.W.3d 521 (Tex. App.–Fort Worth 2004, pet. denied) and *In re J.M.M., B.R.M., and W.T.M.*, 80 S.W.3d 232 (Tex. App.–Fort Worth 2002, pet. denied) for the above proposition. However, in *M.N.G.*, evidence of mother's unstable housing cited by the Second Court of Appeals involves periods of time when mother did *not* have possession of her children, including "at the time of trial." In *J.M.M.*, mother's "long history of transient lifestyle" included mother, after removal of the children, "chang[ing] residences four or five times despite a requirement that she maintain stable housing" and mother's stated plan at trial to move to Florida "to create a better life". The *Mann* court then found that since the evidence does not indicate that mother failed to maintain safe and stable housing while A.S. and C.M. were in her care, "a reasonable fact-finder could *not* firmly believe that mother's failure to maintain stable housing following the removal of her children amounted to conduct endangering their physical or mental well-being under" subsection (E). *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.–Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.). ***But see*** *Jordan v. Dossey*, No. 01-09-00618-CV (Tex. App.–Houston [1st Dist.] May 13, 2010, no pet.) (mem. op.) (Mother lived an unstable, transient lifestyle that indicates a pattern of engaging in conduct that would endanger the child emotionally and physically by giving him a life of instability and uncertainty even though the child was not living with mother at the time.).

13. Ceasing Visitation Insufficient

The Houston First Court of Appeals notes that a "parent's absence from a child's life is conduct that endangers a child's emotional well-being." The appellate court then concludes that mother's three months of no visits immediately prior to the trial did not rise to endangering conduct under subsection (E) because it was for a short period of time and was due to a "worthwhile pursuit" since mother was enrolled in a Job Corps program. *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.–Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.).

14. Failure to Complete Services Insufficient

The *Mann* court "do[es] not consider [mother's] failure to comply with her court-ordered service plan to be evidence of endangering conduct under" subsection (E). *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.–Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.). ***But see*** *Latham v. Dep't of Family and Protective Servs.*, 177 S.W.3d 341 (Tex. App.–Houston [1st Dist.] 2005, no pet.) ("[Mother] knew her parental rights were in jeopardy, *yet she failed to comply with the agency's family reunification plan.*" Failure to comply with service plan and drug use supports trial court's finding of endangerment under subsection (E)).

15. Evidence Supports Denial of Extension

Father appealed, complaining that: (1) the trial erred when it delayed in appointing him counsel; (2) the trial court did

not make the necessary findings to extend the case; and (3) the evidence was legally and factually insufficient to support termination under (E) and best interest. The Department began its investigation in March 2006 when mother gave birth to the child and tests indicated that mother used cocaine while pregnant. Although incarcerated, the father was brought to the adversary hearing, where the Department advised him to provide names of relative for possible placement. By February 2007, mother relinquished her parental rights, and father had already complied with many tasks in his service plan. However, he was arrested in January 2007 for attempting to sell drugs, used drugs in August 2007, and was re-incarcerated before trial. The record does not reflect when his first counsel was appointed, but an order substituting his counsel was entered on June 5, 2007. Counsel represented father at the August 3rd and December 7, 2007 permanency hearings and at the trial in February 2008. Subsection 107.113(a) provides that in a suit filed by a government agency in which termination is requested, the court shall appoint an attorney *ad litem* for an indigent parent who appears in opposition to the suit. There is no indication in the record that father asserted indigence, requested counsel, or complained of the lack of counsel to the trial court. The Austin Court found that his attorney "represented him zealously," holding that the court's failure to appoint counsel at the outset did not result in the rendition of an improper judgment or prevent him from presenting his case to the court. In rejecting father's complaint about the extension order not making a finding of extraordinary circumstances, the Austin Court found that father failed to preserve the error because he did not object at trial. Father was not harmed by the extension because "bulk of the evidence supporting the jury's finding had already occurred by the time of the extension" and provided him additional time to balance his past conduct with services and visits. The Austin Court considered evidence of father's extensive history of drug use, illegal drug sales, incarceration before and after the child's birth, and domestic violence in affirming termination under subsection (E). In response to father's claim that he never physically injured the child, the Austin Court recounted that father exposed the child to drugs, to himself and others who were under the influence of drugs, and to the potential of associated violence. Father also continued to use drugs when he knew his parental rights were at stake and caused his incarceration, which added to the instability of the child's life. *Melton v. Tex. Dep't of Family and Protective Servs.*, No. 03-08-00168-CV (Tex. App.–Austin Feb. 25, 2010, no pet.) (mem. op.).

D. TFC 161.001(1)(L)

After consuming alcohol at a party, mother began to argue with the children's father. Mother ultimately drove away from the party with two of her children unrestrained in the backseat of her vehicle and her infant child on her lap unrestrained. Mother hit a telephone pole, killing her infant child in her lap and injuring the children in the back seat. Mother was ultimately convicted of intoxication manslaughter. The trial court terminated mother's parental rights under subsection 161.001(1)(L).

On appeal, mother argued that the evidence supporting termination of her parental rights was insufficient because she was convicted of intoxication manslaughter, an offense that is not enumerated under subsection (L). The Department argued that "Title 3" as referenced in subsection (L) refers to the Penal Code. The court disagreed, finding that the reference to "Title 3", in subsection (L), refers to the Juvenile Justice Section of the Family Code based on: (1) the Code Construction Act; and (2) subsection (L)'s use of the term "adjudication" which typically refers to juvenile justice proceedings. The court ultimately reversed mother's termination, opining that although the Legislature might want to consider adding intoxication manslaughter as an enumerated offense under subsection (L), "for now, [mother] was never convicted of any of the enumerated offenses, nor had she been adjudicated under Title 3 of the Texas Family Code to have engaged in conduct that violated any of the specific Penal Code sections listed in Section 161.001(1)(L)." Although the court found the evidence legally insufficient to support the predicate termination ground, it nevertheless remanded the case for a new trial in the interests of justice because mother did not contest the best interest finding and the issue of intoxication manslaughter in this context was a matter of first impression. *In re A.N. and S.N.*, No. 11-08-00309-CV (Tex. App.–Eastland Aug. 6, 2009, no pet.) (mem. op).

E. TFC 161.001(1)(M)

1. Use of Termination Orders on Appeal Permissible

Mother had her parental rights terminated on two separate occasions to other children. She appealed both orders of termination. Mother gave birth to another child and the Department sought termination pursuant to subsections (E) and (M). Mother argued the trial court abused its discretion in allowing the Department to rely on the prior orders of termination while the orders were on appeal. In accordance with 109.002(c), an appellate court may not suspend an order that provides for the termination of the parent-child relationship in a suit brought by the state or a political subdivision of the state permitted by law to bring the suit. The court held: "because the two prior orders were properly admitted into evidence and were in full effect at the time of the termination of [mother's] parent-child relationship with [A.J.R.], [the Department] need not reestab-

lish that [mother's] conduct with respect to the other children was in violation of sections 161.001(1)(D) or (E)." Mother's issue was overruled. *In re A.J.R.*, No. 13-08-00607-CV (Tex. App.–Corpus Christi Aug. 20, 2009, no pet.) (mem. op.).

2. Admission of Prior Termination Order Sufficient

Mother's parental rights were terminated under (D), (E), (M), (O), and best interest. Mother, in a statement of points contained in her notice of appeal, challenged the sufficiency of evidence under termination grounds (D), (E), and (O) only. At trial, a certified copy of a decree terminating mother under subsection (E) was admitted into evidence. The Houston Fourteenth Court concluded that the evidence was legally and factually sufficient to support the trial court's finding under (M), and the unchallenged ground was binding on appeal. Therefore, the judgment was supported without considering the other statutory predicate termination grounds. *In re R.S.*, No. 14-08-01013-CV (Tex. App.–Houston [14th Dist.] Oct. 1, 2009, pet. denied) (mem. op.).

F. TFC 161.001(1)(N)

1. Drug Use and Inability to Provide Safe Environment

Fourteenth Court of Appeals considered: (1) the circumstances under which T.G. was removed; (2) mother failed to comply with the provisions of her service plan; (3) mother's house contained safety hazards during the pendency of the case; and (4) mother tested positive for drugs during the pendency of the case to determine that mother had demonstrated an inability to provide a safe environment for the child. *In re T.G.*, No. 14-09-00299-CV (Tex. App.–Houston [14th Dist.] Apr. 8, 2010, no pet.) (mem. op.).

2. Inability to Provide Safe Environment

Father's parental rights were terminated pursuant to Family Code subsection (N). On appeal, father argued "There is no evidence concerning [his] permanent residence. Further, the children resided with [him] in the past, and there is no indication that [he] failed to provide a safe environment during those periods." The court of appeals disagreed, affirming the termination of father's parental rights. Although the Department attempted to complete a home study to determine whether the children could live with father in Pennsylvania, father did not return phone calls and his acts established that he did not have any legitimate plan to live with the children elsewhere; he also lied about moving back to Texas on several occasions. Father failed to complete his services despite being advised that completion of the plan was important to remedying the issues which led to the Department's involvement. Father also failed to provide the children's foster mother any monetary support and did not support the children during the pendency of the case. *In re T.M., D.M., Jr., C.M. A/K/A S.M., and D.M.*, No. 2-09-145-CV (Tex. App.–Fort Worth Dec. 31, 2009, pet. denied) (mem. op.).

3. Ideal Efforts to Return Not Required

Mother appealed the termination of her parental rights under (N) and best interest. Mother argued that she did not purposefully abandon the child after her incarceration because she attempted to make efforts to have the child placed with extended family in Puerto Rico. However, the CASA volunteer spoke to a relative in Puerto Rico and was convinced that there was no safe or appropriate environment in Puerto Rico in which to place the child. The Waco Court found this element legally and factually sufficient. Mother next complained that the Department failed to make a reasonable effort to return the child because it failed to provide services for her while she was incarcerated, did not assign a Spanish-speaking caseworker, only contacted one relative for alternative placement, and failed to arrange transportation for her to obtain counseling services. The Waco Court found that mother had been provided a service plan but failed to do any services, although she complained that there were no services available in the state jail. The Department's preparation and administration of a service plan constitutes reasonable efforts to return a child to a parent. In affirming this element of subsection (N), the Waco Court held that the issue is not whether the Department could have done things differently, but whether the Department made reasonable efforts, not ideal efforts. *In re M.V.G.*, No. 10-09-00054-CV (Tex. App.–Waco Mar. 3, 2010, no pet.) (mem. op.).

G. TFC 161.001(1)(O)

1. Trial Court's Order Approving Service Plan Sufficient

Regarding the trial court's finding that she failed to comply with the provisions of a court order, mother argued that the record did "not contain an order signed by the Court with which [she] may or may not have complied with." However, the Department filed a service plan which the trial court approved and adopted without modification in a signed order. "Although the family service plan is not a court order itself, the trial court's order approving and adopting the family service plan established that compliance with the requirements of the family service plan was an action necessary for [mother] to obtain the return of her children." [Citation omitted]. *In re K.L.A.C., D.D.C., and S.L.H.C.*, No. 14-08-00960-CV (Tex. App.–Houston [14th Dist.] Jan. 21, 2010, no pet.) (mem. op.).

2. Judicial Notice of Trial Court's Order

Although the Department did not offer the trial court's orders into evidence, it asked the trial court to take judicial notice of the trial court's own file in the cause. A trial court may take judicial notice of its own orders, records, and judgments rendered in cases involving the same subject matter and between practically the same parties. The record does not reflect that the trial court ruled it would take judicial notice of its file; however, a trial court need not announce that it is taking judicial notice. Judicial notice is mandatory when a party requests the court do so and the party supplies the court with the necessary information. In this case, the trial court had the necessary information, its own file, and the Department's request that it take judicial notice of the file. Thus, the trial court's orders requiring mother to comply with the service plan, attend parenting classes, pay child support, and submit to random drug tests were properly before the trial court. *In re H.M.P. and B.R.P.*, No. 13-08-00643-CV (Tex. App.–Corpus Christi Jan. 7, 2010, no pet.) (mem. op.).

3. Failure to Take Medication Constitutes Failure to Comply

The Department's focus on mother's failure to comply with her court-ordered service plan concerned mother's failure to take her prescribed medication consistently. Mother received a one-month prescription for Abilify. The record established that mother never refilled her medicine. The Fourteenth Court of Appeals found that the evidence supported the finding that mother failed to comply with her service plan under subsection (O). In its conclusion, however, the Fourteenth Court of Appeals made the following comments: "[I]t is troubling that there was no competent medical testimony that consistent use of the prescribed medication was either necessary for [mother] to properly care for M.G. or would have been sufficient to enable [mother] to properly care for her child. Consequently, [mother's] parental rights may have been terminated for the failure to follow court orders potentially unrelated to the parenting of M.G. … [W]e urge the legislature to consider adjusting the present scheme for terminations so as to require that any court ordered requirements for return of the child be *rationally related* to standards of acceptable parenting and supported by competent evidence." *In re M.G.*, No. 14-09-00136-CV (Tex. App.–Houston [14th Dist.] Nov. 17, 2009, no pet.) (mem. op.) (emphasis added).

4. (O) Does Not Specify the Number of Provisions a Parent Must Fail to Complete

Subsection (O) simply provides that a parent's rights may be terminated if a parent fails to comply with a court order; it does not quantify any particular number of provisions of a service plan that a parent must fail to warrant termination. Nor does it quantify the degree of conduct that is deemed a failure as to a particular provision. It also does not include a procedure for evaluation of a parent's partial achievement of plan requirements. *In re A.A.F.G., H.C.Q., and A.G.Q.*, No. 04-09-00277-CV (Tex. App.–San Antonio Dec. 23, 2009, no pet.) (mem. op.).

5. Removal for Abuse or Neglect

Fourteenth Court of Appeals affirmed termination of mother's parental rights on (O) ground, holding that the evidence was legally and factually sufficient to support termination of mother's rights under subsection (O). Based on the following evidence, the court found that M.G. was removed due to abuse or neglect. The original intake report alleged mother was mentally and physically neglectful of M.G. In investigating the allegation by telephone, mother expressed concern about M.G.'s *nonexistent twin* while M.G. could be heard "screaming and crying in the background [and mother] was unconcerned." Mother refused to sign a safety plan. Two additional reports were filed with the Department, both concerning mother's apparent delusions. In August 2007, mother was arrested for kicking out windows on a public bus while M.G. was with her. M.G. was placed with mother's aunt, who later returned M.G. to mother without court or Department approval. The Department removed M.G. after receiving a report from a psychologist that mother's "thinking is severely distorted by paranoid delusions" and that mother's "psychotic thought processes … likely place [M.G.] at high risk for exposure to dangerous situations." *In re M.G.*, No. 14-09-00136-CV (Tex. App.–Houston [14th Dist.] Nov. 17, 2009, no pet.) (mem. op.).

6. Evidence of Abuse or Neglect After Removal

Evidence of events occurring after removal also point to the abuse or neglect of M.G. The court states: "the testimony from [Department] employees that M.G. was developmentally delayed and that appellant at times had difficulty interacting with him corroborates the prior evidence concerning abuse or neglect." *In re M.G.*, No. 14-09-00136-CV (Tex. App.–Houston [14th Dist.] Nov. 17, 2009, no pet.) (mem. op.).

7. Evidence Established Risk, Not Abuse or Neglect

First Court of Appeals reversed termination of mother's parental rights on (O) ground, holding that the evidence was legally insufficient to support termination of mother's rights under subsection (O). C.M. came into the care of the Department just days after he was born. At the time of his birth, C.M.'s older sibling, A.S., was in the care of the Department due to allegations that mother left A.S. crying

in bed for hours, attempted to mute A.S.'s cries by placing a pillow over her face, and '"yanked' the child really hard." Mother eventually relinquished her rights to A.S. and the child was placed with the child's paternal grandmother where she remained at the time of trial.

Mother argued on appeal that there is no evidence indicating that C.M. was removed due to mother's abuse or neglect. The appellate court examined the evidence to determine whether C.M. was removed from mother due to mother's abuse or neglect of C.M. The appellate court found the evidence established that C.M. was removed due to risk rather than his sustaining any actual abuse or neglect. C.M. was clean, healthy, appropriately dressed, and free of marks or bruises when he was taken into care by the Department. Evidence that mother failed to obtain prenatal care until she was ordered to do so in the seventh month of pregnancy; failed to comply with the service plan that was court-ordered in A.S.'s case; and failed to secure housing at the time of C.M.'s birth were found by the appellate court to be "*factors [that] may indicate risk to C.M. if he were to remain under [mother's] care*;" the evidence did "*not indicate that [mother] abused or neglected C.M., leading to his removal*." (Emphasis added).

The appellate court rejected the Department's argument that mother jeopardizing C.M.'s well-being supports the notion that C.M. was removed from mother's care due to abuse or neglect. "*While mother's abusive conduct toward A.S. may indeed have jeopardized C.M.'s well-being and given the Department reason to remove C.M. under Chapter 262, it is not evidence that C.M. actually sustained abuse or neglect by mother.*" (Emphasis added). "Although mother's abusive conduct toward an older sibling may be evidence of endangering conduct toward a younger sibling under subsection (E), *it does not demonstrate* that the parent engaged in abusive or neglectful conduct toward the younger sibling, as required under subsection (O)." (Emphasis added). *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.–Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.).

H. TFC 161.001(1)(Q)

1. Evidence of Parole and Inability to Care

Father terminated under subsection (Q). On appeal, he argued that his evidence of parole and his letters indicating that he wanted the children to be away from their mother rendered the evidence insufficient to support (Q). The court of appeals affirmed the termination. First, as is well-established, parole decisions are inherently speculative. Regarding his inability to care for the children, although father wrote letters indicating that he wanted the children away from mother, he had not arranged for a caregiver prior to going to prison. Father did nothing to protect the children while in prison and left the children with mother when he went to prison. The evidence established that before his incarceration, father had not supported the children or been involved in their lives. *In re D.H., S.H., & B.H.*, No. 11-08-00294-CV (Tex. App.–Eastland July 30, 2009, pet. denied) (mem. op.).

2. Convictions on Appeal

A jury terminated mother's parental rights under to subsection (Q). On appeal, mother argued that her convictions were inadmissible as a matter of law because they were being appealed and therefore were not final. The court of appeals disagreed. The rules of evidence are immaterial because the convictions were being used for termination rather than impeachment. The Legislature did not include the finality requirement in section 161.001 when deciding that certain criminal convictions committed under particular circumstances would support termination of parental rights. Subsection (Q) permits termination after "conviction", with no express requirement of finality. "We conclude that appeals of criminal convictions need not be exhausted before evidence of those convictions is admissible in parental rights termination cases." The court of appeals also noted that the strict time requirements for finalizing termination cases added "contextual weight" to the view that the Legislature intended non-final convictions to be admissible in termination cases. *Rian v. Tex. Dep't of Family and Protective Servs.*, No. 03-08-00155-CV (Tex. App.–Austin July 31, 2009, pet. denied) (mem. op.).

3. Judicial Admission of Incarceration in Pleading

First Court of Appeals affirmed the trial court's order finding Aranda's appellate point regarding subsection (Q) to be frivolous. At trial, a federal judgment indicates that "Franscisco Arellano-Arasate" was sentenced to 46 months in prison. On appeal, Aranda argues the federal judgment cannot support the trial court's predicate finding regarding subsection (Q) because the Department made no showing that Aranda is the person named in the federal judgment. Aranda's cross-petition contains the following statement: "On October 1, 2006 [Aranda] pled guilty to the federal offense of being an alien unlawfully in the United States after deportation and he received a sentence of 46 months. He is currently incarcerated in a federal facility in South Carolina." The Department asserts this statement in Aranda's pleading constitutes a judicial admission and that the federal judgment was merely cumulative of the judicially admitted fact of his incarceration. The appellate court notes that assertions of fact, not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. A judicial admission that is clear and unequivocal is a formal waiver of

proof that dispenses with the production of evidence on an issue, has conclusive effect, and bars the admitting party from disputing the admitted fact. The appellate court found that Aranda's assertion in his cross-petition regarding his federal conviction and incarceration to be a clear and unequivocal statement and, thus, a judicial admission that waived the necessity of proof on the fact of Aranda's incarceration. The judicial admission had a conclusive effect and it barred Aranda from later disputing the facts of the statement. *Aranda v. Dep't of Family and Protective Servs.*, No. 01-09-00058-CV (Tex. App.–Houston [1st Dist.] Oct. 15, 2009, no pet.) (mem. op.).

I. TFC 161.002

1. Paternity Registry Statute Is Constitutional

Despite the fact there was not a complaining father in this case, the trial court *sua sponte* declared 161.002(b), pertaining to Texas' Paternity Registry, unconstitutional. In citing both the United States Supreme Court and the Texas Supreme Court, the court stated: "An unwed father does not automatically have full constitutional paternal rights by virtue of a mere biological relationship. [Internal citations omitted]. Rather, he must, early in the child's life, take some action to assert those rights." [Citations omitted]. The court continued: "That he (or another father) could possibly be aggrieved is not a proper basis to declare the paternity registry unconstitutional in this case, either as applied or on its face." "A statute cannot be unconstitutional based only on harm to another; there must be an actual injury to the litigant in the present case." *In re C.M.D.*, 287 S.W.3d 510 (Tex. App–Houston [14th Dist.] 2009, no pet.).

2. No Formal Requirements to Admit Paternity

The alleged father of K.W. appealed the termination of his parental rights under subsection 161.002(b)(1) and under subsections 161.001(1)(D), (E), and best interest. The evidence established that although the alleged father did not execute an acknowledgement of paternity or file a claim or counter-claim asserting paternity, he did admit at trial that he was the father of K.W. The Forth Worth Court held that since there are no formalities that must be observed for an admission of paternity, alleged father's oral admission of paternity at trial was sufficient and precluded the Department from obtaining termination under subsection 161.002(b)(1). *In re K.W.*, No. 2-09-041-CV (Tex. App.–Fort Worth Jan. 14, 2010, no pet.) (mem. op.).

J. TFC 161.003

The trial court terminated mother's and father's parental rights to the children under section 161.003. In reviewing the case, the Texarkana Court noted that a sister court has characterized the provisions of section 161.003 as "more stringent' than the elements of section 161.001. The court rejected the assertion of the caseworker that the parents could not meet the needs of the children when the caseworker failed to identify the "specified" needs. Expert testimony indicated that the parents could parent could parent S.M.M. as long as she did not have any "significant medical problems." The Texarkana Court concluded that although expert testimony did show the parents suffered from a mental deficiency, it failed to show the parents are unable to meet the children's needs. Section 161.003 requires more than mental deficiency. The fact that certain aspects of parenting may be difficult is legally insufficient to support termination under section 161.003. The Texarkana Court reversed the termination. *In re A.L.M. and S.M.M.*, 300 S.W.3d 914(Tex. App.–Texarkana 2009, no pet.).

K. TFC 161.103 – Affidavit of Relinquishment

Once an affidavit has been shown to comply with the requirements of 161.103, the affidavit may be set aside only upon proof, by a preponderance of the evidence, that the affidavit was executed as a result of fraud, duress, or coercion. The burden of proving such wrongdoing is on the party opposing the affidavit. The Court reiterated: (1) coercion occurs if someone is compelled to perform an act by force or threat; (2) duress occurs when, due to some kind of threat, a person is incapable of exercising her free agency and unable to withhold consent; and (3) fraud may be committed through active misrepresentation or passive silence and is an act, omission, or concealment in breach of a legal duty, trust, or confidence justly imposed, when the breach causes injury to another or the taking of an undue and unconscientious advantage. *In re D.E.H.*, 301 S.W.3d 825 (Tex. App.–Fort Worth 2009, pet. denied).

VII. BEST INTEREST

A. Completion of Services Alone Not Sufficient to Avoid Termination

The evidence established that mother complied with all of the Department's requests and services. "However, a parent's compliance does not preclude a finding that termination is in a child's best interest." Although mother completed the Department's services, she was required to make adequate progress before the child could be returned to her. Mother's lack of honesty during treatment and services hindered her progress and the Department did not believe she could provide a safe placement for the child. The court found the evidence supporting the best interest finding sufficient. *In re D.R.J.*, No. 07-08-0410-CV (Tex. App.–Amarillo July 8, 2009, pet. denied) (mem. op.).

B. Criminal History Alone Sufficient to Support Termination

The Department did not present evidence on most of the *Holley* factors. In fact, essentially the only evidence offered by the Department was of father's lengthy criminal record which included: (1) multiple violent offenses (three were against the child's mother); (2) multiple theft conviction; (3) two drug possession convictions; (4) an unauthorized use of a motor vehicle conviction; (5) two convictions for driving while license invalid; and (6) harassment. The court applied this criminal history to the two *Holley* factors regarding whether the existing parent-child relationship is a proper one and the emotional and physical danger to the child now and in the future. The court affirmed father's termination, writing: "Termination of parental rights should never become an additional punishment for the parent's imprisonment. [Citation omitted]. Here, however, [father's] criminal history was lengthy, was repeated, resulted in [father's] incarceration for periods ranging from a few days to months to years, and evidence of repeated violence toward the child's mother, who was pregnant with another child during two beatings. Under these circumstances, and despite TDFPS's failure to present any evidence of the remaining [*Holley*] factors, we hold that the trial court could have formed a firm belief or conviction that termination was in the best interest of [the child]." *Hines v. Tex. Dep't of Family and Protective Servs*., No. 01-08-00045-CV, (Tex. App.–Houston [1st Dist.] Dec. 3, 2009, no pet.) (mem. op.).

C. Best Interest Focus on Child, Not Parent

Father appealed a frivolous determination arguing, *inter alia*, that his recent securing of employment and housing and buying gifts for the children demonstrated that he was "on the right track," and that termination of his parental rights was not in the children's best interest. The record established that father had an extensive history of drug use, unstable employment, unstable housing, failure to pay child support, and had a pending marijuana charge. The Amarillo Court emphasized that the focus was on the child and not on the father, and that the factfinder need not place the child at risk simply to afford a parent an opportunity to do something that he should have done all along. The court concluded that it was not aware of any constitutional provision that subordinated the best interest of the child to maintaining the parent-child relationship because the parent was "on the right track." *In re L.T., L.M.R., and L.M.L.*, No. 07-09-0280-CV (Tex. App.–Amarillo Mar. 30, 2010, no pet.) (mem. op.).

D. Focus Is on Parent's Ability to Provide Care

In determining best interest, the court stated that because the child is an infant, its review focused on the parent's ability to care for a young child totally independent of her caregivers and whether the child had any conscious knowledge of the parent. *In re R.S.*, No. 14-08-01013-CV (Tex. App.–Houston [14th Dist.] Oct. 1, 2009, pet. denied) (mem. op.).

E. History of Violence and Needs of the Children

In its analysis of the *Holley* factors, the court concluded that alleged father's criminal history, his exposing the children to violence in violation of the placement agreement, and his need to be away from home due to his employment as a trucker established that he could not provide for the physical and emotional needs of the children. The court concluded that the alleged father would not provide the children with a safe, stable, and non-violent environment. *In re X.C.B. AKA. X.C., I.C.B. AKA I.C., S.B.C., and J.W.C. AKA J.W.W.*, No. 14-08-00851-CV (Tex. App.–Houston [14th Dist.] July 30, 2009, pet. denied) (mem. op.).

F. Focus Is on the Parent, Not Other Caregivers

Considering mother's complaint on best interest, the court found evidence that the children love mother very much and enjoyed their visits to be "at best marginally relevant." Mother testified that she was not currently able to care for the children, and the record was replete with instances in which the children suffered emotionally and physically because of mother's false reports of non-existent medical conditions. Finally, the court noted that several of the best interest factors refer to evidence that maternal grandparents, Bradley and Paula, are able to provide for the children's needs, and that *in deciding best interest, the focus must be on the parent and not on other caregivers*. *In re M.H., S.H., and G.H.*, No. 10-08-00308-CV (Tex. App.–Waco May 5, 2010, no pet.) (mem. op.).

G. No Duty to Seek Out Relative Placement Before Termination Can Occur

Father argued that K.W.'s best interest could be met by placing the child with his sister who was able to assume parental responsibilities and that reasonable efforts should be made to place with a relative before a non-relative. The Fort Worth Court found that father provided no authority to suggest that there is either a statutory or common-law duty to make the Department investigate a relative placement before parental rights may be terminated. The court held that although the determination of where a child is placed is a factor in evaluating best interest it is not a bar to termination that placement will be with non-relatives. *In re K.W.*, No. 2-09-041-CV (Tex. App.–Fort Worth Jan. 14, 2010, no pet.) (mem. op.).

H. Evidence of Mental Illness

The court concluded that the following evidence supported the conclusion that mother was unwilling and unable to effect positive environmental and personal changes regarding her mental health and parenting under subsection 263.307(b)(11): mother's history of blackouts; her rejection of the diagnosis that they are caused by psychotic episodes; her denial that she ever blacked out while caring for her children; her failure to address the danger to her children in the event she blacks out while they are in her care; her depression and thoughts of suicide less than one month before trial; her failure to seek medical attention for depression and suicidal thoughts; her refusal to accept the diagnosis that she was suffering from depression at the time of trial; and the testimony from the Department's caseworker that mother may not be able to care for her children for some time even if she diligently works toward addressing her mental health issues. *In re S.A.G., E.J.G., and N.S.G.*, No. 2-09-125-CV (Tex. App.–Fort Worth Mar. 18, 2010, no pet.) (mem. op.).

I. Termination Reversed Because Both Parents' Rights Not Terminated

Termination of mother's parental rights is not justified by the Department's plan for adoption of the child so long as the biological father retains his parental rights. The court, in finding the best interest evidence legally sufficient, stated: "we conclude that the evidence of [mother's] history of abusive relationships, positive drug tests, failure to comply with the trial court's order and avail herself of programs that could assist her in promoting the best interest of the child, combined with the reasonable inference that she allowed [her boyfriend] to have contact with the child after she was aware that [her boyfriend] was suspected of having injured the child is sufficient evidence to allow the finder of fact to have formed a firm belief or conviction that termination of [mother's] parental rights would be in the child's best interest."

However, the court held: "Because the Department cannot adopt the child so long as the biological father retains his parental rights, termination of [mother's] parental rights will not necessarily advance the goal of prompt and permanent placement of the child in a safe environment." The court continued: "While the Department need not prove definitive plans for the child's placement, [internal citations omitted], we can see no compelling benefit that would be gained by severing the bond that exists between [mother] and the child at this time, especially in light of the Department's current plans to attempt to place the child with her biological father."

The court also held: "As the evidence establishes that [mother] poses no threat to the child during supervised visits and since the Department's goal of providing the child stability and permanence through adoption cannot currently be accomplished, we cannot see how the finder of fact could form a firm belief or conviction that the drastic act of termination would be in the best interest of the child."

In footnote 4, the court stated: "Our conclusion that the Department has failed to present factually sufficient evidence regarding the best interest of the child is not based on the Department's inability to identify its definitive plans for the child. Rather, our conclusion is based, in large part, on the Department's reliance on benefits that the child will only obtain if the child is permanently placed in a stable environment. Since the Department will first attempt to place the child with her biological father, termination of [mother's] parental rights will not significantly advance the Department's plans and the maintenance of [mother's] parental rights will not significantly impede the Department's plans." *In re J.N.*, 301 S.W.3d 429 (Tex. App.–Amarillo 2009, pet denied).

J. *Holley* Factors

1. Desires of the Child

Both children were under the age of five at the time the case was tried. However, the record reflects that the children's behavior was better when the parents were not with them. Mother was not capable of redirecting H.M.P.'s behavior and in some instances instigated H.M.P.'s inappropriate behavior. H.M.P. spit in mother's face at one visit and mother and H.M.P. "would fight back and forth between each other." *In re H.M.P. and B.R.P.*, No. 13-08-00643-CV (Tex. App.–Corpus Christi Jan. 7, 2010, no pet.) (mem. op.).

2. Present and Future Needs of Child

Mother's failure to provide proof of employment at trial even though service plan required such proof indicates mother's inability to meet child's physical needs. *In re T.G.*, No. 14-09-00299-CV (Tex. App.–Houston [14th Dist.] Apr. 8, 2010, no pet.) (mem. op.).

3. Present and Future Danger to Child

Mother testified that although she smoked marijuana, she never did so in front of the children. She stated that she was not negatively affected by the drug because it only "relaxed" her. Mother's continued drug use and inability to recognize its dangers constitutes a present and future danger to the children's physical or emotional well-being. *In re H.M.P. and B.R.P.*, No. 13-08-00643-CV (Tex. App.–Corpus Christi Jan. 7, 2010, no pet.) (mem. op.).

4. Parental Abilities and Available Programs

Tenth Court of Appeals affirmed termination of parents' parental rights to infant. Under parental abilities and available programs, the appellate court noted that the Department allowed mother's eleven-year-old daughter and twelve-year-old son to remain in the home that she shared with father. The son had some behavioral problems. He saw a counselor and then had no further problems. Both children were doing well in school and participated in extra-curricular activities. However, mother had prior cases with the Department in 2002, 2003, 2004, 2006, and 2007. Mother gave custody of her third-eldest child to his father. Mother did not take her parenting classes seriously and could not verbalize what she had learned in the classes. Mother's counselor testified mother had not made significant progress to warrant return of the young infant to her care. *In re S.K.A.*, No. 10-08-00347-CV (Tex. App.–Waco Aug. 19, 2009, no pet.) (mem. op.).

5. Stability of Home or Proposed Placement

Hazardous condition of home and criminal activity of mother and other occupants of home establish mother is unable to provide a safe living environment and supports best interest finding. *In re T.G.*, No. 14-09-00299-CV (Tex. App.–Houston [14th Dist.] Apr. 8, 2010, no pet.) (mem. op.).

6. Acts or Omissions of Parent

Allowing children to live in a home with one individual convicted of a sexual crime against a child and another individual convicted of drug possession is relevant to the *Holley* factor of acts and omissions of the parent. *In re T.G.*, No. 14-09-00299-CV (Tex. App.–Houston [14th Dist.] Apr. 8, 2010, no pet.) (mem. op.).

VIII. TFC 263.405 AND POST-TRIAL ISSUES

A. Statement of Points Issues

1. Statutory Dismissal Deadline Precluded

Mother failed to include an issue in her statement of points regarding her complaint that the trial court unlawfully extended the statutory dismissal deadline. The Dallas Court of Appeals agreed with mother and reversed the case, finding that the 263.401 statutory dismissal deadline was jurisdictional, and as such, mother was not required to include the complaint in her statement of points. The Texas Supreme Court disagreed. The Supreme Court has held that the statutory deadline in section 263.401 is procedural, not jurisdictional. The Supreme Court reversed the Dallas Court of Appeals, holding "[a]s such, the mother's failure to challenge the trial court's extension of the statutory deadline in her statement of points waived the issue on appeal." *In re J.H.G.*, 302 S.W.3d 304 (Tex. 2010).

2. Alleged 14th Amendment Violation Does Not Defeat Preclusive Effect of 263.405

Fourteenth Court of Appeals held it could not consider new issues raised by mother on appeal that were not contained in mother's statement of points on appeal. The appellate court rejected mother's assertion that it should review her issues, despite the lack of preservation, because the admission of testimony regarding race resulted in a facial violation of the 14th Amendment. The appellate court held that mother did not preserve her issues in the trial record because she: (1) never objected to any of the evidence regarding either her or the child's race; (2) did not request that the jury charge include an instruction regarding race; and (3) has not identified in her brief what evidence the trial court excluded and why it was admissible. *Carlson v. Tex. Dep't of Family and Protective Servs.*, No. 14-09-00133-CV (Tex. App.–Houston [14th Dist.] Mar. 18, 2010, no pet.) (mem. op.).

3. J.O.A. Did Not Vitiate TFC 263.405

The trial court signed the order of termination on April 7, 2009. Trial counsel filed a notice of appeal on April 30, 2009, but did not file a statement of points. On May 11, 2009, trial counsel was removed and appellate counsel was appointed. In his brief, father did not raise ineffective assistance of counsel, nor did he complain that section 263.405 is unconstitutional as applied to his appeal. Instead, he argued that 263.405 is unconstitutional to the extent that it bars complaints regarding sufficiency of evidence. "We do not agree with [father's] assumption that *J.O.A.* eliminates the need to comply with section 263.405 or that its holding gives us the unrestrained ability to ignore the absence of a statement of points of error on appeal." The Waco Court acknowledged that because father failed to raise ineffective assistance of counsel or an as-applied constitutional challenge to 263.405 it could simply affirm the judgment for failure to file a statement of points. *In re A.B.*, No. 10-09-00137-CV (Tex. App.–Waco Oct. 28, 2009, no pet.) (mem. op.).

4. Constitutional Issues Not Raised

Father failed to file a statement of points on which he intended to appeal. In addition to failing to file a statement of points, the appellate court wrote: "Neither has [father] presented a claim of ineffective assistance of counsel or raised any constitutional issues regarding the application of §263.405(i)." The court held: "Thus, neither of those matters are before us despite the absence of a statement of points." "Therefore, [father] has presented nothing for our review." *In re N.J.N.*, No. 07-09-0216-CV (Tex. App.–Amarillo Oct. 28, 2009, no pet.) (mem. op.). *See also In re V.M.O. and K.A.O.*, No. 07-09-0187-CV (Tex. App.–Amarillo Dec. 18, 2009, no pet.) (mem. op.) ("We agree

with the Department that *J.O.A.* has no application to this case. Appellant does not contend the statute requiring a statement of points is unconstitutional as applied to him, nor does he contend he has been deprived of the effective assistance of counsel.").

5. Failure to Challenge Ground and Best Interest in SOP

Trial court did not abuse its discretion in finding father's appeal frivolous. Father was terminated on best interest and four statutory grounds, subsections (D), (E), (L), and (Q). Father did not challenge best interest or subsection (L) in his statement of points. An appeal of a termination order is limited to issues presented in father's statement of points. The absence of a complaint in the statement of points regarding best interest and subsection (L) prevents father from raising these complaints for the first time on appeal. The unchallenged best interest and subsection (L) determinations support termination. *Carlson v. Tex. Dep't of Family and Protective Servs.*, No. 14-09-00133-CV (Tex. App.–Houston [14th Dist.] Mar. 18, 2010, no pet.) (mem. op.).

6. Extension for Filing Statement of Points

Mother argued that the burden for filing her statement of points fell on trial counsel. However, trial counsel had been replaced by appointed appellate counsel. Appellate counsel was appointed before the fifteen-day deadline of 263.405(b). "If [mother's] new counsel needed extra time to prepare a statement of points on appeal, new counsel could have requested an extension of time to file the statement of points under Texas Rule of Civil Procedure 5 **before** the 15-day deadline expired." *In re C.W., Jr., I.S., E.R., and D.G.*, No. 14-09-00306-CV (Tex. App.–Houston [14th Dist.] Dec. 10, 2009, no pet.) (mem. op.) (emphasis added).

B. TFC 263.405 Applies to Conservatorship Cases

Father argued that because the trial court appointed the children's maternal grandparents as their managing conservator, but did not terminate his parental rights, section 263.405 did not apply. The court of appeals disagreed. Although released before the removal of Family Code subsection 263.401(d) and its definition of "final order", the court of appeals found the *A.J.K.* case from the Houston Fourteenth Court of Appeals persuasive. There, the Fourteenth Court held that Chapter 263 applies to cases in which the Department is involved. The court of appeals further noted that the headings of subchapter (E) are for suits affecting the parent-child relationship, not termination suits. "The language of the subtitle itself is not limited to termination, and the context in which the statute lies does not require that result. We find the discussion by the Houston court of statutory construction and examination of the interests at issue persuasive, and conclude that this appeal is accelerated subject to Chapter 263's provisions – and that the statement of points thus applies to this appeal as a part of those provisions." *In re G.J.P. and R.P.*, No. 06-09-00066-CV (Tex. App.–Texarkana May 5, 2010, no pet. denied) (mem. op.).

C. Frivolousness

1. Obtaining a Record

The specific issue before the Court was whether an indigent parent could be denied an appellate record because he failed to file a timely statement of points. Before the trial court, father discharged his attorney and proceeded *pro se*. On July 18, 2006, the trial court terminated father's parental rights. Two days later, on July 20, 2006, father was appointed appellate counsel. Appellate counsel did not file a statement of points or take any other post-trial action. The trial court appointed father different counsel on August 9, 2006, outside the fifteen-day period of section 263.405(b). Father's second attorney filed a statement of points forty days after the judgment was signed. At the 263.405(d) hearing, which was held fifty-six days after the signing of the judgment, the trial court denied father a record, determining that he had not presented a substantial question for appellate review because he failed to timely file a statement of points.

The Court noted that it was unclear in the record as to whether father was actually represented by counsel during the fifteen-day period of 263.405(b). But the Court found the issue "immaterial", writing: "[W]hether [father] failed to file the statement required for appeal because he had no counsel or ineffective counsel, he is entitled under *J.O.A.* to complain on appeal of ineffective assistance." Although father was not arguing ineffective assistance before the Court, it nevertheless found the "effect" of his argument "the same." The Court found it important that the trial court denied a free record, not because it determined the issues in the statement of points to be frivolous, but rather based on the lateness of the statement of points. The Court remanded the case to the appellate court for the preparation of a full record and briefing on the issues in father's statement of points.

It must be noted, however, that the Court specifically stated that its holding does not require the preparation of a full reporter's record in every case. The Court wrote: "If a trial court determines in a section 263.405(d) hearing that an appeal on the issues attempted to be raised by the parent would be frivolous, review is limited to the record of that hearing." *In re B.G., C.W., E.W., B.B.W., and J.W.*, 317 S.W.3d 250 (Tex. 2010).

2. Burden on Appellant

Mother executed a voluntary relinquishment of parental rights. The trial court terminated her parental rights under subsection (K). The trial court found mother's appeal frivolous. On appeal, mother challenged the sufficiency of the evidence supporting the findings that: (1) she voluntarily executed an unrevoked and irrevocable affidavit of relinquishment of parental rights in compliance with Family Code Chapter 161; and (2) termination was in the child's best interest. No evidence was offered at the 263.405(d) hearing except for mother's unsworn statement that she was under stress at the time she executed her relinquishment. The court of appeals found the appeal frivolous because: (1) mother raised no evidence at the 263.405(d) hearing that her affidavit was involuntary; and (2) her attorney did not attack the trial court's findings supporting termination or summarize for the trial court the evidence that was missing or insufficient to sustain the findings. *Rodriguez v. Tex. Dep't of Family and Protective Servs*., No. 03-09-00450-CV (Tex. App.–Austin Apr. 28, 2010, no pet.) (mem. op.).

3. Use of Affidavit to Prove Frivolousness

The record before the appellate court consisted of the clerk's record, the reporter's record from the 263.405(d) hearing, and the eight-page affidavit of the Department's caseworker. "[The caseworker's] affidavit was admitted without objection and contains a detailed summary of the evidence presented at the termination hearing." Based almost solely on the caseworker's affidavit, the court of appeals affirmed the trial court's frivolous finding. *In re M.W.C., Jr.; M.C.; & E.P.*, No. 11-09-00152-CV (Tex. App.–Eastland Mar. 5, 2010, no pet.) (mem. op.).

4. Counsel's Summary of Evidence Sufficient to Prove Frivolousness

Father appealed a frivolous determination arguing that the evidence was legally and factually insufficient to support termination and the trial court erred in not granting his request for a bench warrant. At the hearing on father's motion for new trial, the Department's counsel summarized the evidence for the trial court, emphasizing that father never saw or had a relationship with the child, never established paternity or paid child support, did not complete programs offered in prison, engaged in illegal conduct while in prison, was in no position to parent the child, and the child has done well in foster care and would be available for adoption. In reviewing the sufficiency of the evidence and affirming the trial court, the Sixth Court considered the evidence presented in the Department's counsel's summary. *In re J.J.W.*, No. 06-09-00030-CV (Tex. App.–Texarkana Aug. 11, 2009, pet. denied) (mem. op.).

5. Counsel's Summary of Evidence Not Sufficient to Prove Frivolousness

Third Court of Appeals concluded it was unable to determine from the 263.405(d) hearing record whether mother's appeal was frivolous. The appellate court ordered the court reporter to prepare and file reporter's records containing all evidence admitted at the termination trial. The 263.405(d) hearing consisted solely of argument by attorneys representing the Department, mother, and the attorney *ad litem* for the child. While statements by the Department's counsel included a summary of relevant evidence introduced at trial, the summary was not supplemented by any live testimony or any other type of evidence. The appellate court noted it was "exceedingly difficult for us to determine with any confidence whether [mother's] points, particularly sufficiency, are frivolous based on the record of the 263.405 hearing." *Barnett v. Tex. Dep't of Family and Protective Servs.,* No. 03-09-00429-CV (Tex. App.–Austin Jan. 14, 2010, order).

6. Frivolousness Regarding Motion for New Trial Upheld

Fourth Court of Appeals upheld trial court's order denying father's *Craddock* motion for new trial. Neither father nor his attorney appeared for the final hearing. Father's parental rights were terminated. Father filed a motion for new trial, arguing *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939), which holds that when a defendant has proper notice, a default judgment should be set aside and a new trial granted if: (1) the failure to answer or appear at trial was not intentional or the result of conscious indifference but was due to a mistake or accident; (2) the defendant sets up a meritorious defense; and (3) the motion is filed at such a time that granting a new trial would not result in delay or otherwise injure the plaintiff. The trial court found father met the first prong, but ruled that father did not have a meritorious defense. Completing drug treatment was one of father's requirements in his service plan. Father admits in the affidavit attached to his motion for new trial that he is still taking methadone and is not completely drug free. The attorney *ad litem* for the children noted at the motion for new trial hearing that one of the reasons trial was reset was so father could completely stop using drugs, including methadone. The appellate court held that father did not set up a meritorious defense because his affidavit establishes that he has not been successful in completing drug treatment and becoming drug free. Further, father's affidavit admits that he failed to comply with the service plan by failing to complete parenting classes. The appellate court affirmed the trial court's finding that father's appellate point regarding the denial of his motion for new trial was frivolous. *In re M.A.M., M.S., A.R.S., and A.N.S.*, No. 04-09-00158-CV

(Tex. App.–San Antonio Aug. 19, 2009, no pet.) (mem. op.).

7. Admission of Prejudicial Evidence Rendered Frivolous Finding Improper

Third Court of Appeals reversed the trial court's order determining mother's appeal to be frivolous and ordered that the appeal proceed on the merits. Trial court abused its discretion in finding mother's appeal to be frivolous. The Department introduced at trial evidence regarding an incident of sexual abuse allegedly involving mother and her brother several years earlier. The Department's petition to terminate mother's parental rights did not allege that mother ever sexually abused her children. During the 263.405(d) hearing, the Department claimed it presented the evidence not to establish a risk that mother would perpetrate but that she might acquiesce to a male paramour. The appellate court, in reversing the trial court, found that the trial court admitted evidence of past sexual abuse involving mother and her brother that had little, if any, connection to the Department's termination suit. Further, such evidence tends to have an extreme prejudicial impact that can give rise to reversible error when admitted. *Loehr v. Tex. Dep't of Family and Protective Servs.*, No. 03-09-00142-CV (Tex. App.–Austin July 22, 2009, no pet.) (mem. op.).

D. Preservation of Factual Sufficiency Complaint

Regarding mother's complaint about the factual insufficiency of the evidence, the Department argued that because mother failed to file a motion for new trial following the jury's finding that her parental rights to the children should be terminated, she failed to preserve her factual sufficiency complaint regarding termination of her parental rights to the children. The Tyler Court agreed with the Department's arguments and overruled mother's issues on these points. *In re E.M., N.M., and J.M.F., Jr.*, No. 12-09-00092-CV (Tex. App.–Tyler Sept. 23, 2010, pet denied).

E. Equitable Bill of Review

Father filed a petition for a bill or review in connection with a termination proceeding brought by his ex-wife. At a bench trial in the underlying termination case, trial court found that Father "voluntarily left his child in the possession of another" and "failed to support the child in accordance with his ability" for at least one year prior to his ex-wife's filing the termination suit and entered an order terminating his parental rights to B.G. At trial, father defended the case, arguing that he was unable to see his daughter because his ex-wife had secreted the child. Following the termination suit, a step-parent adoption was granted. Father filed a direct appeal of the termination case, but not the adoption. However, his notice of appeal was filed late, and the case was dismissed for lack of jurisdiction.

During the pendency of his direct appeal, father filed a petition for an equitable bill of review in the trial court seeking to set aside the termination order. In his petition, Father again alleged that: (1) ex-wife had fraudulently secreted his daughter and prevented him from visiting the child; (2) he did not voluntarily abandon his child; and (3) he paid child support for at least one year prior to the termination suit. He also alleged that the court appointed amicus attorney did not visit with father and the child together, nor did she otherwise execute her duties under Texas Family Code section 107.003; that his trial counsel did not adequately represent him at trial; and his appellate counsel did not timely file a notice of appeal. He also made the general assertions that he: (a) he had meritorious claim(s) or defense(s) in the underlying termination action; (b) he was prevented from raising these claims or defenses by fraud, accident or wrongful acts and omissions through no fault of his own; and (c) the acts and omissions complained of were unmixed with any negligence on his part. He also alleged in the alternative, that an official mistake occurred which prevented him from raising certain material claims and defenses, and from presenting key evidence earlier. Although the petition was accompanied by Father's sworn statement that the facts alleged in the petition were true, he did not plead specific facts or outline specific claims or defenses that he was prevented from presenting. Nor did he file or present any evidentiary materials to support the allegations in his petition.

Ex-wife filed a motion to dismiss Father's petition for a bill of review, contending that his petition did not allege, with particularity, facts necessary to support bill of review relief. Specifically, ex-wife contended that the petition: (1) did not allege or provide prima facie proof of a meritorious ground of appeal, (2) did not allege extrinsic fraud on her part, (3) admitted that Father was responsible for the untimely appeal due to the negligence or mistake of his counsel, and (4) did not plead or provide prima facie proof that official mistake caused father's untimely appeal. The trial court agreed and dismissed his bill of review. Father appealed.

In rejecting his appeal, the Houston First Court held that father's claims are general are not specific enough to sufficiently establish a meritorious ground for appeal or defense, nor did Father present any proof in support of these claims. *In re B.G.*, No. 01-09-00579-CV (Tex. App.–Houston [1ST Dist.] Sept. 23, 2010, pet. denied) (mem. op.).

IX. INEFFECTIVE ASSISTANCE OF COUNSEL

A. No IAC for Conservatorship Issues

At trial, the Department nonsuited its termination grounds and only sought managing conservatorship of the children. The trial court granted the Department's petition and appointed the children's maternal grandparents as their managing conservator. On appeal, father argued that his trial counsel had provided ineffective assistance.

The court of appeals posed the specific question before it as: "Does the recognized right to effective assistance of counsel for cases involving the termination or severance of parental rights also extend to cases in which only conservatorship is decided?" The court answered the question in the negative. The court reviewed leading decisions from the United States Supreme Court and the Texas Supreme Court, concluding: "A review of those opinions provides one absolute: the right to counsel, and a concomitant right to effective counsel measured under constitutional guidelines, exists when the result of the proceeding is the permanent severance of a parent's rights to a child." The court reasoned that a "determination of conservatorship or custody does not reach" such a constitutional level because conservatorship restrictions, even if severe, are not permanent and can be modified. "Thus, the main rationale for importing the right to effective assistance of counsel into a civil proceeding does not exist in a case where the severance of that recognized right is not implicated." The court continued: "we find no authority, in a child custody case, to authorize a remedy of overturning a trial court decision based on ineffectiveness of counsel." The court held "[t]he claim of ineffective assistance of counsel cannot be considered by this Court, and the arguments based on that claim are overruled." *In re G.J.P. and R.P.*, No. 06-09-00066-CV (Tex. App.–Texarkana May 5, 2010, pet. denied) (mem. op.).

B. No Evidence of IAC in the Record

Four days into trial, the court, *sua sponte*, made a finding on the record that trial counsel was ineffective. After being queried by counsel as to whether counsel had a right to have the basis of the determination on the record, the court responded; "No, you don't. So – the record is what it is." Counsel filed a mandamus petition in the Austin Court of Appeals seeking to have that finding vacated. The Austin Court granted conditional mandamus, stating that the record showed no evidence of deficient performance amounting to ineffective assistance of counsel under *Strickland* and its progeny. *In re Turner*, No. 03-08-00514-CV (Tex. App.–Austin Dec. 23, 2009, orig. proceeding) (mem. op.).

C. Estoppel in Claiming Ineffective Assistance

Mother claimed ineffective assistance of counsel. The Fourteenth Court held that because mother failed to show up for trial and refused to cooperate with her counsel, under the invited error doctrine, she was estopped from asserting that claim on appeal. *In re R.S.*, No. 14-08-01013-CV (Tex. App.–Houston [14th Dist.] Oct. 1, 2009, pet. denied) (mem. op.).

D. IAC Claim Does Not Defeat Failure to File Timely Notice of Appeal

Appeal dismissed for want of jurisdiction. Notice of appeal was filed sixty-eight days late. Although ineffective assistance of counsel is an issue that may be raised in an appeal from a termination proceeding, an appellate court does not have jurisdiction to consider *any* appeal unless jurisdiction has been invoked, either by a timely notice of appeal or a timely bona fide attempt to appeal. An appellate court cannot suspend the rules to alter the time to perfect a civil appeal. *In re A.N.C., T.C.E.C., Jr., and L.J.C.*, No. 2-09-429-CV (Tex. App.–Fort Worth Mar. 18, 2010, no pet.) (mem. op.).

E. No IAC Claim for Retained Counsel

Father was appointed counsel soon after the children were removed from the home. However, he decided to retain counsel in lieu of the attorney appointed by the court. The court held: "Because [Father] had retained counsel rather than counsel appointed pursuant to the Family Code, we hold he is not entitled to raise ineffective assistance of counsel." *In re V.G., E.G., A.G., J.G., JA.G.*, No. 04-08-00522-CV (Tex. App.–San Antonio Aug. 31, 2009, no pet.) (mem. op.).

Termination Case Law Update

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24th Annual Juvenile Law Conference
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PRE-TRIAL ISSUES

Standing

***In re A.M., A.M., and B.M.*, No. 04-09-00069-CV (Tex. App.—San Antonio Feb. 24, 2010, pet. denied) (mem. op.)**

- Standing under TFC 102.006
- Maternal aunt failed to file a suit for adoption within 90 days after the date of the termination order
- Department struck her suit based on aunt's failure to file her suit within the 90 day period

- On appeal, aunt contended that the Department should be estopped from contesting her lack of standing because it encouraged her to perform services and visit the children, leading her to believe that the Department would consent to the adoption
- Aunt also argued that she should have been given a hearing to determine whether the Department withheld consent for her to file suit without good cause and that TFC 102.006 is unconstitutional, both facially and as-applied

- The San Antonio Court held that TFC 102.006 does not require a hearing regarding the issue of withholding consent without good cause and equity cannot confer standing where none exists in the statute – *See H.G.* and *S.L.M.*; it also held that 102.006 is not unconstitutional, either facially or as applied to aunt

Competency

***In re M.C.*, No. 2-09-300-CV (Tex. App.—Fort Worth May 27, 2010, no pet.) (mem. op.)**

- Mother's parental rights terminated at trial
- On appeal, mother contends that the trial court should have ordered that she undergo a competency evaluation because of evidence that she had untreated bipolar disorder – she argued that the trial court's error was fundamental and violated her right to due process

- The Fort Worth Court held that the Family Code does not prescribe a competency standard that a parent must meet before participating in a termination trial – the court determined it could not impose one where none exists
- Even if such a standard did exist, mother's appeal fails because the trial court found that mother understood the service plan and the proceedings
- Court finally overruled mother's complaint that her attorney was ineffective for failing to raise this issue

TRIAL ISSUES

Batson Challenge

***In re J.A.W. and S.P.W.*, No. 06-09-00068-CV (Tex. App.—Texarkana Apr. 1, 2010, pet. denied) (mem. op.)**

- Mother's parental rights terminated after a jury trial
- On appeal, mother argued that the trial court erred in denying her *Batson* challenge, contending that the record indicated that several veniremembers gave similar answers to African-Americans, but were treated differently

- In rejecting mother's complaint, the Texarkana Court held that treating veniremembers differently does not necessarily rise to racially disparate treatment
- The Department's counsel offered race-neutral explanations for his preemptive striking of the two African-American jurors
- The Texarkana Court noted that it gives great deference to the trial court's decision regarding purposeful discrimination because it requires an assessment of the credibility and content of the prosecutor's reasons

Reasonable Efforts and Termination

***Frank R. v. Tex. Dep't of Family and Protective Servs.*, No. 03-09-00436-CV (Tex. App.—Austin Apr. 13, 2010, no pet.) (mem. op.)**

- Father appealed the trial court's finding that his appeal was frivolous, contending that the Department had a duty to make a relative placement before his parental rights could be terminated

- The Austin Court affirmed the frivolous determination
- The court determined that although the trial court should evaluate reasonable efforts of the Department to identify relatives who could provide a safe environment for the child if the child is not returned to a parent, the Department's placement of the child with a non-relative does not preclude termination
- The court noted that it could not find either a statutory or common law duty of the Department to seek a relative placement prior to termination

Mediated Settlement Agreements

In re S.A.D.S., ___ S.W.3d ___ (Tex. App.—Fort Worth 2010, no pet.)

- Mother and the Department entered into an MSA in which the child's maternal grandfather was appointed sole managing conservator and mother possessory conservator – the agreement complied with the requirements of TFC 153.0071
- At the hearing to enter an order based on the agreement, the Department asked the trial court to sign an order that included a finding that appointing mother as managing conservator would not be in the child's best interest because it would significantly impair the child's physical health or emotional development – this provision was not in the MSA but the Department argued it was a necessary finding

- Trial court entered an order containing the requested finding over mother's timely objection
- On appeal, mother argued that the trial court erred in entering an order which varied the terms of the settlement agreement because it added the significant impairment finding

- The appellate court sustained mother's challenge, modifying the trial court's order
- The court reasoned that 153.0071 deals directly with mediated settlement agreements in conservatorship suits – 153.0071(d) sets out the requirements for an MSA to be binding; 153.0071(e) provides for the right to judgment on an MSA that complies with subsection (d)
- "As long as a mediated settlement agreement complies with section 153.0071, the trial court must comply with the specific edicts of that section…"

EVIDENTIARY ISSUES

Criminal Convictions and Fifth Amendment

***Murray v. Tex. Dep't of Family and Protective Servs.*, 294 S.W.3d 360 (Tex. App.—Austin 2009, no pet.)**

- Father complained on appeal that the trial court erred in admitting his prior criminal convictions under TRE 609 because some of them were more than ten years old and were for non-violent acts
- He also asserted that the trial court erred in requiring him to assert his Fifth Amendment privilege on a question-by-question basis

- The Austin Court rejected father's first complaint, holding that the Department's proffer of his criminal convictions went to the issue of best interest, and that father's use of illegal drugs and his prior convictions were relevant to several of the *Holley* factors – the age of the convictions did not render them more prejudicial than probative
- Regarding the Fifth Amendment issue, the court determined that father was not entitled to maintain a running assertion of the Fifth Amendment; rather, he was required to assert the privilege to each question

104.006

***In re D.D.D.K., C.E.K., Jr., and C.E.K.*, No. 07-09-0101-CV (Tex. App.—Amarillo Dec. 1, 2009, no pet.) (mem. op.)**

- Both father and mother appealed the termination of their parental rights; only father argued that the trial court erred in admitting the hearsay statements of the children under TFC 104.006
- Father argued that the foster parents' questioning of the children constituted coaching of the children, and that the children had severe developmental delays, rendering their statements less reliable

- The Amarillo Court determined that the trial court did not err in admitting the children's statements because the evidence established that the children's SANE exams indicated sexual abuse and the children's therapist testified that the children's statements were reliable and accurate, consistent, and were related to her on multiple occasions
- The court also noted that the children had not seen each other for a period of time, that the subject matter of the children's statements contained information children of their ages were not likely to know, and that the children's sexual behavior bolstered reliability

161.004 and Prior Evidence

***In re M.F., C.B.F., and E.F.*, No. 11-08-00276-CV (Tex. App.—Eastland May 13, 2010, no pet.) (mem. op.)**

- Mother and father entered into an MSA naming maternal aunt and uncle PMC of the children, mother and father retained PC
- A final order was entered consistent with the MSA
- Due to conflicts between the parties, the aunt and uncle relinquished custody of the children to the Department
- The Department sought and was granted termination of mother's and father's parental rights; part of the evidence used at trial predated the MSA

- On appeal, the parents argued that the Department was precluded from offering evidence that occurred prior to the agreed final order under the doctrine of res judicata
- The Eastland Court disagreed, holding that although there was not a prior order denying termination of parental rights, the agreed order was filed in response to a petition to terminate mother's and father's parental rights
- Thus, under TFC 161.004, the evidence prior to the agreed final order could be used to prove endangering conduct

***In re D.S. and N.S.*, ___S.W.3d___ (Tex. App.—Amarillo 2011, no pet. h.)**

- The Department was denied termination in a suit filed in April 2007; the Department filed a subsequent petition to terminate in October 2009
- Termination was granted in part based on evidence occurring prior to April 2007
- On appeal, father argued that his attorney should have interposed res judicata as a bar to litigating issues tried in the April 2007 termination proceeding

- The court found TFC 161.004 applied because: 1) the Department filed its live petition for termination on October 29, 2009, a date after the denial of termination; 2) the circumstances of D.S., N.S., and the mother materially and substantially changed on September 21, 2009 when the mother signed an open adoption agreement and an affidavit of voluntary relinquishment; 3) on July 9, 2007, the parent-child relationship of the father and another child was terminated; and 4) evidence supported a best interest finding.

- Section 161.004(b) allowed the trial court to consider evidence at the second hearing presented in favor of termination at the previous hearing
- Ineffective complaint was overruled because counsel was not required to challenge the admissibility of the evidence at the 2010 hearing on the ground that the evidence existed at the time of the 2007 hearing – "with the authorization granted by 161.004(b), such an objection would have lacked merit."

GROUNDS

161.001(1)(D)

***In re S.K.A.*, No. 10-08-00347-CV (Tex. App.—Waco Aug. 19 2009, no pet.) (mem. op.)**

- Father appealed the termination of his parental rights under (D)
- The evidence established that mother was using drugs while pregnant with the child – although father termed mother's drug use while pregnant "stupid", he did nothing to stop it
- The Waco Court affirmed father's termination, finding that his failure to take any action to protect the child by preventing mother from using drugs while pregnant established (D)

161.001(1)(E)

***In re J.C.R.*, No. 04-09-00500-CV (Tex. App.—San Antonio June 16, 2010, no pet.) (mem. op.)**

- Mother had another child, C.G., who had been in the Department's care for one year because he had a spiral fracture of the tibia that mom could not explain.
- The day before J.C.R. was born, C.G. sustained fatal injuries while on a supervised visit with mother, mother's brother, and J.C.R.'s father
- The Department removed J.C.R. from mother's care immediately upon her birth. The San Antonio Court noted: "the State's termination case was based on the environmental and conduct endangerment involving mother's older child." It continued: "And, notably, as with the previous injury a year earlier when C.G. had suffered another intentional injury, a spiral fracture of the tibia, [mother] was unable to explain how C.G. was injured."

- Looking to the bulk of evidence concerning the events leading up to and surrounding C.G.'s death, the San Antonio Court found the evidence sufficient to support both environmental and conduct endangerment
- Case squarely links prior conduct and environment to a child removed at birth

***In re D.W.*, No. 10-09-00188-CV (Tex. App.—Waco Dec. 30, 2009, no pet.) (mem. op.)**

- Father appealed the termination of his parental rights under (E), complaining that the trial court erred in determining that he had engaged in endangering conduct because he was incarcerated when he learned that mother was pregnant
- Following well-established case law, the Waco Court held that knowledge of paternity is not a prerequisite to showing a course of parental conduct that endangers a child under (E)
- Father's significant history of drug use and criminal conduct and incarceration established (E)

161.001(1)(F)

***In re C.L.; In re M.C.G.*, No. 14-09-00643-CV, No. 14-09-00644-CV (Tex. App.—Houston [14th Dist.] Sept. 16, 2010, no pet.) (mem. op.)**

- Undisputed evidence showed that for a twelve-month period, father provided no money to support M.C.G. while earning at least $13,500 over that period
- On appeal, father argued that the Department must present evidence of his inability to pay during **each** of the twelve months

- Record showed that father's income was not broken down by month during that period
- Court reiterated that the evidence must show that the parent failed to support in accordance with his or her ability ending within six months of the filing of the petition and that the one-year period must be twelve consecutive months – in this case, "the Department filed its motion to terminate on September 4, 2009, and thus the relevant time period is any twelve consecutive months between March 4, 2007 and September 4, 2009."

- In overruling father's argument, the court held that "if [father] was unable to provide support during some of those months, that will not interrupt the running of the one-year period **if** he made no effort to pay during other months in which there is a clear ability to pay." (emphasis supplied)
- The court further held that "Any excuse for failing to provide support, such as using the money for another purpose, is irrelevant in assessing a violation under section 161.001(1)(F)."

161.001(1)(L)

***In re A.N. and S.N.*, No. 11-08-00309-CV (Tex. App.—Eastland Aug. 6, 2009, no pet.) (mem. op.)**

- Mother convicted of intoxication manslaughter after the death of her infant child
- The trial court terminated her parental rights under TFC 161.001(1)(L)
- On appeal, mother argued that the evidence was insufficient to support termination under (L) because she was convicted of intoxication manslaughter, a conviction that is not enumerated in subsection (L)

- The Department argued the language "that a parent has been adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections" refers to Title 3 of the Penal Code
- The Eastland Court disagreed with the Department's creative argument, finding that the reference to Title 3 in subsection (L) refers to the juvenile justice section of the Family Code

- The court noted that the Legislature might want to consider adding intoxication manslaughter as an enumerated provision under (L)
- Although the case was reversed on legal insufficiency, the court chose to remand the case for a new trial rather than simply render it

161.001(1)(M)

***In re A.J.R.*, No. 13-08-00607-CV (Tex. App.—Corpus Christi Aug. 20, 2009, no pet.) (mem. op.)**

- Mother's parental rights terminated on two prior occasions for conduct in violation of (D) and (E) - both were on appeal at the time this case was tried
- Mother's parental rights to A.J.R. were terminated in the instant case under (E) and (M)
- Mother argued on appeal that the prior terminations could not be used to establish (M) ground because they were on appeal and potentially could be reversed

- The court affirmed mother's termination
- It held that an appellate court, in accordance with TFC subsection 109.002(c), may not suspend a judgment terminating parental rights in a suit brought by the Department
- Because the two prior orders were properly admitted into evidence, and were in full force and effect at the time mother's parental rights were terminated in this case, the Department established termination under (M)

161.001(1)(N)

***In re M.V.G.*, No. 10-09-00054-CV (Tex. App.—Waco Mar. 3, 2010, no pet.) (mem. op.)**

- Mother appealed the termination of her parental rights under (N), arguing in part that the Department failed to use reasonable efforts to return the child because it failed to provide services to her while incarcerated
- The Waco Court disagreed, finding that mother had been provided a service plan, but failed to do any services

- Following established case law, the court found that the Department's preparation and administration of a service plan was sufficient to establish reasonable efforts
- The court also held that the issue was not whether the Department could have done things differently, but whether the Department made reasonable efforts, not ideal efforts, to return the child

161.001(1)(O)

***In re M.G.*, No. 14-09-00136-CV (Tex. App.—Houston [14th Dist.] Nov. 17, 2009, no pet.) (mem. op.)**

- Mother's termination under (O) affirmed based on her failure to take prescribed medication consistently
- Court extended (O), holding that removal for abuse or neglect can include a review of the evidence occurring after removal
- "[W]e urge the [L]egislature to consider adjusting the present scheme for termination so as to require that any court ordered requirements for return of the child be *rationally related* to standards of acceptable parenting and supported by competent evidence."

***In re S.N., S.M.N., and D.A.N.*, No. 14-07-00161-CV (Tex. App.—Houston [14th Dist.] Mar. 5, 2009, no pet.) (mem. op.)**

- Department received referral alleging neglectful supervision and physical neglect of the children by mother
- When police arrived they discovered the children had been left alone for several hours; mother did not return for the children
- Mother relinquished but father terminated under (N) and (O) grounds

- On appeal, father asserts that the "removal for abuse or neglect of the child" means that the parent who failed to comply with the court order must be the *same* parent whose acts or omissions caused the child's removal

- The appellate court rejected father's contention, holding "Subsection (O) does not require the parent who failed to comply with a court order be the same parent whose abuse or neglect of the child warranted the child's removal. Had the [L]egislature intended such a requirement, it could have easily provided the conservatorship be 'as a result of the child's **removal** from the parent under Chapter 262 for the abuse or neglect of the child *by the parent.*'"

***Mann v. Tex. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.—Houston [1st Dist.] Sep. 17, 2009, no pet.) (mem. op.)**

- Termination of parental rights reversed – 161.001(1)(E) and (O) held legally insufficient
- Subject child removed from the hospital shortly after birth; mother had an older child in care due to mother's physical and emotional abuse of the older child
- Department argued that mother's abuse of the older child, her failure to obtain prenatal care, and her failure to obtain stable housing constituted abuse or neglect under (O)

- The court disagreed; “While appellant’s abusive conduct toward [older child] may indeed have jeopardized [younger child’s] well-being and given DFPS reason to remove [younger child] under Chapter 262, it is not evidence that [younger child] actually sustained abuse or neglect by appellant.”

- The court continued: “Though a parent’s abusive conduct toward an older sibling may be evidence of endangering conduct toward a younger sibling under § 161.001(1)(E), it does not demonstrate that the parent engaged in abusive or neglectful conduct toward the younger sibling as required under 161.001(1)(O).”

- The Court also rejected the Department’s arguments that failing to obtain prenatal care was endangering conduct and that mother’s failure to obtain stable housing during the case constituted endangering conduct
- Interesting case because our paper contains cites for other cases in which the Houston First Court has held the exact opposite of the above
- (O) continues to be a hot topic for challenge as this case creates a new standard for termination under (O), specifically in relation to the construction and interpretation of “abuse or neglect”

161.001(1)(Q)

***Rian v. Tex. Dep't of Family and Protective Servs*., No. 03-08-00155-CV (Tex. App.—Austin July 31, 2009, pet. denied) (mem. op.)**

- Mother's parental rights terminated under (Q)
- On appeal, mother argued that her criminal convictions were inadmissible because they were being appealed and therefore were not final
- The Austin Court disagreed

- The court held that the Legislature did not include a finality requirement in subsection (Q) when deciding that certain criminal convictions would support termination of parental rights - subsection (Q) uses the term "conviction" with no express requirement of finality

- The Court also discussed that the timelines for CPS cases were short; this adds to the view that the Legislature intended non-final criminal convictions to be admissible in termination cases – time restraints in termination cases often mean that termination cases will be completed before the appellate process has run in criminal cases
- Comports with the interpretation of final convictions in (L) ground cases

BEST INTEREST

***In re D.R.J.*, No. 07-08-0410-CV (Tex. App.—Amarillo July 8, 2009, pet. denied) (mem. op.)**

- On appeal, mother argued that her compliance with the Department's requests and services precluded a finding that termination of her parental rights is in the child's best interest
- In affirming the termination, the Amarillo Court found that although mother did complete her service plan, she did not make adequate progress
- The court went on to write that completion of services does not necessarily preclude a finding of best interest

INTERESTING CASES

The UCCJEA

***In re L.R.J.*, No. 11-08-00279-CV (Tex. App.—Eastland Feb. 18, 2010, no pet.) (mem. op.)**

- Father's parental rights were terminated; the Texas trial court granted adoption of the child by her stepfather
- Problem was that an initial custody determination had been made a few years earlier in Michigan – the home state of all parties

- After mother, stepfather, and the child moved to Texas, mother filed a petition to terminate father's parental rights
- Father filed a plea to the jurisdiction, requesting that the Texas trial court decline to exercise jurisdiction because the Michigan court retained jurisdiction over the child's custody determinations

- The Eleventh Court of Appeals agreed with father and reversed the termination and adoption
- Jurisdiction is predicated on the UCCJEA
- TFC Section 152.203 prohibits a court from modifying a custody determination unless: 1) an initial determination is made that the other state determines it no longer has jurisdiction or that a Texas Court would be a more appropriate forum; or 2) a Texas court or a court of the other state determines that the child, the child's parents, or any person acting as a parent no longer reside in the other state

- In this case, the Michigan court continued to exercise jurisdiction after the Texas case was filed (it entered a contempt order against mother for failing to follow the grandparent visitation order) and neither court determined that father no longer resided in Michigan
- Under 152.203, the Texas district court had no jurisdiction to modify the Michigan order

ICWA

***In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.—Waco 2009, no pet.)**

- Mother appealed the judgment terminating her parental rights, raising four complaints under the Indian Child Welfare Act of 1978 (ICWA)
- Despite the Department's knowledge that the children were believed to be American Indian, the trial court conducted the trial using the typical standards rather than the heightened ICWA standards

- ICWA requires a heightened burden of proof and requires notice to be sent to various individuals; it ultimately requires a determination of the child's Indian status
- On appeal, the Department contended that mother waived her issues by not objecting to the trial court's failure to apply ICWA, by failing to object to the jury charge, and by failing to include the issues in her statement of points

- The Waco Court rejected each of the Department's arguments
- First, the Waco Court found that ICWA, as federal law, preempts state law on error preservation; because there is no provision in ICWA to file a statement of points, mother was not required to comply with 263.405 to preserve her issues
- The court also found that because ICWA preempts state law, the failure to follow ICWA may be raised for the first time on appeal, despite the rules of error preservation

- The court held that it is incumbent on both the Department and the trial court to determine whether ICWA applies; it is the duty of both the trial court and the Department to send notice in an involuntary proceeding "where the court knows or has reason to know that an Indian child is involved."
- This includes when a party advises the trial court or when the Department has uncovered information which suggests that the involved child is an Indian child

- As a remedy, the court conditionally affirmed the termination, but abated the case for a determination as to whether the children were Indian children
- If the children were Indian, then the case would be remanded for a new trial using ICWA standards
- On abatement, the trial court determined that the children were Indian children – the Waco Court ultimately reversed and remanded the case

Post-Trial Issues and 263.405

De Novo Hearing and 263.401

***In re Marla C. Russell*, No. 03-10-00610-CV (Tex, App.—Austin Oct. 15, 2010, orig. proceeding) (mem. op.)**

- Before the 263.401 statutory dismissal deadline, the associate judge commenced trial on the merits and issued an interlocutory order of termination
- After the dismissal deadline had passed, parents timely filed a request for a de novo hearing under Family Code section 201.015; the trial court granted the request, setting the case for a de novo hearing before a jury

- Parents filed a motion to dismiss for failure to commence the de novo trial by the dismissal deadline; the trial court denied the motion. The parents then sought mandamus relief.
- The appellate court held that, unlike the granting of a motion for new trial, the granting of a de novo hearing under section 201.015 does not reinstate the case on the trial court's docket as if no trial had occurred for purposes of the statutory deadline for commencement of trial on the merits. The granting of the request for a de novo hearing did not negate the actions of the associate judge for purposes of the dismissal deadline.

Restricted Appeals

***In re J.D.O., Jr.*, No. 07-10-0370-CV (Tex. App.—Amarillo Dec. 6, 2010, order)**

- Father did not answer the Department's suit despite proper notice and did not appear at trial, either personally or through counsel
- Father filed a notice of appeal more than ninety days after the final order was signed, well outside of the deadlines under the TRCP and TRAP

- The issue before the appellate court was whether it had jurisdiction over the appeal as either a traditional appeal or a restricted appeal
- A restricted appeal is available provided that the appellant can show that he: 1) filed his notice of appeal within six months of the date the trial court signed its judgment; 2) did not participate in the complained-of trial; and 3) did not file any timely post-judgment motions, including a request for findings of fact and conclusions of law.

- The appellate court determined that it had jurisdiction over father's appeal as a restricted appeal
- In this case, father filed his notice of appeal later than 35 days but less than six-months after the final order was signed; was a party to the suit but did not participate either personally or through counsel; and did not file any timely post-trial motions (his statement of points was outside the fifteen-day period)

Appointment of Counsel

***In re C.D. and K.D.*, No. 2-10-00070-CV (Tex. App.—Fort Worth Sept. 1, 2010, no pet.) (mem. op.)**

- Grandmother was party to an involuntary termination proceeding as the children's managing conservator
- Appellate court ordered that grandmother was indigent and abated the appeal for the trial court to appoint counsel for grandmother under Family Code TFC subsection 263.405(e)

- Trial court declined to appoint counsel, looking to TFC 107.013 which applies to the appointment of counsel for indigent "parents" in Department initiated proceedings
- The appellate court noted that there is no corresponding right to counsel for grandparents or non-parents; "It would make little sense to construe section 163.405(e) to require the trial court to appoint counsel on appeal for a party who is not constitutionally required to have counsel at trial merely for expediency's sake."

Failure to Include Issue in Statement of Points

***In re J.H.G.*, 302 S.W.3d 304 (Tex. 2010)**

- Before the court of appeals, mother argued that the trial court unlawfully extended the dismissal deadline under 263.401 – this issue was not in her statement of points
- The Dallas Court of Appeals agreed with mother and reversed the case, finding that the statutory dismissal deadline was jurisdictional, and as such, did not have to be included in a statement of points

- The Supreme Court disagreed
- The 263.401 deadline is procedural, not jurisdictional
- Therefore, mother was required to include the issue in her statement of points – by not including the issue mother waived her complaint – "mother's failure to challenge the trial court's extension of the statutory deadline in her statement of points waived the issue on appeal."
- The case was remanded to the court of appeals for a consideration of mother's remaining issues

J.O.A. and 263.405

- All courts to interpret 263.405 after *J.O.A.* have interpreted it the same way, except one
- Led by the Waco Court, the majority of courts have held that *J.O.A.* only permits claims of ineffective assistance of counsel or challenges to the constitutionality of 263.405 to be brought if not in a statement of points
- The Beaumont Court has rejected this rationale
- Does 263.405 have any teeth in Beaumont now?

***In re M.F. and B.F.*, No. 13-10-00248-CV (Tex. App.—Corpus Christi Dec. 2, 2010, no pet. h.) (mem. op.)**

- Mother failed to include the issues she complained of on appeal in her statement of points
- Joining the vast majority of its sister courts, the Corpus Christi Court declined to review her issues, holding "Although section 263.405(i) does not prevent an appellate court from considering a claim of ineffective assistance of counsel or certain constitutional complaints that were not included in a statement of points, [mother] does not raise these arguments. Thus, we are limited to reviewing only those issues that were specifically presented to the trial court in [mother's] statement of appellate points."

263.405 and Full Record

***In re B.G., C.W., E.W., B.B.W., and J.W.*, 317 S.W.3d 250 (Tex. 2010)**

- The trial court permitted father to discharge his court appointed attorney and proceed *pro se* at trial
- Trial court ordered termination of father's parental rights
- Two days after the trial court signed its order terminating father's parental rights, father was appointed an attorney to handle his appeal – the record did not contain an order reflecting the appointment or that counsel took any action on behalf of father

- Father was appointed a second lawyer twenty days later (22 days after the judgment was signed)
- At this time, the Supreme Court had not handed down the *M.N.* case providing for a fifteen-day extension for filing a statement of points
- Second counsel filed a notice of appeal and affidavit of indigence – he was granted an extension for both
- No statement of points was filed until 40 days after the date of the termination order

- Because father had not filed his statement of points timely, the trial court determined that father's appeal was frivolous and no record was necessary to review his issues
- The Tyler Court affirmed
- On appeal, the Texas Supreme Court reversed and remanded the case to the court of appeals

- Father did not assert an ineffective assistance of counsel claim on appeal, but the Court determined that he was not required to argue this because 263.405 operated to deprive him of his due process right to an appeal
- "Although [father's] argument is not cast as a complaint of ineffective assistance of counsel, the effect is the same."
- The trial court did not determine that father's issues were frivolous, only that he should not have a record because he failed to timely file a statement of points

- The Supreme Court discussed what remedy to fashion, deciding to remand the case to the court of appeals for the preparation of a full record; the appellate court is to consider the issues in father's statement of points as if it had been filed timely

263.405 and Conservatorship Cases

***In re G.J.P. and R.P.*, 314 S.W.3d 217 (Tex. App.—Texarkana 2010 pet. denied)**

- Issue was whether 263.405 applies to cases in which conservatorship, not termination, was decided
- Father argued that because his parental rights were not terminated, only restricted, 263.405 did not apply

- Relying on the *A.J.K.* case, the Texarkana Court determined that 263.405 does apply to conservatorship cases in which the Department is involved
- Although the *A.J.K.* case relied on the definition of "final order", as set out in the now obsolete 263.401(d), the court found the rationale and logic of the *A.J.K.* case persuasive
- Chapter 263 applies to cases in which the Department is involved, and the heading of subchapter E involves suits affecting the parent-child relationship, not just termination

263.405(d) Hearings and Evidence

***In re J.J.L., J.M.L., L.M.E., G.X.E., Jr., and M.A.E.*, No. 04-10-00061-CV (Tex. App.—San Antonio July 21, 2010, no pet.) (mem. op.)**

- On appeal, father argued that the San Antonio Court should adopt a rule providing for a full record of the trial on the merits in every parental termination case in which there is an allegation that trial counsel was ineffective
- The court declined to do so, but did order the preparation of a full record

- The court ordered the full record because "the record contains only conclusory statements by the attorneys that the evidence was either insufficient or sufficient."
- It continued: "Therefore, based upon a review of only the record from the new trial hearing, it is impossible to ascertain whether the trial court abused its discretion."

INEFFECTIVE ASSISTANCE OF COUNSEL

Estoppel and Ineffective Assistance of Counsel

***In re R.S.*, No. 14-08-01013-CV (Tex. App.—Houston [14th Dist.] Oct. 1, 2009, pet. denied) (mem. op.)**

- Mother attempted to argue ineffective assistance of counsel on appeal
- The Houston Fourteenth Court rejected her complaint under the invited error doctrine, determining that because mother failed to appear for trial and refused to cooperate with her counsel she could not assert ineffective assistance of counsel
- Now, a parent's failure to participate in his or her defense can possibly estop them from claiming ineffective assistance of counsel

Retained Counsel and Ineffective Assistance

***In re V.G., E.G., A.G., J.G., JA.G.*, No. 04-08-00522-CV (Tex. App.—San Antonio Aug. 31, 2009, no pet.) (mem. op.)**

- Father argued on appeal that his counsel provided ineffective assistance
- The San Antonio Court rejected the argument, holding that because father had retained counsel rather than appointed counsel, he was not entitled to raise ineffective assistance

Ineffective Assistance of Counsel in PMC Cases

***In re G.J.P. and R.P.*, 314 S.W.3d 217 (Tex. App.—Texarkana 2010 pet. denied)**

- Father's parental rights were restricted, not terminated
- At the time of trial, father was incarcerated for the charge of killing his wife and her child
- On appeal, father asserted that 263.405 was unconstitutional and that he received ineffective assistance of counsel

- The Texarkana Court properly did not address father's constitutionality arguments because they resolved his issues on non-constitutional grounds
- However, the court did address his ineffective assistance complaint, reaching a very surprising decision

- The court framed the issue as: "Does the recognized right to effective assistance of counsel for cases involving the termination or severance of parental rights also extend to cases in which only conservatorship is decided?"
- The court determined the answer is "no"

- While termination of parental rights results in the permanent deprivation of a liberty interest, a determination of conservatorship of custody does not reach such a level; "Ineffective assistance of counsel is a constitutional claim that is only available in very limited situations. Generally, it can be raised only in criminal cases (where loss of freedom is at stake) and parental rights termination cases (where the relationship between parent and child is permanently severed)."
- The court determined that because the case was a conservatorship case, the "extra-constitutional" protection of ineffective assistance did not apply

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