DFPS CASE LAW UPDATE

BRIAN J. FISCHER
Attorney At Law
Board Certified: Juvenile Law
Texas Board of Legal Specialization
6200 Gulf Freeway
Suite 202
Houston, Texas 77023
(713) 520-7500
Fax: (713) 644-8080
E-mail: bjflaw@hotmail.com

State Bar of Texas
26th ANNUAL ROBERT O. DAWSON
JUVENILE LAW INSTITUTE
February 11-13, 2013
San Antonio

CHAPTER 20

RESUME

BRIAN J. FISCHER
ATTORNEY AT LAW
6200 GULF FREEWAY
SUITE 202
HOUSTON, TEXAS 77023
(713) 520-7500
FAX# (713) 644-8080
e-mail: bjflaw@hotmail.com

Licensed: State Bar of Texas: 1979
Licensed: State Bar of Florida: 1980
Licensed: United States Southern District of Texas: 1986 to present
Licensed: United States Court of Appeals, 5th Circuit: 1981 to present
Licensed: United States Court of Appeals, 11th Circuit: 1981 to present
Board Certified: Juvenile Law, Texas Board of Legal Specialization: 2001 to present
Council Member, State Bar of Texas, Juvenile Law Section: 2002-2009
Secretary: State Bar of Texas, Juvenile Law Section: 2005-2007
Chair: State Bar of Texas, Juvenile Law Section: 2007-2008
Immediate Past Chair, State Bar of Texas, Juvenile Law Section: 2008-2009
Chair: Houston Bar Association, Juvenile Law Section: 1994, 2011, 2012
Member: State Bar of Texas, Juvenile Law Section: 1987 to present
Member: Board of Directors: Chris Cole Children's Fund: 2006 to present
Vice President: Chris Cole Children's Fund: 2009 to present
Speaker: State Bar of Texas, Juvenile Law Section: Robert O. Dawson Juvenile Law Institute: 1999, 2000, 2001, 2002, 2004, 2007, 2009, 2013
Speaker: State Bar of Texas Juvenile Law Section: Nuts & Bolts of Juvenile Law Seminar: 2002, 2003, 2007, 2008
Speaker: Lubbock County DRC Juvenile Law Symposium 2009
Speaker: The Juvenile Trial Project: Edinburg, Texas: 2003
Speaker: The Juvenile Trial Project: San Antonio, Texas: 2003
Speaker: Houston Bar Association, Juvenile Law Section: Ad Litem Practice in Juvenile Courts of Harris County: 1994
Speaker: Texas Center for the Judiciary: Beyond the Bench Seminar: Galveston, Texas: 2010
Speaker: Adjusting the Bar: The Definitive Ad Litem Seminar in DFPS Cases: 2010, 2012
Conference Coordinator: Speaker: Juvenile Law Conference: Houston: 2010, 2011, 2012
Speaker: Juvenile Law Practice: Galveston County Criminal Defense Association: 2007
Speaker: Juvenile Law Mock Jury Trial Project: Houston Bar Association: 2007, 2008
Speaker: Juvenile Law in Harris County District Courts: Houston Bar Association: 2008
Speaker: Houston Bar Association, Juvenile Law Section: Trial of a CPS Case, 2002
Substitute Associate Judge/Master: Juvenile Courts of Harris County, Texas: 1998 to present.

TABLE OF CONTENTS

DFPS CASE LAW UPDATE

1. OVERVIEW.

The purpose of this paper is to discuss the DFPS case law updates that have come down from the Courts of Appeals and the Texas Supreme Court since last year's conference.

I have been providing case law updates each Friday to everyone on my e-mail list since last year's conference.

I have been advised against saying this, but if you would like to be included in the e-mail list for Friday case law updates (including Juvenile Law Cases and DFPS Cases) please e-mail me and request that you be included in the e-mail list. (God help me!)

2. SUPREME COURT RULE REGARGING APPEALS

On August 11, 2011 the Texas Supreme Court adopted **Misc. Docket No. 11-9169** that totally screwed up the Appellate Procedure in DFPS Cases. The Order mandated that if the Respondent (Parent) was deemed indigent for trial the Respondent was automatically deemed indigent for appeal (unless a contest to indigency is filed) and furthermore, upon the filing of a Notice of Appeal, the Court Reporter's Record and Clerk's Record must be filed within ten days after the filing of the Notice of Appeal, with only one ten day extension due to the Court Reporter. Additionally, the Notice of Appeal is due 20 days after the judgement is signed but the Motion for New Trial is due 30 days after the judgment is signed. Additionally, if a party files a contest to indigence after the Notice of Appeal is filed and the contest is upheld, the Court of Appeals will have already assigned an appellate cause number and then a motion to dismiss must be filed.

Further, the Trial Court is Ordered to employ a substitute Court Reporter if the Official Court Reporter requires time to complete the Reporter's Record.

This has created havoc in the Courts in Harris County and put an incredible burden on the Court Reporters.

My opinion is that the Supreme Court needs to revisit the accelerated appeals procedure to place the burden on the appellate courts and revert to the Rules of Appellate Procedure for the timetable for the Court Reporters and the attorneys.

3. CASE LAW UPDATE

The following cases have been released by the Courts of Appeals and the Supreme Court of Texas since last year's case law update:

1. *In the Interest of: E.R.,J.B., E.G. and C.L., Children No. 11-0282, Supreme Court of Texas (July 6, 2012)*

In this case, the Supreme Court of Texas found that the DFPS Caseworker did not exercise due diligence in serving the mother. Additionally the Supreme Court found, that under the circumstances of the case that the six month requirement for the filing of a Bill of Review did not apply as a result of the fact of this case.

In the restricted appeal under the two year bill of review statute the Court found that although the DFPS Caseworker had already completed an affidavit for publication on the mother, that the mother continued to visit with the children at the DFPS offices and the caseworker had a valid phone number for the mother. Further, the Court, in naming the attorney ad litem's name for the mother on publication, found that the attorney ad litem for the mother on publication did not inquire as to any contact that the caseworker had with the mother and if the caseworker had a valid phone number for the mother.

The Supreme Court reversed the case and remanded it to the 5th Court of Appeals to determine if the mother exercised due diligence in pursuing the bill of review within the 2 year period allowed by the statute for general bills of review.

CAUTION: Attorneys ad Litem for parents served buy publication: The burden is on you to insure that: 1. DFPS has exercised due diligence in location the parent; and 2. You had better exercise due diligence in locating the parent (or your name will show up in print!!!)

2. *In re: C.T.C.a Minor Child, 365, S.W.3rd(Tex.App. Dallas 2012)*

In this Case the Father signed a an acknowledgement of paternity on August 3, 2009. On October 10, 2009 Father signed a Waiver of Interest in the child. On November 10, 2009 Mother filed a Petition for Termination of Parental Rights. On November 14, 2009 Father signed a Waiver of Service of Citation as to the Termination Petition and signed an Agreed Decree of Termination on November 24, 2009 terminating Father's parental rights. Father contended that the signed the Waiver of Interest and Agreed Decree based upon Mother's representations that they would be married and raise C.T.C. together.

According to Father on March 7, 2010 Mother broke off the engagement and ended their relationship and told Father that he would "have no relationship with his son. Father contacted counsel on April 20, 2010 and on September 29, 2010 filed a Bill of Review asserting "extrinsic fraud" on the part of the Mother in getting him to sign the waiver of interest and Agreed Termination Decree.

The 5th Court of Appeals said that TFC Section 162.211(a) requires that a Bill of Review be filed within 6 months of the termination decree just as TFC Section 162.211(b) does and denied Father's challenge to the termination decree as denying Father due process.

On August 24, 2012 the Texas Supreme Court granted the Petition for Review of the case and "Pursuant to Texas Rule of Appellate Procedure 56.3, without considering the merits, the Court grants the petition for review, sets aside the judgments of the court of appeals and trial court, and remands the case to the trial court for rendition of judgment pursuant to the parties' settlement agreement."

3. ***In the Interest of A.M.C., J.M.C,III, C.D.C and H.D.C, No. 09-12-00314-CV, 9th Court of Appeals***

In this case which was rendered September 26, 2012 the 9th Court of Appeals found that the publication service on the mother in the termination case was not properly served by publication and reversed the termination of the mother's parental rights that the trial court terminated pursuant to T.F.C. Section 161.001(1)(D)(E)(N) and (O).

The mother alleged that DFPS did not exercise due diligence in its efforts to locate her and that there was no affidavit of due diligence in the file. DFPS conceded that fact and joined in the mother's request for the granting of a new trial as to the mother. The father's termination was not reversed by the 9th Court of Appeals.

a. ***Texas Family Code Section161.001(1)(O)***

1. ***In the Interest of: E.C.R., No. 01-11-00791-CV, 1st Court of Appeals***

In the E.C.R. case the 1st Court of Appeals on March 12, 2012 found that there was legally insufficient evidence to terminate under 161.001(1)(o) because the conduct alleged by the mother was not directed at the child the subject of the suit but rather at another child not the subject of the suit. There were no allegations against the mother as to abuse or neglect of the child the subject of the suit and therefore the 1st Court of Appeals reversed the trial court finding that there was legally insufficient evidence to terminate on the "O' ground.

2. ***In the Interest of: K.E.S., A Child; No. 02-11-00420-CV, 2nd Court of Appeals***

In the K.E.S. case the 2nd Court of Appeals on July 12, 2012 reversed the termination of the father's parental rights finding that although he was incarcerated since the child's birth and had no knowledge of the child's birth, and had participated in some classes in prison, and requested an opportunity to participate in services when released from prison, the 2nd Court of Appeals found that no reasonable fact finder could form a firm belief that the father engaged in conduct that endangered the child. Additionally the court found that the father cooperated to the best of his ability with DFPS and therefore there was insufficient evidence to terminate the father's parental rights based upon "O" grounds and the Court of Appeals reversed the termination of the father's parental rights and reversing the appointment of DFPS as managing conservator and remanded for a new trial as to the father. The mother's attorney filed an Anders Brief and the Court agreed with mother's attorney and upheld the termination of the mother's parental rights.

3. ***What Does This Mean for T.F.C. Section 161.001(1)(O)***

So what does this mean for the practitioner when faced with a case where DFPS has only 161.001(1)(O) for termination? DFPS stills needs to prove that there was a basis for pick up of the child or children at trial. If DFPS cannot prove that there was a risk to the child the subject of the suit (not another child who is not the subject of the suit) they may not be able to get beyond the legal and/or factual sufficiency issues at trial.

4. ***Experts***

1. ***Christian Olsen v. State of Texas; No. AP-76,175-Court of Criminal Appeals***

In the Olsen case the Court of Criminal Appeals addressed the issue of Expert Witnesses in a criminal case (Capital Murder). In that case the trial court addressed the issues of Daubert and Nenno and found that the proffered expert by the defense did not qualify as an expert under TRE 702. The Court of Criminal Appeals addressed at length Daubert and Nenno and discussed at length the reliability issue. The trial judge excluded the expert's testimony and the Court of Criminal Appeals reversed the trial court finding that the defense expert qualified as an expert under Daubert and Nenno.

5. ***Standing for Foster Parents***

1. ***In Re: Tina and Greg Salverson; No. 01-12-00343-CV, 1st Court of Appeals***

In the Salverson case the Petitioners (Foster to Adopt Foster Parents) in the Writ of Mandamus alleged that the trial court wrongfully struck their Petition in Intervention in a DFPS case. The Petitioners alleged that they had standing to intervene because they had standing under Section 102.004(b) of the Texas Family Code. That section provides that "other persons" with substantial past contact with the child may intervene. The Petitioners had 4 months of possession of the child. The trial court struck the Petition in Intervention citing TFC Section 102.003(12) in granting the Motion to Strike

the Petition in Intervention. TFC Section 102.003(12) provides that foster parents must have possession for 12 months in a DFPS case in order to intervene.

The 1st Court of Appeals stated that TFC Section 102.004(b) allows the court to grant a grandparent or ***other person*** deemed by the Court to have substantial past contact with the child to intervene in a suit filed by person authorized to file suit if there is satisfactory evidence that the appointment of a parent or parents as sole managing conservators of joint managing conservators would significantly impair the child's health or emotional development. The Court reasoned that although the foster parents would not have standing to file an original suit, they had standing to intervene. The Court cited ***In Re: A.M., 60 S.W.3rd 166, 169(Tex.App.-Houston (1st Dist.)2011,no pet.)*** in support of its ruling. The Court found that the trial court applied the wrong section of the Family Code in granting the Motion to Strike and granted the Petition for Writ of Mandamus and ordered the trial court to consider the Petition to Intervene under the relaxed standard of TFC Section 102.004(b).

6. ***Accelerated Appeals***

1. ***W.C.and L.H., Appellants v. Texas Department of Family and Protective Services; No. 03-12-00495-CV, 3rd Court of Appeals***

In this case the 3rd Court of Appeals Ordered the Court Reporter to file the Reporter's Record by August 24, 2012 and stated in their Opinion that if the Record is not filed the Court would issue a Show Cause Order to the Court Reporter to show cause why the Record was not filed. Since the Supreme Court Order on accelerated appeals is DFPS cases was filed the Appellate Court are not cutting the Court Reporters any slack.

2. ***In Re: Chavela Crain D.H.a/k/a D.T., Appellant v. Texas Department of Family and Protective Services, No. 03-12-00471-CV, 3rd Court of Appeals***

In this case the 3rd Court of Appeals issued a Show Cause Order to the Court Reporter Chavela Crain for failing to comply with the Court's Order to file the Reporter's Record. The Court Ordered the Court Reporter to file the Reporter's Record by August 20, 2012 and cautioned her that a Show Cause Order would issue if the Reporter's Record was not filed. The reporter did not file the record by August 20, 2012 and on August 23, 2012 the Court issued it's Opinion ordering the Court Reporter to appear in the 3rd Court of appeals on September 12, 2012 at 9:00 a.m. to show cause why she should not be held in contempt and have sanctions imposed upon her for failure to obey the Courts August 9, 2012 Order instructing her to file the Reporter's Record by August 20, 2012. The Court did state in the Order that the Show Cause Order would be withdrawn if the record was filed by September 4, 2012. Reporters need to beware that the Courts mean business.

3. ***In the Interest of C.S.and G.S., Children; No. 10-12-00133-CV, 10th Court of Appeals***

In this case the Court Reporter's Record was missing the last 40 minutes of the reporter's record was corrupted and therefore was unavailable for transcription.

The court of Appeals abated the appeal and ordered the trial court to conduct a hearing to determine if the record was destroyed without appellant's fault, weather the lost or destroyed record is necessary to appellant's appeal and the lost or destroyed portion of the reporter's record cannot be replaced by agreement of the parties. The Court further stated that the parties should mediate that issue and see if the parties can reach an agreement regarding the missing record. The Court also ordered the trial court to issues finding of fact and conclusions within 7 days of the order.

4. ***J.M. and A.G., Appellants, No. 03-12-00487-CV, 3rd Court of Appeals***

In This Case the 3rd Court of appeals found that the attorney for appellant had not timely filed the brief for appellant under the accelerated appeal Order of the Supreme Court in DFPS Cases. The Brief was due September 4, 2012 and the brief was not filed. The 3rd Court of Appeals cited the Supreme Court Order in the opinion and Ordered that the brief be filed by September 24, 2012. The Court stated in the opinion that if the brief is not filed by the 24th the attorney may have to appear and show cause why he should not be held in contempt for failing to file the brief.

5. ***S.M.K and K.A.M., Appellants, No. 03-12-00585-CV, 3rd Court of Appeals***

In this case the 3rd Court of Appeals found that the Reporter's Record was due to be filed by September 4, 2012. The Court said that the Reporter requested an extension of 30 days to file the record. The Court again cited the Supreme Court Order that required the record to be filed within 10 days with a 10 day extension and for good cause found another 10 day extension. The Court instructed the Reporter to file the Record by September 20, 2012 and stated that if the record was not filed by then the Court Reporter may have to show cause why she should not be held in contempt.

6. *In Re: Luis Cuellar, J.M. and A. G., Appellants; No. 03-15-00487-CV, 3rd Court of Appeals*

In this case the 3rd Court of Appeals issued a Show Cause Order ordering Luis Cuellar, the attorney for Appellant to appear in the 3rd Court of Appeals on October 19, 2012 to show cause why he should not be held in contempt for not complying with the 3rd Court of Appeals Order of September 7, 2012 ordering the attorney to file the Appellant's Brief no later than September 24, 2012. The Court said in its Opinion that the Order to Show Cause would be withdrawn if the attorney files the Appellant's Brief on or before October 19, 2012.

7. Ander's Briefs

In the Interest of: C. N. S. and T.G.S, No: 09-12-00016-CV, 9th Court of Appeals

In this case the 9th Court of Appeals reaffirmed that counsel for Appellant may file an Ander's Brief pursuant to *Anders v. California* asserting that there are no arguable grounds on appeal. Counsel is required to provide a copy of the Brief to the appellant and the appellant may file a pro-se brief. The 9th Court of Appeals found that the appellant did not file a pro-se brief and affirmed the trial court.

8. Sufficiency of the Evidence

1. In the Interest of E.B and H.B., Children, No. 02-11-00209-CV, 2nd Court of Appeals

In this case the 2nd Court of Appeals found that the endangerment grounds were insufficient and reversed the order terminating the father's parental rights and reversed and remanded the case to the trial court for a new trial. The children remained in that voluntary family placement about nine months before TDFPS returned them to Father's care. About a month after reunification, TDFPS removed the children from Father after a doctor opined that A.B. had injuries that were not accidental, and TDFPS placed the children with an unrelated foster family. TDFPS filed its petition for termination the next day. About seven months later, the children were placed with a second foster family, G.H. and J.H.

In June 2009, after a bench trial, Father's parental rights were terminated. The trial court found by clear and convincing evidence that Father had knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being, that he had engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the children's physical or emotional well-being, and that termination of the parent-child relationship with Father was in the children's best interest. S.B.'s (Mother's) rights were also terminated, but she did not appeal that decision.

Father appealed from that judgment and challenged the legal and factual sufficiency of both endangerment findings and of the best interest finding. In July 2010, this court reversed the judgment and remanded the case to the trial court. In doing so, we overruled Father's legal sufficiency challenges, sustained his challenge to the factual sufficiency of the evidence supporting the endangerment findings, and did not reach his challenge to the factual sufficiency of the evidence supporting the best interest finding. No one petitioned for review of that decision.

Father's parental rights were terminated for a second time in June 2011 when a jury made the same endangerment and best interest findings that the trial court had made in the first trial. This appeal followed. The Appellate Court discussed at length the evidence and stated "Here, we determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that the parent violated subsection (D) or (E) of section 161.001(1). If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction in the truth of its finding, then the evidence is factually insufficient. When we reverse on factual sufficiency grounds, then we must detail in our opinion why we have concluded that a reasonable factfinder could not have credited disputed evidence in favor of its finding. To prove endangerment under subsection (D), TDFPS had to prove that Father (1) knowingly (2) placed or allowed his children to remain (3) in conditions or surroundings that endangered their physical or emotional well-being. Subsection (D) focuses on dangerous conditions or surroundings that endanger the physical or emotional well-being of the children. It focuses on the suitability of the children's living conditions. Thus, under subsection (D), it must be the environment itself that causes the children's physical or emotional well-being to be endangered, not the parent's conduct. Accordingly, viewing all the evidence in the light most favorable to the termination judgment and disregarding all contrary evidence that a reasonable factfinder could disregard, we again hold that some evidence exists that would support a factfinder's firm belief or conviction that Father violated subsections (D) and (E), and we overrule those portions of Father's first two points challenging the legal sufficiency of the evidence to support the termination of his parental rights on these two grounds. As we did in the first opinion, we next address whether the evidence is factually sufficient to support termination of Father's parental rights pursuant to subsection (D) or (E). We review all of the evidence, focusing on the evidence concerning the three allegations that TDFPS relies on as establishing subsections (D) and (E) grounds for termination: (1) H.B.'s failure-to-thrive diagnosis, (2) Father's hostile behavior, and (3) the conditions of Father's homes." The Court then went on to discuss the testimony at length and determined as follows "Accordingly, viewing all the evidence and affording due deference to the jury findings, we again hold that the evidence relating to H.B.'s failure-to-thrive diagnosis is factually

insufficient to terminate Father's parental rights under subsection (D) or (E) because a reasonable factfinder could not have formed a firm belief or conviction that Father underfed H.B. or knowingly allowed her to be underfed," The Court then went on to discuss the father's conduct to DFPS and the police. All of that evidence was presented at the first trial which was reversed and the Court stated "Because the second trial did not involve new evidence of Father's hostile conduct, evidence of Father's conduct will again be factually insufficient to support termination under subsection (E) absent new evidence that this conduct endangered the well-being of his children." The Court then went on to discuss the condition of the father's homes at length and found "Accordingly, applying the appropriate standard of review, we hold that evidence of the condition of Father's homes is factually insufficient to support termination of Father's parental rights under subsection (D) or (E) because a reasonable factfinder could not have formed a firm belief or conviction that the children were present in Father's homes when the unsanitary conditions were reported in 2007, 2009, 2010, and 2011 or that the children were endangered by the conditions that existed when they did live in the home in June and July 2008" The Court then found "Applying the appropriate standard of review, the volume of disputed evidence—set forth extensively above—that a reasonable factfinder could not have credited in favor of subsection (D) or (E) findings is so significant that a factfinder could not reasonably have formed a firm belief or conviction of the truth of the allegations that Father violated subsection (D) or (E).110 Therefore, the evidence is factually insufficient to support termination of Father's parental rights under subsection (D) or (E). Accordingly, we sustain the remaining portions of Father's first and second points." The Court then discussed the intervention and stated that it would not invade the province of the legislature in addressing the intervention statutes. The Court finally concluded "Having determined that the evidence is factually insufficient to terminate Father's parental rights under subsections (D) and (E) of section 161.001(1) of the family code and having overruled his other points, we reverse the trial court's judgment and remand the case to the trial court for a new trial."

2. *In the Interest of:J. E. H., A Child; No. 04-12-00110-CV, 4th Court of Appeals*

In this case the 4th Court of Appeals reversed termination based upon insufficiency of the evidence. The facts were thee the father was arrested for possession of marijuana while transporting his son and incarcerated. The caseworker testified that although she had attempted to work with the father he did not complete services. Trial commences on November 17, 2011 to the judge and because of other matters the trial was recessed until January 20, 2012. The state called only one witness, the father. The father called only one witness, his sister she testified that the father was a "good dad".

In closing argument the attorney for DFPS argued that the caseworker testified on the first day of trial, on November 17, 2011, that there were several attempts to set up the psychological evaluation of the father. However, the Court found that there was confusion regarding the testimony from November 17, 2011 and January 20, 2012 on the part of the DFPS attorney.

The Court of Appeals found that the only credible testimony was that of the father and his sister regarding the father being a "good father".

The court addressed the issue of "judicial notice" of the Court's file and found that although the Court may take judicial notice of the Court's File, the Court may not take judicial notice of the facts contained in the pleadings in the Court's file. Additionally, the Appellate Court found that the Trial Court could take judicial notice of the allegations made by the caseworker in the Family Service Plan.

The Appellate Court found that the allegations in the Affidavit of the caseworker was not evidence that the father abused or neglected the child (even though he was arrested while driving a car under the influence of marijuana).

The father's testimony was that he" made a wrong choice" That was the only evidence offered by DFPS.

Later in the father's testimony, the Department attempted to elicit testimony about why J.E.H. was removed, but it failed to do so. Instead, the father gave the following non-responsive answer:

> Q: Isn't it true, sir, that you were pulled over driving under the influence with marijuana when your son was in the car in December of 2009?
> A: If I was I was not arrested for marijuana, and I went to jail for marijuana.
> Q: Okay.
> A: But it was just the police, when they would – where my momma stays at and the laws is crooked sometimes and they don't do the right thing, but I never went to no jail or got busted for marijuana or none of that.

The Court of Appeals found that the father's testimony is not sufficient to support a finding that J.E.H. was removed from the father's care for abuse or neglect. And, because there is no evidence to support such a finding, the evidence is legally insufficient to support termination on "O" grounds.

The Court of Appeals then went on to discuss the grounds for termination under 161.001 (1) (p) Texas Family Code. The Court found: that the Department had the burden of proving that the father. used a controlled substance in a manner

that endangered the child. See TEX. FAM. CODE ANN. § 161.001(1)(P) (West Supp. 2012) (emphasis added). As evidence to support the finding that the father used a controlled substance in a manner that endangered J.E.H., the Department, once again, points to Mitsui's affidavit, which was attached to its petition; the allegations made in the family service plan; and father's testimony. As explained, the trial court could not take judicial notice of Mitsui's affidavit or the allegations made in the family service plan. With regard to the father's testimony, the above excerpts of his testimony do not support a finding that the father used a controlled substance in a manner that endangered J.E.H. The Department also points out that the father testified tested positive for cocaine during the pendency of this suit. While the father admitted that he tested positive for cocaine during the pendency of this suit he denied having actually used cocaine and gave no testimony that would support a finding that his use of controlled substance endangered J.E.H. There is simply no evidence in this record that supports the finding that the fatther used a controlled substance in a manner that endangered J.E.H. Therefore, the evidence is legally insufficient to support termination on "P" grounds.

The Court found that because the father did not seek reversal on the issue of managing conservatorship, the appellate court reversed termination and remanded the case to the trial court for a new trial.

3. ***In the Interest of: E.N.C., J.A.C., S.A.L., N.A.G. AND C.G.L.,Minor Children; No*: NO. 11-0713, Texas Supreme Court**

In this case the Texas Supreme Court reversed the 6th Court of Appeals finding that the evidence was legally insufficient to terminate the father's parental rights even though he had was deported to Mexico before the children were taken into care by DFPS.

The Court found that the father had been convicted in Wisconsin of having sex with an underage girl. In 1996 the father moved to Texas without completing his probation in Wisconsin and married the mother. The couple lived together for 9 years. The two children the subject of this suit father by the father were born in 1998 and 1999. The father supported the children and an child bron from a previous relationship of the mother. In 2004 or 2005, after Francisco and Edna separated, Francisco approached the immigration authorities in Dallas for purposes of procuring a green card. Because Francisco had left Wisconsin in violation of his probation terms, he was arrested, jailed, and ultimately deported. Francisco is not allowed to return to the United States for ten years (until at least 2014), but he testified by telephone at trial that he would like to return to the United States to help J.A.C. and S.A.L. In the meantime, J.A.C. and S.A.L., along with their three half-siblings, remained with the mother in Texas. DFPS investigated the mother from 2000 but did not remove the children from the mother.

The father worked in Mexico making $400.00 per month, remarried and had two children by his current wife. His children the subject of this suit visited the father in Mexico at least once, 1 ½ hears prior to trial. The father maintained telephone contact with the children and sent support for the children before they were removed to foster care by DFPS. In 2009 DFPS removed the children from the mother because she was apparently giving the children Tylenol PM to make them sleep and taking her mother's prescription pain medication.

In the combined Permanency Plans and Progress Reports DFPS was allowing the father to have monthly telephone contact with his children. Once the children were moved to Bryan he was no longer permitted to have telephone contact.

The Supreme Court found that there was no Court Order for the father to pay child support nor did DFPS offer the father a Family Service Plan and DFPS said that the father would have to complete his probation for "sex with a minor" before they would let his have access to the children. The father provided clothing for the children through his uncle who traveled to the United States every two weeks and the uncle would visit with the children every two weeks.

At trial no evidence was offered regarding the father's probation. The caseworker testified that she had no idea why the father was deported and that he did not provide any support for the children, and that she did not provide a Family Service Plan for the father because he had been deported. The caseworker and the Child Advocate both testified that the father's parental rights should be terminated because the children were in a long term foster home and the foster home was thinking about adoption. The father testified by telephone thru an interpreter and testified that he never saw the mother do anything to the children. No other evidence was adduced at trial. The trial court terminated the father's parental rights pursuant to T.F.C. Sections 161.001(1) (d)(e)(f) and (n). The father appealed.

A divided Court of Appeals affirmed the father's termination and the Supreme Court heard the case on appeal from the Court of Appeals.

The Supreme Court found that no reasonable fact finder could find by clear and convincing evidence that the father engaged in a course of conduct that endangered the children and the Court of Appeals found that the father's probation was based upon supposition. The Supreme Court found that due process applies to all persons in the United States whether they are here legally or not. The Supreme Court the considered the Holly V. Adams best interest standards and found that the evidence was legally insufficient to meet the test. The Supreme Court further found that DFPS never assed the father's circumstances in Mexico.

The Supreme Court specifically found "In sum, we conclude that no reasonable fact-finder could have formed a firm belief or conviction that termination of Francisco's parental rights was in the children's best interest, and the court of appeals erred in holding otherwise. *See* TEX. FAM. CODE § 161.001(2); *J.F.C.*, 96 S.W.3d at 272. We do not conclude that the children's best interest is unquestioningly for them to join their father in Mexico; it is possible that the children's best interest is to remain in the United States, whether in foster care or with Alvaro or another family member. But the Department is required

to meet its burden of proof, and the evidence introduced at trial fails, at this juncture, to support the Department's burden as to the best-interest finding.

The Supreme Court reversed the Court of Appeals finding that due process commands that the Clear and convincing standard be applied to termination cases.

The Supreme Court specifically stated in its conclusion "On remand, the Department has several options to consider, including offering Francisco a service plan to assess whether it would be feasible and appropriate for him to have custody of his children, and allowing Francisco an opportunity to comply with the plan. The fact that Francisco resides in Mexico should not seriously hamper the Department's efforts. *See, e.g.*, *Angelica*, 767 N.W.2d at 86–87 (discussing State of Nebraska's coordination with the Guatemalan consulate and agencies for the purpose of conducting a home study and determining whether sufficient services exist in

Guatemala to monitor and protect the well-being of the children)."

4. *In the Interest of J.M; No. 04-12-00311-CV, 4th Court of Appeals*

In this case from the 4th Court of Appeals which came down November 9, 2012 the Appellate Court found factually insufficient evidence for termination and also found that the father in Mexico was not personally served. Additionally, the father had been appointed an attorney on June 11, 2011 and the attorney never appeared at any of the hearings or trial.

On June 11, 2011 DFPS removed the child from the mother. The Original Petition alleged that J.M.'s father was Julian Martinez. That same day the Trial Court authorized service on Julian Martinez by posting a copy of the Petition on the Courthouse Door. There was no order in the court file authorizing substituted service. At the adversary hearing the attorney for the father did not appear and the caseworker told the Court that the correct name for the father was Jose Martinez and that had been deported to Mexico. The Status Conference was held on August 17, 2011. Father's attorney did not appear and the caseworker told the Court that the Mexican Consulate had been contacted to locate the father. On December 5, 2011 the caseworker filed a Permanency Plan and Progress Report that stated the father had been located in San Luis Potosi, Mexico, that she was in contact with the father though the Mexican Consulate and had sent the father a service plan. The report further stated that Martinez was maintaining contact with the caseworker through the Consulate. The case worker reported Martinez was "somewhat engaged" in his service plan, but that it was difficult for her to judge Martinez's progress because of his location and because her only contact with Martinez was through the Consulate. The case worker reported that Martinez was engaged in therapy, had provided proof of employment and housing, and had tested negative on one drug test. However, he had not completed parenting classes, and due to his residency, had not been able to participate in visits with his child. The report stated the Department was seeking to terminate the mother's parental rights, but did not state the Department was seeking to terminate Martinez's rights. Father's attorney did not appear at the December 5, 2011 hearing. The caseworker testified that the agency was seeking termination of the mother and father's rights because of lack of progress on the service plan. On April 10, 2012 DFPS filed its final pre-trial Permanency Plan and Progress Report. It said that the caseworker continued to maintain contact with the father through the Consulate and he continued to be engaged in therapy and had completed parenting classes and a domestic violence class. Martinez also completed a psychological evaluation, which recommended further psychological services to address issues of lack of autonomy and insecurity to help him develop the personal tools that could enable him to assume the care of his son. The report stated Martinez had not yet engaged in the additional recommended services. The case worker recommended termination of Martinez's rights because of the "not favorable" psychological evaluation and the recommendation of treatment before reunification, the fact he has no bond with the child, and because he had not had any visits throughout the legal case. Father's attorney did not appear on April 10, 2012.

Trial was held on April 16, 2012 and the father's attorney did not appear. Mother's Affidavit of Relinquishment was entered into evidence, the paternity registry was introduced into evidence and the caseworker testified the Department was asking the court to terminate Martinez's rights based on his failure to legitimate and, alternatively on the ground of constructive abandonment. She testified she believed this was in the best interest of the children. No other evidence was presented.

The trial court signed the order of termination the same day. The trial court signed the order of termination the same day. The order and erroneously states Martinez "appeared in person and through his attorney of record and announced ready." The order contains the trial court's findings by clear and convincing evidence that: (1) Martinez either was served with citation or waived service of process; (2) Martinez did not respond by filing an admission of paternity, a counterclaim

for paternity, or a request for voluntary paternity to be adjudicated; and (3) Martinez constructively abandoned the child. The court adjudicated Martinez to be J.M.'s father and ordered the parent-child relationship between Martinez and J.M. terminated on failure to register with the paternity registry or file a petition for legimitation and constructive abandonment. The order does not contain a finding that termination of the parent-child relationship is in the best interest of the child and the trial court did not make such a finding orally. The Department was named J.M.'s permanent managing conservator.

On May 15, 2012 new counsel appeared for the father and filed notice of appeal alleging that the order terminating his parental rights should be reversed because he was not properly served, the evidence is factually insufficient to support the termination order, and because he received ineffective assistance of counsel.

The 4th Court of Appeals cited the E.R. case from the Texas Supreme Court regarding the constitution protection regarding parental rights and termination. The Appellate Court found that In addition, section 102.010(d) of the Family Code requires that a statement of the evidence of service, approved and signed by the court, be filed with the papers in the cause. The appellate record does not contain either the section 102.010(d) statement of evidence or a return of service. When the Department learned appellant's name and his location, more than four months before trial, it did not attempt to serve him by any means, even though he had not waived service or appeared. The record establishes that Martinez did not appear, either personally or through his appointed attorney, in any pleading filed in the cause or at any hearing in the cause. The Appellate Court further found that DFPS did not comply with the requisites of service and as a result the case was reversed. The Appellate Court further found that the evidence was factually insufficient for termination because of the lack of service and that there was no finding that termination of the father's parental rights was in the best interest of the child and there was no evidence of constructive abandonment. The Appellate Court specifically found "The case worker's statement that "each of these fathers or alleged fathers constructively abandoned their children" is too conclusory to amount to any evidence." The Court then reversed the termination of the father's parental rights and remanded the case for a new trial.

5. ***In the Interest of: M.W.H., C.L.H., S.D.L.H., and T.M.H., Children; No. 13-12-00187-CV, 13th Court of Appeals***

In this case which came down on November 29, 2012, the 13th Court of Appeals reversed the trial court's termination of parental rights on factual insufficiency. On July 11, 2010 a baby was found in an SUV non responsive and was taken to the hospital and pronounced dead. DFPS picked up the parents other children and filed a petition to terminate. Both mother and father subsequently plead to 2nd degree injury to a child and received 2 years in TDCJ.

DFPS prepared Family Service Plans for mother and father and the goal was family reunification. Testimony at trial included that the home was piled up with junk and at the time of the baby that died being found by police the father was asleep inside the trailer home and mother was next door cooking. After the implementation of the Family Service Plan, mother and father cooperated with the agency and did services. In August of 2011 mother and father pled to the injury of a child cases and received 2 years confinement and $5,000.00 fines. While in prison mother gave birth to another baby. At trial the DFPS Caseworker testified that because of the convictions the agency changed the goal to termination. The children's grandmother and grandfather testified that they were ready, able and willing to take the children. The caseworker testified that they had concerns about the grandparent's home and the safety of the children in the home. However the child advocate did testify that she was not in favor of termination because she had seen substantial changes in the parents. She also testified that the grandparent's home was acceptable but she had observed conduct by the grandfather on her visits, such as grandfather hitting a dog with a belt and therefore could not recommend placement of the children with the grandparents.

The trial court terminated the parents rights based on T.F.C. Sections 161.001(1)(d)(e)and (l). The court also denied the grandparent's intervention which they had filed.

The Appeal followed. The appeal was based upon the expiration of the dismissal date, factual insufficiency and ineffective assistance of counsel in not objection to the expiration of the dismissal date. The appellate court denied the expiration of the dismissal date argument because no one had objected prior to the commencement of trial. The appellate court then discussed the Holly v. Adams factors regarding best interest and the appellate court specifically stated that because the goal on the Family Service Plan remained reunification. The appellate court specifically found: "If shared and undisputed goals of reunification are to be given any weight and effect when factoring a child's best interest, one factor cannot be dispositive over the others, simply because the statutory time clock is ticking, or of the emotionally-charged nature of a particular case. ***See In re E.N.C.*, 2012** WL 4840710, at *4 (holding that "the Department is required to support its allegations against a parent by clear and convincing evidence; conjecture is not enough"). For the foregoing reasons, even with giving due deference to the trial court's findings, we cannot conclude that the evidence is factually sufficient to support a reasonable trier of fact's firm belief or conviction that termination of Mother and Father's parental rights were in M.W.H., C.L.H., S.D.L.H., and T.M.H.'s best interests." The appellate court reversed and remanded for a new trial.

6. ***In the Interest of K.N.D., A Child, No.01-12-00584-CV, 1st Court of Appeals***

In this case from the 1st Court of Appeals which was rendered on December 21, 2012 the Court found legal insufficiency to terminate the mother's parental rights pursuant to T.F.C. Section 161.001(1)(O). The appellate court specifically discussed chapter 262 of the Texas Family Code in deciding that there was not basis for the finding that there was abuse or neglect of the child.

When the mother was 37 weeks pregnant with K.N.D. the mother got into an altercation and went to the hospital and the child was born the next day. The affidavit attached to the DFPS petition stated the following: "On April 29, 2011, the Texas Department of Family and Protective Services (DFPS) (Children's Protective Services) received a referral concerning the Neglectful Supervision of [K.N.D.] by her mother, [A.D.]. It was reported that [A.D.], while 37 weeks pregnant, was involved in a domestic dispute with her two roommates resulting in her falling down and going to the hospital. It was reported that the male roommate put his hand around the female roommate's neck and chased [A.D.] causing her to fall.

Reportedly, the female roommate came to the hospital and informed a nurse that both she and [A.D.] were prostitutes and the male roommate was their pimp. It was reported [A.D.] has history with the agency where her first child, [S.L.A.D.], was placed for adoption because she could not care for the child."

The affidavit concluded by reiterating that the Department sought temporary managing conservatorship of K.N.D. "[d]ue to concerns for the home environment, including but not limited to the domestic violence in the home, along with [A.D.'s] prior unwillingness to work services with the agency." The caseworker also identified the "instability of the home environment and [A.D.] as a caregiver," and stated that "[t]here is a concern for [A.D.] being a flight risk. There is prior CPS history where she has moved before the investigation could be completed and subsequent CPS history has been validated warranting the removal of her other daughter [S.L.A.D.]." On the day the case was heard for the emergency the trial court gave DFPS emergency managing conservatorship and appointed an ad litem for the child.

At trial the mother appeared through her attorney and the court terminated her parental rights. She filed a Motion for New Trial and timely appealed. Mother's attorney argued that the there was insufficient evidence to show that there was any abuse or neglect because the child was taken from the hospital and the child had not been injured in any way and there was no evidence of neglect in any way. The appellate court found that "Chapter 262 authorizes the involuntary removal of a child under various circumstances when "there is an immediate danger to the physical health or safety of the child." But the mere occurrence of circumstances justifying removal, such as found by the trial court in this case, do not necessarily imply that the removed child was subjected to abuse or neglect. And even if the child was subjected to abuse or neglect, that fact alone does not establish that any particular parent was responsible for such abuse or neglect. Evidence of "endangerment" prior to removal of the child, without more, is not sufficient to satisfy section 161.001(1)(O)."

The Court of Appeals reversed the termination but did not reverse the appointment of DFPS as Managing Conservator.

9. ***Right to Counsel on Termination Case***

In the Matter of C.L.S.; No. 01-11-00439-CV, 1st Court of Appeals

In this case which came down on October 31, 2012 the Court addressed the right to Counsel in a private termination case. In the Trial Court the Mother sued the father to have him declared to be the legal father and then terminate his parental rights. The Trial Court on November 22, 2010 issued a scheduling order setting the case for trial on March 8, 2011. The father appeared on March 8, 2011 and the case was reset for trial to April 4, 2011. When the father appeared, the mother and her attorney were present as was the ad litem. Father's attorney, who was named in the opinion did not show up and had not filed a motion to withdraw. The case went to trial with father pro-se.

The following discussion occurred on the record during cross-examination of the father: "Mother's counsel: You had the ability to have a lawyer here today; didn't you. Father: Yes, sir, I did. But he did not show. Mother's counsel: Well, you don't have an attorney that you have a contract with yet; do you? Father: Yes, I do. Mother's counsel: Did you bring the contract with you? Father: Actually, he has the contract. But he didn't show up and he has $2,500 of my money. So, I got on the phone with him and he told me that the case was too short of a distance — Mother's counsel: Objection. Nonresponsive, Your Honor. Trial court: Sustained.

There was nothing in record to explain whether the discussion was in reference to the father's attorney or some other attorney. Additionally, there was nothing in the record to explain why the father was pro se. There was also nothing in the record to show that the trial court admonished the father about the peril of proceeding pro-se.

The trial court terminated the father's parental rights and the appeal proceeded.

The 1st Court of Appeals discussed at length ***Faretta v. California***, 422 U.S. 806, 807, 818–20, 95 S. Ct. 2525, 2532 (1975) the Supreme Court case that a criminal defendant has a right to represent himself but must be admonished as to the dangers and disadvantages of self-representation. The Court then went on to state that the requirements of Faretta also

apply to termination cases where a parent wishes to represent himself and the trial court must provide the Faretta admonishments prior to proceeding to trial with the parent pro-se.

The Appellate Court specifically stated in the opinion: "Because a termination of parental rights case is like a criminal case—both protect valuable personal rights from "devastatingly adverse action"—we will "apply the same right to counsel standard that we apply to criminal cases" The Court further held: "Thus, we hold that in parental termination cases, before a parent is permitted to represent himself pro se, the record should show that the trial judge has informed him that there are technical rules of evidence and procedure, and that he will not be granted any special consideration solely because he has asserted his right of self-representation."

The Court found that because there was no evidence on the record that father was admonished regarding his rights and nothing in the record to explain why his attorney did not show up, the Court reversed the termination and remanded the case to the trial court for further proceedings.