"Trends in DFPS Termination Cases (A Call for Reform)"

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For almost thirty (30) years, I have been practicing juvenile and family law in Texas. For twenty-five of those years, I have been representing and advocating for children and parents in cases involving the Department of Family and Protective Services ("DFPS"). At the heart of this litigation, advocates on all sides are driven by the legislative and common law mandate "best interest of the child". I have met some people, who believe so stridently that their version of what constitutes best interest is the only way to safeguard children that they ignore the evidence available to be presented in the case. They are convinced that the "acorn does not fall to far from the tree"; "people never change"; "drug addiction is a choice not a disease"; "if you are able at anytime to abuse or neglect your children or put yourself in a circumstance where others abuse or neglect your children, we can never trust your ability to protect your children again"; "if you have been to prison, it does not matter what you do to try to re-integrate into society, you will never measure up"; "rehabilitation does not work". The list goes on and on and while it would be easy to dismiss these statements as over simplifications, exaggerations, distortions or untruths the fact is that some individuals are not equipped to be parents. There are parents whose conduct, by act or omission, present very real and very present danger to their children. There are parents who when faced with allegations of abuse or neglect, do nothing at all to secure the return of the children and reunification of the family. There are parents who have engaged in such horrible conduct, either through action or omission, even the most reasonable advocates could not support reunification. Frankly, there are cases where termination of parental rights is the only viable option available to the Court. However, the "aggravated circumstances" cases are not the majority of the cases that involve termination. The truth is that sometimes parents fail their

children; sometimes the system fails the parents; sometimes the system fails the children; sometimes the system fails both the children and the parents; sometimes the system and the parents fail the children and sometimes it all works very well. Because we statistically and politically measure from failure rather than success, it is an unfortunate reality that a failure in this system can have devastating and tragic consequences to the child and the child's family.

The positions described above are met with the same stridency from parental advocates who rail against a system they feel passionately to be dramatically skewed in favor of DFPS and view the system as "adverse to parents, families and especially children." They assert that caseworkers prepare family service plans that would be extremely difficult, if not impossible, for an employed, functioning, normal college graduate to complete within 12 months. They take a population of mostly poor, undereducated and situationally impoverished families, or families and parents with addiction or mental illness, or deficits in rated intelligence (IQ), and require them to work closely with underpaid caseworkers who are extremely overworked, find it impossible to properly service the assigned caseload and follow up on DFPS commitments. They do this at a minimum by failing to timely issue 2054 authorizations for services, assessments or counseling. Caseworkers complain that they are subjected in court to interrogation by lawyers who don't know them, the cases or even the client the lawyer purports to represent. This is a recipe for disaster. With a turnover rate of substitute care workers of over 50% a year and supervisors and caseworkers being forced to do case work for sub-care units decimated by resignations, the resulting services, options, responsiveness and quality of care for children have all suffered. When case work quality declines and frustrated substitute care caseworkers resign, the quality and quantity of evidence and availability of witnesses also declines. Corners get cut, vital evidence gets lost or becomes unavailable and grounds for termination become harder and

harder to prove.

One result of this situation has been a legislative trend towards alterations to DFPS structure and attempts to privatize DFPS. The immediate impact of this legislative trend was to send quality DFPS employees to private contractors that were positioning to be the privatizing force and contract providers to the government for substitute care. Simultaneously with the attempt at privatization, the legislature acted to stave off political embarrassment and to protect children from injuries and death because of inadequate DFPS investigations. Huge funding shifts by the legislature to investigation units created a massive transfer of experienced caseworkers from substitute care to investigations. With more investigations, additional caseloads now had to be handled by substitute care staff whose ranks had already been raided on two (2) separate fronts. As such, the substitute care units are understaffed and undertrained.

The second legislative trend has been to add to the grounds for termination of parental rights and to make the post judgment termination process immensely cumbersome and full of traps for parents and their lawyers. The legislature made appellate timetables ridiculously short and created situationally unconstitutional procedural steps which have guaranteed a significant increase in the number of termination cases and appeals. Many believe (and some courts have held) that these steps can have unconstitutional applications. Not only has there been a significant increase in the number of termination cases and appeals, an alarmingly higher percentage of these appeals are being turned away because the trial counsel has failed to properly perfect an accelerated appeal and timely file a statement of appellate points.

The trend of recent Texas appeals of termination cases reflects more and more appellate courts stating they are forced to follow the mandates of a statute which is, at best, constitutionally suspect, even though this results in parents losing their parental rights, without

an adequate opportunity to be heard on appeal in a fair proceeding, i.e., without the merits of their appeal even being considered. If we as a society, regardless of our individual political or religious values and ideology believe that the government should not be able to interfere in and seek to forever terminate an individual's rights to their children without a fair and equitable trial, should we not also believe that the appointed counsel for indigent parents should treat them with the same dignity and level of preparation that paying client's receive from their counsel? Should we not expect that reasonable investigations and discovery on the parent's behalf should be done prior to trial and that witnesses should be called to testify on their behalf? Wouldn't it be a basic element of representation in what has been characterized as a "death penalty" civil case, that several client conferences should have occurred with counsel prior to trial?

In this respect, the most significant cause of the most significant trend in DFPS termination cases is antithetical to our constitutional safeguards of due process. As a lifetime advocate for children at trial and parents on appeal, it is my belief that **§263.405 of the Family Code** should be repealed or significantly amended. While claiming to be designed as a way to reduce post-judgment delay, this statute serves no useful purpose other than to prevent parents from presenting their claims on appeal. The appellate process, as it existed before enactment of **§263.405** was in my experience a faster track to final permanency orders. However, this may not currently be the case statewide, given the number of Appellate Courts which, while questioning the constitutional validity of the law, find that they are legally constrained to follow it.

DFPS presumes, despite its staffing problems and inconsistencies that it always acts in the best interests of the children. However, when abused and neglected children are removed from their home and then abandoned or marginalized by an inadequate caseworker, or a dysfunctional and underfunded agency, the children often grow up convinced that they caused

the loss of their entire family by acknowledging that abuse or neglect occurred. The burdens on the children increase if there is any statewide accuracy to the assertions (as some foster parents disclose) that they have never seen a caseworker or an attorney or guardian of the child at their home. Some children traumatized by abuse or neglect clearly express a desire to be free from their parents and/or abusers. However, some children traumatized by abuse or neglect feel strongly that DFPS is harming them further by restricting or ending their parental contact. DFPS too often takes action that can only be described as punitive to the parents rather than addressing the best interests of the child. It is unnatural and unhealthy for a child that has a well-developed bond to a parent (even a parent who may have abused or neglected the child) to be disconnected from all family and to have all contact reduced to supervised office visits for one (1) hour, twice a month. This is especially true when the Family Service Plan has a primary goal of family reunification. There appears to be no sound psychological basis for the children, to be cut off all contact between parent and child pending the outcome of an appeal or for the position that supervised visits at DFPS offices are in the best interest of children prior to a trial but are not in the best interest of the child after cases are reversed on appeal of legal or factual insufficiency of the evidence.

The citizens of Texas, especially the children in DFPS custody, need and deserve a system that truly recognizes that the constitutional dimension of the parent-child relationships flows both ways. While the parents have the constitutional protections, so do the children. They are situationally helpless and arguably, as victims, should have a greater right to assert constitutional protections for themselves. The children have a constitutional right to and a protected interest in the preservation of their relationships with their parents and family. Wrongful termination orders harm the children as well as the parents. It is within this prism,

viewing the trends in termination cases, we should ask that as lawyers, advocates, and judges should we support repeal or significant amendment of this statute?

Following the legislative trends, there have been some very interesting and sometimes conflicting decisions in our appellate courts in these termination cases. A significant number of decisions have dealt with the legislative limitation on the rights of parents to appeal termination of their parental rights. In my own very unscientific survey, I have never witnessed such uniform distaste for a section of law, than this section. From all areas of Texas jurisprudence lawyers, judges and scholars question the scope and intent of **§263.405 (b) and (i)** and whether or not the statute is unconstitutional. It has been held to be unconstitutional, as applied, and the import of the legislation appears to be, in application, an intention to silence parents regardless of the merits of the case. What is apparent is that our appellate courts feel constrained to reluctantly follow a statute that mandates them to eliminate an appeal without any consideration of the merits.

A second and related trend is the confusion of the degree of relief granted when a Decree of Termination is reversed. Is the conservatorship order appointing DFPS as Managing Conservator after termination subsumed within and created as a result of the termination or does it operate independently? After (2) panels on the First and Fourteenth Courts of Appeals reached diametrically opposite conclusions, the Texas Supreme Court recently upheld a post judgment DFPS Sole Managing Conservatorship Order based upon the pleadings, proof and absence of a Statement of Appellate Points on the issue of Managing Conservatorship, even though the termination finding was reversed and rendered in favor of the parent for legal insufficiency of the evidence. The issue of Conservatorship was not included in the Statement of Appellate because the issue had never been really presented by either party at trial. The case was tried as a

termination case and after the request for termination was granted, DFPS was appointed as Sole Managing Conservator, as required by the Family Code. In addition, the findings of conservatorship should also include possessory conservators. A finding of termination does not usually lend itself to an award of Managing Conservator or Possessory Conservator to the now non-existent parents. **This decision puts trial counsel in a very untenable position, of having to file a Statement of Appellate Points on all conceivable, yet undiscussed and unfound grounds that might arise later**. If the intention of the legislature by enactment and amendment of §263.405 was to speed up permanency, it has failed as miserably as the privatization of DFPS.

I. §263.405 Appeal of a Final Order

(Case Law and Questions of Constitutionally)

The legislative mandates of an accelerated appeal and the specific requirements of the statute take precedence over any procedural rules to the contrary. This statute applies in both terminations and conservatorship cases involving DFPS. The statute, as amended in 2005, provides as follows;

FAMILY CODE

CHAPTER 263. REVIEW OF PLACEMENT OF CHILDREN UNDER CARE OF DEPARTMENT OF PROTECTIVE & REGULATORY SERVICES

Sec. 263.405. APPEAL OF FINAL ORDER.

(a) An appeal of a final order rendered under this subchapter is governed by the rules of

the supreme court for accelerated appeals in civil cases and the procedures provided by this section. The appellate court shall render its final order or judgment with the least possible delay.

(b) Not later than the 15th day after the date a final order is signed by the trial judge, a party intending to appeal the order must file with the trial court a statement of the point or points on which the party intends to appeal. The statement may be combined with a motion for a new trial.

(c) A motion for a new trial, a request for findings of fact and conclusions of law, or any other post-trial motion in the trial court does not extend the deadline for filing a notice of appeal under Rule 26.1(b), Texas Rules of Appellate Procedure, or the deadline for filing an affidavit of indigence under Rule 20, Texas Rules of Appellate Procedure.

(d) The trial court shall hold a hearing not later than the 30th day after the date the final order is signed to determine whether:

(1) a new trial should be granted;

(2) a party's claim of indigence, if any, should be sustained; and

(3) the appeal is frivolous as provided by Section 13.003(b), Civil Practice and Remedies Code.

(e) If a party claims indigency and requests the appointment of an attorney, the court shall

require the person to file an affidavit of indigency and shall hear evidence to determine the issue of indigency. If the court does not render a written order denying the claim of indigence or requiring the person to pay partial costs before the 36th day after the date the final order being appealed is signed, the court shall consider the person to be indigent and shall appoint counsel to represent the person.

(f) The appellate record must be filed in the appellate court not later than the 60th day after the date the final order is signed by the trial judge, unless the trial court, after a hearing, grants a new trial or denies a request for a trial court record at no cost.

(g) The appellant may appeal the court's order denying the appellant's claim of indigence or the court's finding that the appeal is frivolous by filing with the appellate court the reporter's record and clerk's record of the hearing held under this section, both of which shall be provided without advance payment, not later than the 10th day after the date the court makes the decision. The appellate court shall review the records and may require the parties to file appellate briefs on the issues presented, but may not hear oral argument on the issues. The appellate court shall render appropriate orders after reviewing the records and appellate briefs, if any.

(h) Except on a showing of good cause, the appellate court may not extend the time for filing a record or appellate brief.

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

Added by Acts 2001, 77th Leg., ch. 1090, Sec. 9, eff. Sept. 1, 2001. Amended by Acts 2005, 79th Leg., ch. 176, Sec. 1, eff. Sept. 1, 2005.

A partial list of cases that affirmed termination of the parent-child relationship based upon un-preserved error due to the failure of counsel to timely specify, within a statement of Appellate Points, the points upon which the party intends to appeal includes the following:

1. **Adams v. DFPS , (No 01-06-00243-CV) (Tex App. - Houston[1st District] 02/22/07) (No pet.) (mem. op.)**

   M appealed legally and factual sufficiency of only the best interest finding and did not include a challenge to the grounds in her Statement of Appellate Points.

2. **In re B.S., D.R.S. and P.W.S (No 09-06-293-CV) (Tex. App. - Beaumont) (05/22/97) (no pet. h.) (mem op)**

   M failed to raise her claim of ineffective assistance of counsel or the unconstitutionality of **§263.401(I)** in her Statement of Appellate Points**.**

3. **<u>In re C.B.M AND M.H.</u> (No 08-06-00136-CV) (Tex App. - El Paso) (12/14/06), (no pet.) (mem. op.)**

A statement of Appellate Points was not filed by M. The Court cannot consider any points not included in a Statement of Appellate Points.

4. **<u>In re C.M.</u> 208 S.W. 3rd 89 (Tex. App. - Houston [14th Dist] 2006, no pet.)**

M did not file a Statement of Appellate Points. Accordingly, the court may not consider any

of the issues she has raised on appeal.

5. **<u>In re D.A.R.</u>, 201 S.W. 3rd (Tex. App. - Forth Worth 2006, no pet.)**

Questioning the constitutionality of **§263.405(I)** the court held that they were barred by the

legislature from considering points on appeal because they do not appear in a Statement of Appellate Points or Motion for New Trial.

6. **<u>In re E.A.R., EAR and I.D.A</u> 201 SW 3rd 813(Tex. App - Waco 2006, no pet.)**

M attempted to appeal the termination of her parental rights. M failed to file a Motion for New Trial or Statement of Appellate Points. Accordingly, the court could not consider the points on appeal.

In a concurring opinion, Justice Vance questioned constitutionality of **§263.405(I).**

7. **<u>In re E.J.W., C.L.W, and D.G.G.</u> (No 04-06-00219-CV) (Tex. App - San Antonio) (10/11/06) (no pet.) (mem. op.)**

M attempted to but was precluded from raising a point on appeal that was not included in her Statement of Appellate Points.

8. **<u>In re H.H.H. AND E.A.H.</u> (No. 06-0. - 00093) (Tex. App. - Texarkana) (10/04/06) (no. pet.) (mem. op.)**

The failure to file a Statement of Appellate Points does not deprive the Appellate Courts of jurisdiction, it just precludes consideration of any issues on appeals.

9. **<u>In re J.F.R., J.B.R., J.A.CR and J.C.</u> (No. 09-06-115-CV) (Tex App. - Beaumont) (03/08/01) (no pet.) (Mem. Op.)**

M and F appealed termination and filed a Statement of Appellate Points but did not include in the Statement of Appellate Points their claims of unconstitutionality or ineffective assistance of counsel. Accordingly, they could not be considered on appeal.

10. **<u>In re J.H.</u> , (No 12-06-00002-CV) (Tex App. - Tyler) (01/24/07) (no pet) (mem. Op)**

In a case where a trial court denied the termination request and parents did not file a Statement of Appellate Points, the court was powerless to consider the issues raised on appeal.

11. **<u>In re J.W.H AND C.B.K</u> , (No 10-06-00083-CV) (Tex App. - Waco) (03/21/07) (no pet) (mem op)**

The lack of specificity in the Statement of Appellate Points (i.e. DFPS did not meet it burden of proof) failed to preserve error for review.

12. **In re M.D.** , **(No 05-06-00779-CV) (Tex App. - Dallas) (05/07/07) (no pet. h.) (mem op.)**

F failed to file a Statement of Appellate Points so the court could not consider any issue not raised within the statutory time limit.

13. **In re M.N.** , **(No. 11-06-00228-CV) (Tex App, - Eastland) (05/10/07) (mem.op)**

The statute does not allow for any extension of time to file a Statement of Appellate Points.

14. **Pool v DFPS**, **(No. 01-05-01093-CV) (Tex App. - Houston [1st District]) (03/01/07) (no pet.) (mem. op)**

F appealed termination of his parental rights but filed no Statement of Appellate Points. The court questioned the constitutionality of the statute.

15. **In re R.A.P. III** , **(No. 14-06-00109-CV) (Tex App. - Houston[14th District]) (01/25/07) (pet. Denied) (mem op)**

M appealed termination but failed to include her appeal of the denial of her jury trial request in a Statement of Appellate Points.

16. **In re R.C. and R.C.C. Jr.** , **(No 07-06-0044 - CV) (Tex App. - Amarillo) (4/25/07)**

(no pet.) (mem op)

F appealed termination but filed his Motion for New Trial and Statement of Appellate Points but did not timely file these documents. Both the Majority Opinion and the Concurring Opinion express concerns over the constitutionality of this statute.

17. In re R.J.S. AND M.S. , (Tex App - Dallas) (04/11/07) (pet filed) (mem op)

M failed to file a Statement of Appellate Points. Accordingly, no error was preserved.

18. In re R.M.R. , (No 13-06-351-CV) (Tex App. - Corpus Christi) (no pet) (mem. op.)

M did not file a Statement of Appellate Points.

19. In re S.C. (No 06-07-00051 - CV) (Tex App. - Texarkana) (04/27/07) (no pet) (mem. op)

M failed to file Statement of Appellate Points

20. In re T.R.F. , (No 10-07-00086 - CV) (Tex App. - Waco) (08/15/07)

Issues not raised in a Statement of Appellate Point were waived.

21. In re J.A.J. (No.07-0511) (Tex.) (11/20/07)

M appealed the termination decree of the trial court. The Fourteenth Court of Appeals reversed and rendered. DFPS sought review which was granted on the issue of whether an order appointing DFPS as managing conservator survives a reversal and rendition on the termination where the conservatorship appointment was not assigned as error in the Statement of Appellate

Points. The trial court had made a finding that the appointment of a parent as managing conservator would significantly impair the child's physical health and emotional development. DFPS had pled for managing conservatorship pursuant to **§153.005** and **§263.404**. DFPS also cited **§153.131**. The Court reviewed the relevant statutory provisions **§153.002**(Best Interest); **§153.005** (Appointment of Sole or Joint Managing Conservator); **§153.131** (Presumption of Parent as Managing Conservator). If the Court terminates parental rights, it must have (in this case) appointed DFPS as Managing Conservator **(§161.207)**.

The Family Code further provides that the Court may render a final order, without terminating parental rights, if a finding is made that the appointment of a parent would significantly impair the child's physical health or emotional development and appointment of a relative or other person would not be in the child's best interest. The Supreme Court agreed that **§263.404** does not apply when the trial court enters an order of termination of parental rights but disagreed that the appointment of DFPS was solely as a consequence of or derivative from the termination proceedings. While evidence supporting termination could be insufficient, the same evidence could still support the appointment of DFPS as Managing Conservator under **§153.131**.

The Supreme Court further analyzed the differences in both the quantum of proof and standards of appellate review (firm belief or conviction or abuse of discretion) and that a decision under one standard would not necessarily be the same under the other standard.

In response to Respondent's "de facto termination" arguments, the court pointed to the trial court's jurisdiction to modify a conservatorship order, a parent's right to bring suit, and the mandatory post judgment conservatorship review hearing, under **§263.002** and **§263.501**. The Court of Appeals did not address the financial inability of most of these parents to wage a modification proceeding against the government.

A Motion for Rehearing has been filed seeking a change to the opinion that would mandate the appointment of a parent as possessory conservator (in the absence of a finding under **§153.191**) and the imposition of minimal restrictions on parental possession under **§153.193**

22. <u>In re A.M.T.</u> (No. 09-06-525-CV) (Tex. App. - Beaumont) (11/29/07)

M appealed termination of her parental rights. Judgment was signed on September 20, 2006. M did not file a Statement of Appellate Points by October 5, 2006. On October 16, 2006' M requested the court to appoint her counsel on appeal. The court initially held that it could not consider any points on appeal because no Statement of Appellate Points was filed. However, counsel's unjustifiable failure to preserve certain issues for review, may deprive a parent of due process. To prevail in a claim of ineffective assistance of counsel, M had to establish both deficient performance by counsel and prejudice. Any claim of ineffective assistance must be firmly founded in the record and the record must affirmatively demonstrate the ineffectiveness. Although Appellate counsel was appointed after the 15 days had expired, M was still represented by trial counsel and the court refused to speculate as to why trial counsel did not file the Statement of Appellate Points. M failed to present evidence to support her claim on either November 8, 2008 or when the Court remanded the case to the trial court, ordering the trial court to appoint appellate counsel. To establish prejudice, M would have had to show that counsel's failure to file a Statement of Appellate Points prevented her from asserting a valid challenge to the factual sufficiency of the evidence. The Court then reviewed the evidence, found it to be factually sufficient and thus M was not denied effective assistance of counsel. M also failed to establish why or how counsel's decision at trial prejudiced her.

23. In re J.X.P ,(No. 07-07-0356-CV) (Tex. App.- Amarillo) (1/11/2008)

"While several of our sister courts have questioned the practical application and constitutional validity of this statute, every appellate court called upon to address this question has agreed that the clear language of the statute prohibits appellate courts from considering points not properly preserved by the timely filing of a Statement of Appellate Points." While the court recognized the parent-child relationship to be of constitutional dimension and that the statutory limitation on the right to appeal under **§263.405** can have harsh results, the court refused to create a means of recourse by fabricating an interpretation that would expand the legislatively created procedures for perfection of a statutorily created right of appeal. Since M filed no Statement of Appellate points, she preserved no error for appellate review.

24. In re B.M.O. and T.L.O. ,(No. 13-07-172-CV) (Tex. App.-Corpus Christi) (1/10/2008)

M failed to file a Statement of Appellate Points. Accordingly, all points of error were waived and the termination order was affirmed.

25. In re N.L.H. , (No.07-07-0313-CV) (Tex. App.– Amarillo) (12.06.07)

The Court denied DFPS' Motion to Dismiss Appeal because M failed to file a Statement of Appellate Points. The court held that a Motion that requested a New Trial (because the termination statute was not strictly construed in favor of the parent) did not fail to abide by the intent or letter of **§263.405(i)** and thus presented at least one issue for review.

26. In re D.M. And W.M., (No 10-06-00407 - CV) (Tex App. - Waco) (08.15.07 and

12.12.07)

I. Three separate opinions, 2 concurring and 1 dissenting.

1. Justice Gray - Concurring Opinion. Justice Gray first wanted to dismiss the appeal for lack of jurisdiction because he did not believe the late filing of the Notice of Appeal (Client did not tell counsel to appeal until after the deadline) amounted to a reasonable explanation. However, since neither other Justice would vote to dismiss, Justice Gray joined Justice Reyna to affirm because it was the functional equivalent of a dismissal.

2. Justice Reyna - Concurring Opinion. M's only point of appeal was the failure of the trial court to give her a 180 day extension under **§263.401(b).** Since M did not timely file a Statement of Appellate Points with this issue, her complaint was not preserved. M's explanation for late filing the Notice of Appeal was reasonable and the Court has jurisdiction. The letter from trial counsel relative to the late filed Notice of Appeal had an explanation but failed to contain a Statement of Appellate Points. The letter of trial counsel makes it clear that trial counsel did not understand the applicable deadline for perfection such an appeal. M did not brief the issue whether **§263.405** violated her right to due process. M contended in response to the dismissal notice that it would be a denial of due process to fault her for failing to file a Statement of Appellate Points under the circumstances and that the Court should address the issue as fundamental error. Fundamental error, if found, would allow this point to be considered on appeal but the legislature intended to force litigants to comply with **§263.405(I)** and legislatively precluded the common law doctrine of fundamental error. Moreover, since the due process issue was not even presented in her brief as a point of error, the court could not consider it.

3. Justice Vance - Dissenting Opinion. The Court created any error in the form of

the presentation. The clerk sent the Appellant's Counsel a letter advising that the Court would dismiss the appeal unless she filed a timely response to the order showing grounds for continuing the appeal. Appellant filed a reply claiming that the process, as applied, would violate her due process. Having done what we requested, the Court would improperly and for the first time dismiss this sort of appeal because she failed to raise the issue in her brief even though the letter did not request a brief. Application of **§263.405(b)'s** draconian 15 day time frame and **§263.405(I)** violate M's rights to due process. M's trial counsel filed a Notice of Appeal and withdrew. Appellate counsel was not appointed until 21 days after the deadline for filing the Statement of Appellate Points. This cannot comport with due process.

II. Opinion on Rehearing - Justices Reyna and Vance

Raising the due process issue on her Motion for Rehearing, a majority of the panel concluded that the appointment of appellate counsel 21 days after the deadline for filing the Statement of Appellate Points violated M's due process rights. Termination cases require procedural due process which means an opportunity to be heard at a meaningful time in meaningful and balanced manner. In evaluating the private interests of the parent and child, the risk of erroneous deprivation, the state's interest and the available remedies, the majority held that both the parent and child have compelling private interest to be protected; there is no constitutional right of appeal but if it is granted, it must comply with due process and be fair. The state has an interest in safeguarding the best interest of the child but also has an interest in an accurate and just determination.

Since the Notice of Appeal is not due until 5 days after the Statement of Appellate Points and the filing deadline for a Notice of Appeal can be extended if a party files a Motion for

Extension of Time within 15 days of the deadline, a parent contemplating appeal would not have to inform counsel of their intention to appeal until after their Statement of Appellate Points was due. Accordingly, the Court held that **§263.405(b)** and **§263.405(i)**, as applied to M's case, violated her right of due process.

Having concluded that the statutes violated M's due process right, the Court concluded it was able to address the sole point raised on appeal, i.e., denial of an extension of the case. M testified that she believed she had complied with all of her Family Service Plan except parenting classes. She said she failed to communicate with counsel because of lack of transportation, no phone, she was born with spinabifida, she is disabled and unable to work and has an I.Q. of 62. However, M failed to attend weekly therapy, weekly parenting classes or attended any court dates for many months. The MGM testified she could and would have helped but M disappeared for an unspecified time and told the MGM she was in compliance. The trial court denied the extension but granted a 3-week delay so that counsel could prepare. While "good cause" is not the test, M offered no explanation as to how the court's ruling would have been different if the court had made an "extra ordinary circumstance" finding, as required by the statute. Accordingly, the judgment was affirmed.

III. Dissent on Rehearing - Justice Gray

According to the majority, no matter what the attorney told the client, no matter what the client told the attorney, no matter what the client may have known, any delay is reasonable because any delay until the client communicates the decision to appeal does not have to be explained. The court still does not have a reasonable explanation for the late filing of the Notice of Appeal and the appeal should be dismissed for lack of jurisdiction.

This opinion on Rehearing comprehensively examines and references the problem with

§263.405. **(Op11)**. Some suggestions at reform come from this opinion. The first is the need to have an additional warning to the parents and counsel by the trial court of their right to appeal alone with a statutory time line, with deadlines. The second suggestion was to provide for the possibility of an extension of time to the 15 day limit on a Statement of Appellate Points **(Op8)**. As the Court correctly notes, every other appellate rule or statutory requirement allows for extensions. At a minimum the legislature should incorporate the possibility of an extension of time to the provision regarding the Statement of Appellate Points. **(Op. 8)**.

Another possibility altogether is to allow am Appellate to raise his/her issues in their brief and scrap the Statement of Appellate Points altogether. We could return to simple time line of a standard or non-accelerated appeal. These time-tested deadlines allow an adequate amount of time for Appellate Counsel to obtain a record and formulate points of appeal.

As of this writing, at least the following Appellate Courts have either questioned the constitutional validity of **§263.405(i)** or found it to be unconstitutional in particular applications;

1. Waco (10th Court);
2. San Antonio (4th Court);
3. Amarillo (7th Court);
4. Corpus Christi (13th Court);
5. Houston (1st Court);
6. Fort Worth (2th Court); and
7. Texarkana (6th Court).

When 50% of our Courts of Appeal indicate serious concerns over the Constitutionality of a statute, it becomes clear that despite any original intent, the statute is operating unfairly and the legislative needs to repeal or revise this law.

II. Conservatorship and Reversal:

The question or issue in contention here is whether a trial court finding in fair of termination and subsequent appointment of DFPS as Managing Conservator is a unified or separable judgment? In other words. Is the finding of conservatorship subsumed written the termination finding or if it is separately pled and the subject of some evidence at trial, will a parent (who was fighting to preserve their parental rights at a trial where the only mention of conservatorship was following the termination) lose conservatorship to DFPS if an Appellate Court finds the evidence of termination to be legally or factually insufficient to support the judgement? The answer to this legal controversy may be varied in result depending upon the recitations in the judgment. If the trial court enters a Decree of Termination and the Appellate Court finds that there was no evidence of any ground to support termination should the parents automatically get their children back? The Supreme Court has resolved, in part, this issue which had resulted in diametrically opposite opinion from two (2) different panels in both the First and Fourteenth Courts of Appeal in Houston.

A. Cases in support of the conservatorship award surviving termination:

1. In re J.A.J.. (No.07-0511) (Tex.) (2007)

M appealed the termination decree of the trial court. The Fourteenth Court of Appeals reversed and rendered. DFPS sought review which was granted on the issue of whether an order appointing DFPS as managing conservator survives a reversal and rendition on the termination where the conservatorship appointment was not assigned as error in the Statement of Appellate Points. The trial court had made a finding that the appointment of a parent as managing conservator would significantly impair the child's physical health and emotional development.

DFPS had pled for managing conservatorship pursuant to **§153.005** and **§263.404**. DFPS also cited **§153.131**. The Court reviewed the relevant statutory provisions **§153.002**(Best Interest); **§153.005** (Appointment of Sole or Joint Managing Conservator); **§153.131** (Presumption of Parent as Managing Conservator). If the Court terminates parental rights, it must have (in this case) appointed DFPS as Managing Conservator **(§161.207)**.

The Family Code further provides that the Court may render a final order, without terminating parental rights, if a finding is made that the appointment of a parent would significantly impair the child's physical health or emotional development and appointment of a relative or other person would not be in the child's best interest. The Supreme Court agreed that **§263.404** does not apply when the trial court enters an order of termination of parental rights but disagreed that the appointment of DFPS was solely as a consequence of or derivative from the termination proceedings. While evidence supporting termination could be insufficient, the same evidence could still support the appointment of DFPS as Managing Conservator under **§153.131**.

The Supreme Court further analyzed the differences in both the quantum of proof and standards of appellate review (firm belief or conviction or abuse of discretion) and that a decision under one standard would not necessarily be the same under the other standard.

In response to Respondent's "de facto termination" arguments, the court pointed to the trial court's jurisdiction to modify a conservatorship order, a parent's right to bring suit, and the mandatory post judgment conservatorship review hearing, under **§263.002** and **§263.501**.

A Motion of Rehearing has been filed seeking a change to the opinion that would mandate the appointment of a parent as possessory conservator (in the absence of a finding under **§153.191**) and the imposition of minimal restrictions on parental possession under **§153.193**.

2. <u>In re Earvin v. DFPS</u>, (No. 01-05-00752-CV) (Tex. App.–Houston [1st Dist.])

(03.15.2007)

F appealed termination of his parental rights alleging legal and factual insufficiency; violation of constitutional rights under the 14th Amendment and appointment of DFPS as SMC. M and F were dating when child was conceived but broke up when F discovered M's drug use. The child was born positive for cocaine. M went to drug treatment and F had regular contact with child during treatment and while M was on weekend releases. When M was finally released from treatment F was unable to contact M or the child. F had sustained a severe leg injury and was out of work for several months and returned to work a few weeks prior to trial. M and child were found in squalid conditions and M was using drugs again. F failed to complete the FSP ordered by the Court.

The Court of Appeals held that there was no evidence that F intentionally or knowingly engaged in conduct or allowed the child to be with the M who engaged in conduct that endangered the child under **§ 161.001(1)(D)(E)**.

The Court held that DFPS also failed to meet its burden as to the 4th element of constructive abandonment under **§ 161.001(1)(N)**. It was not enough to show that DFPS had conservatorship for six months, reasonable efforts towards return and lack of regular contact. The Agency also had to prove that F demonstrated an inability to provide the child with a safe environment. The uncontradicted evidence was that F had regular contact with the child while the child was with the mother in the treatment center and that he did not know where the child was after the M's release from treatment. F had access to a home to provide for the child and returned to work prior to trial. Even if the trial court disbelieved all of the F's evidence, the loss of this evidence does not prove that the opposite is true. DFPS also sought affirmance under **§ 161.001(1)(O)** but the Court refused to consider it because it was not a ground found by the trial

court.

Having reversed and rendered on the termination the Court then considered the fact that the trial court made the findings required under both **§ 161.205** and **§ 263.404** and there was evidence to support the conservatorship finding. The Court concluded that there was sufficient evidence that F was not willing to provide the child with an environment that was in the best interest of the child. F did not attend parenting classes or participate in counseling and only visited the child once while the child was in the Temporary Conservatorship of DFPS. Because F was able to get to and from physical therapy and to the hospital, etc. to care for his mother, the Court was able to conclude he was not willing to provide for his child in the same way.

In a concurring opinion, Justice Jennings argues that neither **§ 161.205** or **§ 263.404** are applicable. Those statutes relate to findings made by the trial court when termination of parental rights is not ordered by the trial court. Since termination was ordered, these independent determinations are not made and the findings, if any, do not apply. The Court should have simply reversed and rendered on the termination because that is the Judgment the trial court should have made.

3. <u>Yonko v. Department of Family and Protective Services</u> 196 S.W.3rd 236 (Tex. App.–Houston 2005, no pet.)

DFPS alleged that Appellant failed to enroll the child in school, failed to provide the child a stable home and that termination was in the best interest of the child. The guardian ad litem was in favor of termination, the attorney ad litem opposed termination.

The Court of Appeals upheld the legal sufficiency challenge but determined the evidence was factually insufficient on the best interest finding. The testimony from the DFPS caseworker

and Appellant was that termination would be harmful to the child, that mom was given $4400.00 to care for child. There was no evidence of psychological or emotional harm unless termination was granted.

Appellee has sought a rehearing on the ability of the trial court to assess the credibility of witnesses and validity to controvert the parent's story.

Appellant has also filed a Motion for Rehearing on the Education Code finding alleging that DFPS has the burden to prove the residence restrictions of the Education code did not apply.

DFPS conservatorship of the child was affirmed.

4. <u>In the Interest of J.R and B.R.</u> 222 S.W. 3rd. 817 (Tex. App.–Houston[14th Dist] 2005, pet. denied)

Mother appealed the termination of her parental rights. The record elicited by DFPS comprised 26 pages. The Court did a thorough and detailed review of the entire record for legal and factual insufficiency points on appeal. In a legal sufficiency review the Court must look at all of the evidence **in a light most favorable to the termination findings** to determine whether a reasonable trier of fact could have formed a firm belief or conviction that the findings are true. **See, <u>In Re: J.F.C.</u> 96 S.W.3d 256, 264-266 (Tex. 2002).** To give appropriate deference to the fact finder's conclusion, the reviewing court must assume that a reasonable fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so. Furthermore the reviewing court should disregard all evidence that a reasonable fact finder could have disbelieved or found to have been incredible. This does not mean that a reviewing court must disregard **all evidence that does not support the finding.** ***Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing***

evidence.

Mothers post removal relationship with an alleged sex offender, who by a review of the evidence never had contact with the children is not evidence of endangerment under **§161.001(D)** which requires proof of a knowing exposure to a dangerous environment in the past.

The photographs admitted into evidence did not corroborate the testimony, nor was the evidence factually detailed in a manner which would allow a reasonable fact finder to conclude that mother knowingly placed the children or allowed them to remain in unsanitary conditions while they were staying at her father's home.

Proof of endangering conduct under **§161.001(1)(E)** also requires proof of past conduct not possible future conduct. Failure to obtain and maintain stable housing while the case is pending also does not support a finding under **§161.001(1)(E)**. There was likewise no evidence that the failure to comply with medication requirements or to complete counseling while the case was pending endangered the physical or emotional well-being of the children.

The case was reversed and rendered on the termination grounds but affirmed as to DFPS being Managing Conservator because Appellant did not challenge this finding and order. Following remand, another Judgment was entered without family code findings on possessory conservatorship, rights, powers and duties and access and possession. A follow up appeal on this issue was unsuccessful and M is currently without access and possession even though the termination case was reversed and rendered for legally insufficient evidence.

B. Cases in support of the conservatorship award being reversed with the termination:

1. <u>In re Colbert</u> <u>v. DFPS</u>, 227 S.W.3rd 799 (Tex. App.–Houston [1st Dist.] 2006 pet.

granted and pending))

M appealed five (5) termination orders relating to all seven (7) of her children. The cases were consolidated from different courts for trial. The trial court entered termination orders based upon **§161.001(1)(D)** (neglect, i.e., intentionally and knowingly leaving children in dangerous conditions). In March 2003, M was living in a 3 bedroom house with her 5 children, her mother and her mother's boyfriend. Subsequently in early April Trenton Jackson moved into the home. On April 3, 2003 Jackson brought his 3 year old daughter (by another woman) into the home for a weekend visit. On April 4 Jackson "spanked or whipped" the child for defecating in her pants. On April 5, 2003 the child was "whipped" again for the same reason. M had left the home to run errands and upon her return, she discovered the child had been injured and Jackson was in custody. The child later died from her injuries, Jackson was found guilty of injury to a child and was sentenced to life in prison. M did not originally believe Jackson committed the injuries and allowed Jackson back in the home. The 5 children were removed and placed with a grandfather and the grandmother. Due to the criminal histories of the mother, her mother and Newman, 4 of the children were removed and put into substitute care. One child remained with the grandfather.

M participated in therapy, parenting classes and anger management. M visited the children as allowed and attended all court hearings. The therapist testified as to the strong bond between the mother and the children, expressed no opinion as to termination, but did state the children needed stability, consistency, patience and structure. The grandfather who had one of the children said he would not have concerns if that child were returned to M. The child advocate (GAL) testified that M's rights should have been terminated because she minimized Jackson's role in the death of his daughter, she had twins by Jackson after the murder, she allowed the children around Newman who had a criminal history, could not remember if or when

he told her Newman could not live in the home; she showed more attention to the newborn twins at the family visits and did not believe she had the will to change or that she could provide the structure necessary for the children.

The DFPS caseworker testified that the goal changed from reunification to termination/adoption based upon events which happened relative to Jackson's trial (M testified for Jackson) and her minimalization of Jackson's role in the death of the child. The worker felt the children had been neglected because of their graphic language and their lack of appropriate socialization. The worker expressed her opinion that M and the children did not have a big bond. The worker was in favor of termination despite Appellant's completion of services and active participation in the case. She could not testify relative to any adoption possibilities. The grandmother testified as to plentiful food, children being well clothed and appropriately disciplined. Furthermore, she offered to move out of the home. Newman testified that he moved out of the home in January 2004 and that M was not home when the injuries occurred to the child. M was never told her home was unsafe or other housing was necessary.

The Permanency Plan and Progress Report indicated M had secured employment and provided DFPS with a statement of earnings.

M challenged the legal and factual sufficiency of the evidence to support termination under **§161.001(1) (D)** and **(2)**. The Court held that termination may not be upheld on the basis that relocation would provide better opportunities, more prosperous parents or that the children might be better off elsewhere. There was no evidence that the environment posed any danger to the twins and that Jackson's residence in the home 8 months before their birth did not qualify. DFPS never visited the home before taking the children. The danger which supported the testimony of the GAL and caseworker were the past criminal records of the grandmother and

Newman. They offered no evidence of harm, danger, current illegal activity or lack of resources to provide for the children. The 4 C's court reports praised the GM for her recovery, church participation, GED and rehabilitation. Newman's testimony that any of his drug use was away from the home was not contradicted. Appellant's prior history with DFPS, the prior removal of 5 children, the M's testimony in favor of Jackson and the fragility of the twins as reasons for removal of the twins were all unrelated to the home environment the children were in at the time of removal and could not support termination.

The Court again rejected the DFPS claim that despite the finding under (D) the Court could uphold termination on any ground pled because their were not any findings of facts and conclusions of law. Accordingly, the Court reversed and rendered relative to the twins.

The case was remanded as to factual insufficiency on the best interest prong with respect to the other five (5) children. Two (2) of the children had expressed a desire to live with Appellant. No evidence was presented as to the desires of the other three (3) children. The evidence supported M's claim that she had been able to take care of the children's physical needs but that she would likely need some assistance. The therapist (provided by DFPS) testified M had made good progress in recognizing Jackson's role in the child's death and moderate progress in taking responsibility for her protectiveness. M testified as to "no further contact with Jackson" and that a lot of stuff came out in this proceeding that she had not previously known. She was not allowed to know everything or otherwise hear the rest of the testimony. There was no evidence that the children would be emotionally or physically endangered by the return of the children. The evidence of M's parental abilities was that they were good before and that they had improved with services. M had done all of the services offered by DFPS, was employed, obtained her GED. DFPS had no specific adoption plans in their current placement and M had a

stable place for the children to live with all objectionable people having volunteered to move out. There was no evidence of any stability as to any proposed placement by DFPS. There was no evidence Jackson abused any of M's children or that she knew that Jackson would injure or kill his own child. The Court reversed the conservatorship order as to DFPS on the other 5 children because the appointment of DFPS as MC was a necessary consequence of the termination and no findings were made under **§263.404** to support the order of managing conservatorship with DFPS. The dissent by Justice Jennings disputes only the remand on the unchallenged conservatorship finding in favor of DFPS.

2. <u>In re Walker v. Department of Family and Protective Services</u>, (No. 01-06-00253-CV) (Tex. App.–Houston [1st Dist.]) (12.21.2006)

The trial court terminated M's parental rights for leaving the children with numerous different men in a known drug neighborhood, slipping out the back door (when DFPS arrived), leaving the children alone with a 4-5" knife within reach and a razor blade with a white residue. F was in jail on pending charges of sexual assault on an unrelated minor. F and M had prior cocaine convictions but no evidence was presented as to when the convictions were obtained. F testified at trial that he had sold drugs but that he was not a drug user.

The trial court terminated F's rights under **§ 161.001 (1) (D) (E)** and also terminated M's rights. Subsequently, M decided to dismiss her appeal and that Judgment is final. The trial court, upon termination, named DFPS as Managing Conservator under **§ 161.207**. F alleged that since he was in jail, DFPS did not present any evidence that he engaged in conduct or knowingly placed or allowed the children to be placed in conditions or surroundings that endangered them. The mere fact of incarceration does not make endangerment. The Court of Appeals agreed that the evidence was legally insufficient under both **(D)** and **(E)**.

The Court also held that while the appointment of DFPS as Managing Conservator was a necessary consequence to termination (**§ 161.207**); the trial court did not make the necessary findings under **§ 263.404**; and the Court of Appeals was not in a position to make the necessary orders under **§ 161.205** by either denying the Petition to terminate or render any orders in the best interest of the child. There is no legal or policy reason for a Court to require a parent to object to the trial court on the appointment of DFPS or bring an independent ground on appeal relative to the same. The Court found it inappropriate to shift the burden from DFPS to the F because to do so would deprive him of his constitutionally protected rights without due process and due course of law.

3. <u>In the Interest of J.A.J.</u> (No. 14-04-01031-CV) (Tex. App.–Houston [14th Dist] 2005, reversed in part) (See IIA1 above).

Mother appealed termination of her parental rights. The evidence reflected that Mother's husband (who was tired of the child's suicide threats including child's self inflicted attempts to choke himself with shoe strings) took the shoe strings and tied them around the child's neck and choked the child leaving visible marks. The child also had a 6" wide bruise across the back of his left leg.

The Court did a legal sufficiency review and a factual sufficiency review. In a factual sufficiency review, **the Court must consider all of the evidence <u>*equally*</u> both disputed and undisputed.** The Court must consider whether the disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of the finding. **§161.001(1)(D)** requires a showing that the child <u>was knowingly placed</u> in an <u>environment</u> dangerous to his physical or emotional well being. **Section 161.001(1)(E)** requires the parent to have personally <u>engaged</u> in conduct or <u>knowingly placed</u> the child with persons who engaged in conduct that

endangered the child.

There was no evidence of past abuse or injury that would have led Mother to know that her husband would have done anything like the shoe string incident to the child. Mother admitted to whipping the child with a belt the day before DFPS picked up the child because “he was going to burn down the house”. The court evaluated whether the discipline was excessive and found the evidence was insufficient as a matter of law under the grounds sought for termination.

The Court reversed the decree of termination and the DFPS Conservatorship order and dismissed the suit.

C. Current Status

After J.A.J. was decided and the Supreme Court held that the Managing Conservatorship question was waived by the failure of counsel to file an Appellate Point on the issue of conservatorship in a case where specific exclusionary findings were made in the decree a Motion for Rehearing has been filed to challenge the issue of why the court would not also render on the issue of Possessory Conservatorship and remand for a new trial on the issues of rights, powers and duties and Possessory Conservatorship. In this case the Decree made findings under **§153.131** that appointment of the parent as a Managing Conservator would endanger the physical or emotional well being of the child. It did make any findings relative to **§153.191** that appointment of the parent as a Possessory Conservator would endanger the physical or emotional well being of the child. In the absence of such a finding the law presumes parental appointment as a Possessory Conservator. A successful challenge to the termination places the parent back into the positions of parent and in order for the Decree to follow the requirements of the Texas Family Code, all parental issues should be resolved. DFPS is asserting that M should have also placed the question of her appointment as a Possessory Conservator in her Statement of

Appellate Points.

Colbert is also in the Texas Supreme Court on the issue of the conservatorship challenge **(§153.131 and §153.191 findings are not contained in this Decree)** and on whether the court of appeals can imply findings as to other grounds not found by the trial court in the termination order. **(See Section 4).** With more litigation in the area of termination and more reversals, it is clear that the Appellate Courts have struggled with this issue. When there are best interest considerations, but no evidence of grounds the Courts have been hard pressed to find a satisfactory resolution that protects the rights of parents and the physical or emotional well being of the children.

III. Sufficiency Reviews of Grounds for Termination

When you couple an expanding list of ways in which parental rights can be terminated and then unreasonably curtail that same parents' rights to a fundamentally fair appeal, it should be easier for the courts to affirm termination orders. It is clearly the trend (subject to the constitutional questions) with respect to **§263.405(i)** cases. Nevertheless, there also seems to be an interesting trend in the analysis of the grounds for termination. In this regard, there seems to be a higher degree of scrutiny as to the grounds and both the quality and quantity of proof necessary to support termination.

1. Colbert v. DFPS (see Section II B 1 above):

Removing subsequently born children based upon history or assessment of risk alone is legally insufficient to support termination under **§161.001(d)**. There has to be evidence of actual endangerment.

2. Earvin v. DFPS (See Section II A above)

Where F was not aware of the hereabouts of M and child until child came into DFPS Custody, the evidence was legally and factually insufficient to support termination under **§161.001(1)(D)or(E)**. Failure of a F to prove that he had an ability to provide for and call for a child under (N) does not prove the opposite. **(See also AAA).**

Reliance upon the paternity registry was a ground for termination does not relieve DFPS to meet all of the elements of its proof requirements to support (N). Minimal efforts or lack of evidence of "reasonable efforts" to return the child (i.e. no home study, little evidentiary mention of F, failure to include F on FSP, and failure to establish F made no attempt to visit) supported a no evidence finding under (N). The failure to prove a case against the father is not by termination.

3. In re J.A.J. (See II B 3 above)

Court of Appeals findings - not challenged in Supreme Court. In analyzing the difference between (D) and (E) the Court noted that in the absence of a history of abuse or a specific act or omission involving endangerment, there is a critical distinction between the "conditions or surroundings" under (D) and the "conduct" under (E). To support termination under (D), DFPS had to prove by clear and convincing evidence that M knowingly placed the child in dangerous conditions or surroundings. Failure to complete a post petition FSP is in and of itself insufficient to support termination under (D) especially when DFPS did not challenge M's explanations for non-compliance. (D) applies only to the environment and it is the "environment" and not "conduct" which must produce the injury or Endangerment Acts of discipline are not relevant

under (D) and in and of themselves, does not equate to abuse under (E).

Termination under (E) cannot be based on a single act or omission alone. Where M was allege to have knowingly allowed F to engage in conduct which endangered the child, DFPS must prove that she had been aware of the danger to the child and knowingly allowed her child to be with a person that endangered the child

4. <u>Ruiz v DFPS</u> , 212 SW 3rd 804 (Tex App. - Houston [1st District] 2006, no pet.)

A parent's inability to explain injuries does not equate to proof of responsibility. Evidence that a parent removed a child from a care giver (without evidence of a placement agreement or safety plan or knowingly that a DFPS referral had been made) is not evidence of any attempt to conceal injuries. DFPS must provide some evidence that a parent caused the injuries, was present when the injuries occurred, knew that the person with whom the child was left was a threat to endangerment or that the injuries were the result of abuse. If a child was injured and some treatment was administrated but such treatment was somehow inadequate, DFPS was required to show that it was inadequate and that the parent was responsible for the inadequate treatment.

5. <u>In re J.R. and B.R.</u> (See II A 4 above)

Mothers post removal relationship with an alleged sex offender, who by a review of the evidence never had contact with the children is not evidence of endangerment under **§161.001(D)** which requires proof of a knowing exposure to a dangerous environment in the past.

The photographs admitted into evidence did not corroborate the testimony, nor was the

evidence factually detailed in a manner which would allow a reasonable fact finder to conclude that mother knowingly placed the children or allowed them to remain in unsanitary conditions while they were staying at her father's home.

Proof of endangering conduct under **§161.001(1)(E)** also requires proof of past conduct not possible future conduct. Failure to obtain and maintain stable housing while the case is pending also does not support a finding under **§161.001(1)(E)**. There was likewise no evidence that the failure to comply with medication requirements or to complete counseling while the case was pending endangered the physical or emotional well-being of the children.

6. **<u>In the Interest of A.A.A..</u>, (No.01-07-00160-CV) (Tex. App.–Houston[1st Dist.]) (11.15.2007)**

M appealed termination of her parental rights under **§161.001 (1)(E)(F)(N)(O)** and **(2)**. The Court of Appeals held that M's single arrest and incarceration for two(2) days for shoplifting cough syrup for her sick child, and the resulting report of M's absence to DFPS by Covenant House did not warrant termination. In this regard, the Court held that a single criminal episode is not a course of conduct which would support termination under **(E)**; failure to maintain stable housing or employment is not enough by itself to support a finding under **(E)**; failure to comply with a FSP or provide regular financial support does not by itself support a finding under **(E)**; failure to support under **(F)**requires the child to have been alive for a period of 12 months prior to the filing of the petition; M does not have a burden to prove her ability to provide the child with a safe environment; DFPS has the burden to prove by clear and convincing evidence that the parent has demonstrated an inability to provide the child with a safe environment **(N)**; M's failure to provide DFPS with proof that she could adequately care for a child is not evidence that

she could not do so; transportation concerns do not equate to evidence of an inability of M to provide a safe environment **(N)**; since the child was not removed from M due to abuse or neglect but simply because M was missing a mandatory statutory element of proof under **(O)** was not met and the evidence was legally insufficient to support termination.

Since **§263.405(i)** requires that all appellate complaints be included in the Statement of Appellant Points, the failure to challenge the appointment of DFPS as MC means that the conservatorship appointment should be upheld. A Motion for Rehearing has been filed to challenge the non-appointment of M as a PC even though no statutorily required findings were made.

IV. Appellate Court May Only Review Specific Grounds found in Termination Decree.

The question here is whether findings of fact and conclusions of law are necessary in termination cases and if they are not sought whether the Court may imply any ground for terminations which was pled and upon which there was evidence before the trial court and the parent failed to challenge or appeal all of the other pled grounds. The First Court of Appeals has said no to this question.

A series of cases have wrestled with the issues. Initially in **Thompson v DFPS , 176 S.W. 3rd 121 (Tex App. - Houston [1st Dist] 2004, pet denied)** the First Court of Appeals held that in the absence of Findings of Facts and Conclusions of Law, termination could be supported on any other pled ground even though it was not included in the judgment. In **Vasquez v DFPS , 190 S.W. 3rd 189,194(Tex App. - Houston [1st Dist] 2005, pet denied)** the First Court of Appeals re-evaluated their position in light of the Family Code requirement that the trial court specify the grounds for termination and found that the Family Code requires the Trial Court to

enter an order for termination only if it finds grounds for terminations by clear and convincing evidence. **§161.206(a)(V.T.C.A. 2005).** Accordingly, the Court held that a parental rights termination can only be upheld on grounds pleaded by DFPS and found by the trial court. In **Cervantes - Peterson v. DFPS**, **221 S.W. 3rd 244 (Tex. App.–Houston [1st District] 2006, no pet.)** the First Court of Appeals upheld **Vasquez** and expressly overruled **Thompson**. This was re-affirmed in the **Ruiz** case.

In that case, the DFPS referral alleged and proof indicated that the child was left with the paternal great-grandmother for periods when mother's whereabouts were unknown; the child had cigarette burns on its arms that Mother could not give a consistent explanation for and the mother failed to complete the Family Service Plan. The Court firmly rejected the DFPS argument that it should be able to affirm the judgment on any of the nineteen grounds pled, which are supported by some evidence, regardless of any express ground relied upon by the trial court in its judgment and regardless of the requirement that the grounds be stated in the judgment under **§161.206 (a)**. The First Court overruled its prior holding in **Thompson** and has now held in **Vasquez, Cervantes (En Banc) and this case** that "a parental rights termination order can be upheld only on grounds both pleaded by DFPS and found by the trial court. In this case, the Court made findings under **§161.001(1)(D) and (E)**. Under **§161.001(1) (D)** the Court looks to the environment (neglect) to see if it is the source of the endangerment. Under **§161.001(1)(E)** the Court looks to see if the danger arises solely from the parent's conduct (abuse) established by the parent's actions or failure to act. Termination under **(E)** must be based upon more than a single act or omission. After a legal and factual sufficiency review, the Court found that no evidence was presented as to who made the referral, or if the mother was alleged to be responsible, that the child was in her possession when the burns occurred, that she knew that placing the child with

her grandmother would have endangered the child or that there was any prior history of abuse or neglect with her grandmother. The Court further found that the evidence did not support the speculation or an inference that anything wrong had occurred by mother removing the child from her grandmother, that she knew that a referral had been made to DFPS or that the removal was done in violation of a court order or family service plan. Finally, no evidence was presented at trial that Ruiz was present when the child injured her face at the Chappa home, that the injuries were caused by abusive treatment, that the treatment was untimely or ultimately deemed inadequate, or that the child was endangered by the allegedly deficient treatment. With respect to the **(E)** grounds, DFPS also referenced mother's admitted marijuana use as grounds for termination. The Court found that the evidence of mother's alleged narcotic use was extremely limited and no evidence of an ongoing problem was presented. Mother admitted to use one time and no evidence was presented to contradict it. Termination must be based upon more than a single act or omission. Furthermore, there was no evidence that mother used narcotics while the child was in her care and the record indicates the child was likely in the care of her grandmother at the time. Accordingly, the judgment was reversed and rendered. **In re Ruiz v. DFPS 212 S.W. 3rd 804 (Tex. App. - Houston [1st District] 2006, no pet.)**

The issue of implied findings is presently pending before the Texas Supreme Court in Colbert.

Conclusion

The trends discussed here represent some significant challenges facing the citizens and government of Texas. In our zeal to advocate for children, we notoriously underfund DFPS and provide short term band - aids to long term issues. As the wounds grow so does the cost of the

band-aid. And we never really seem to get at the root of the problem. Should our legal system be fundamentally fair or should we have cases decided on legal theories never discussed, argued or found by the trial court? Should we learn from and derive substantive and procedural wisdom from a multitude of decisions where judgments are affirmed or should we evaluate the meaning of reversals and utilize them to design a system which is fair to everyone? Should we recognize basic due process principles upon which our country was founded and allow all parties and persons of interest a just and fair trial and a reasonable and fair opportunity to appeal an erroneous decision? Is it time to legislatively disregard the fiction that permits parents to be deprived of their opportunity to try the conservatorship case once their parental rights are re-instated? Are we able to accept the premise that in the haste to try to expedite permanency and resolution of termination cases we created a constitutional quagmire and put at risk key components of procedural due process that damage both children and parents?

What will it take to stop this trend? A cross-section of community leaders, constitutional and civil rights advocates, lawyers, judges, child advocates and legislators of courage. In the legislative process, parents do not usually have an advocate. DFPS clearly has advocates and so do children. Asking that the process be fundamentally fair and constitutionally sound is not "advocating for the child abuser"; it is advocating that the basic principles of the republic should be applied across the board. We should never put ourselves in the position of discarding our freedoms and rights because it is easier to so do than it is to say that a parent accused of abuse or neglect should have adequate recourse in our courts. It is saying that as individuals a community, and a state, we should be better than our law currently allows us to be.

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