

Child Welfare Case Law Update



TEXAS CENTER
★
FOR THE JUDICIARY



Current Federal
Litigation

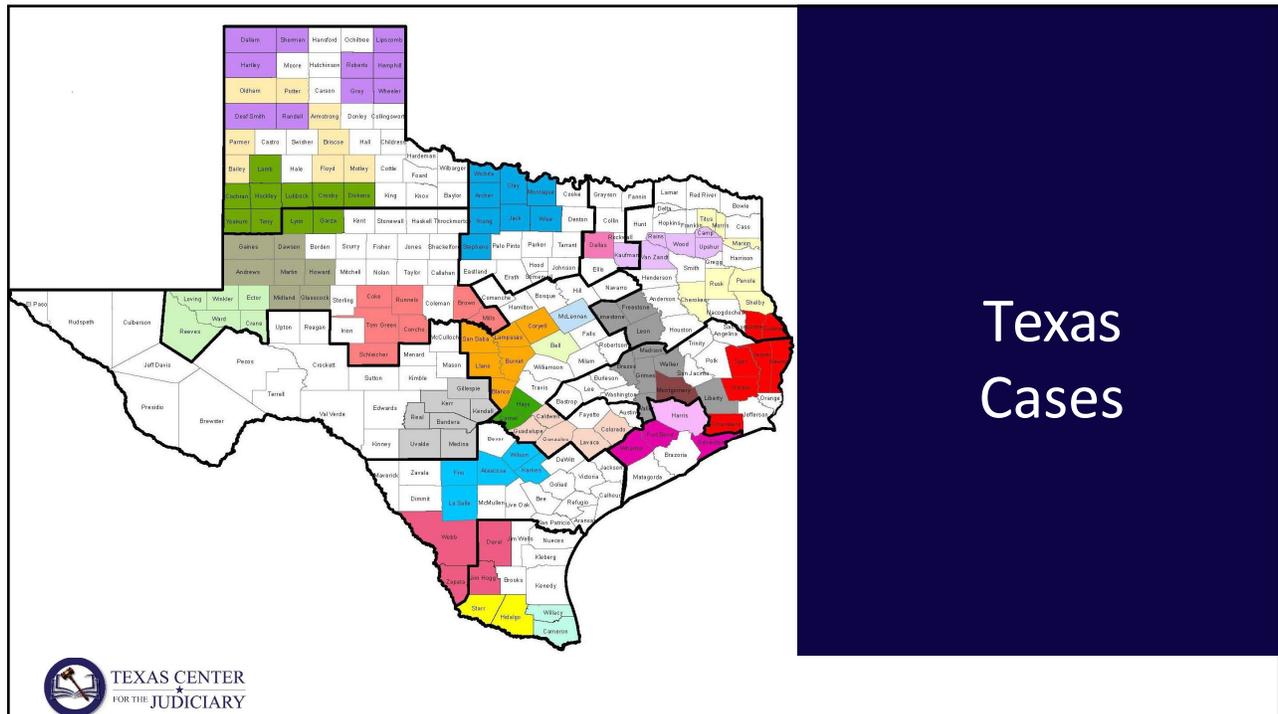


Indian Child Welfare Act (ICWA)

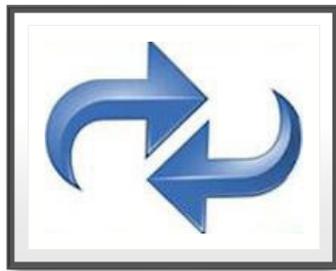
Brackeen v. Bernhardt,

No. 18-11479, 2019 WL 3857613,

2019 U.S. App. LEXIS 23839 (5th Cir. Aug. 9, 2019)



TRANSFER / JURISDICTION



Transfer Order/ Evidence of Transfer



In re E.N., K.N., and M.N., No. 06-18-00019-CV
(Tex. App.—Texarkana July 12, 2018, no pet.)

- Mother and Father argued that the trial court lacked subject-matter jurisdiction to terminate their parental rights.



In re E.N., K.N., and M.N.

- April 2016, in cause number 84853, the “Judge of the Lamar County Court at Law, presiding for the 62nd Judicial District Court” entered a final decree of divorce.
- Mother was appointed the sole managing conservator and Father the possessory conservator of the three minor children.
- Mother continued to live with Father’s parents; Father also lived on the property.



In re E.N., K.N., and M.N.

- November 3, 2016 - Father stole an all-terrain vehicle, Department was contacted due to suspicion that Father and Mother were using methamphetamine.
- Mother and two of the children tested positive for methamphetamine.
- Prior Department history due to drug use.
- Children removed.
- November 8, 2016 - the Department filed its original petition in cause number 85964 in the CCL.



In re E.N., K.N., and M.N.

- December 11, 2017 - Department filed a **motion to consolidate** the parent's prior custody case and the Department's termination case together in the CCL under the cause number 85964.
- The motion contained the case numbers and headings for both the district court case and the CCL action. The motion was granted and signed by the **presiding judge of the CCL**.
- Termination trial before the CCL - parental rights were terminated. The Department was appointed the permanent managing conservator of the children.
- Mother and Father appeal.



In re E.N., K.N., and M.N.

- For the CCL to acquire jurisdiction to enter a termination order in this case, that jurisdiction had to be transferred to the CCL from and by the district court, because the district court had continuing, exclusive jurisdiction. See TFC § 155.001(a),(c).
- The consolidation order was signed by the presiding judge of the CCL, rather than the presiding judge of the district court.



In re E.N., K.N., and M.N.

- Even if the consolidation order is liberally construed to be a transfer, it was void because nothing in the record indicates that the CCL judge signed the consolidation order while sitting for the district court.
- Therefore, the appellate court concluded that the CCL's order terminating the parental rights of Parents to the children was void because the district court had continuing, exclusive jurisdiction at the time the order was entered.



BUT WHAT ABOUT EXCHANGE OF BENCHES?

While these judges “may, in their discretion, exchange benches or districts from time to time,” even in termination cases, **the record must be clear** that the signing judge is **acting on behalf** of the court with continuing exclusive jurisdiction.



STANDING



In re H.S., 550 S.W. 3d 151 (Tex. 2018)

- Whether the maternal grandparents (MGPs) had standing to pursue a SAPCR under TFC § 102.003(a)(9), which confers standing on nonparents who have had “actual care, control, and possession of the child for at least six months.”



In re H.S.

- January 2013 - Mother and newborn move in with MGPs.
- August 2013 - SAPCR: child’s parents JMC, Mother appointed right to establish primary residence
- March 2014, Mother moved into sober-living facility.
- Child stayed with MGPs.



In re H.S.

- While at sober living facility - Mother went to home on regular basis, had dinner with child, bathed her, and put her to bed.
- Father visited sporadically.
- MGPs managed and controlled child's everyday activities.
- Parents involved with medical decisions.
- MGPs kept parents informed about Child.



In re H.S.

- In October 2014, MGPs filed a petition to modify, asking to be appointed PMCs with right to designate primary residence; assert standing pursuant to TFC § 102.003(a)(9).



In re H.S.

- Trial court grants Father's plea to the jurisdiction.
- Grandparents appeal.



Tex. Fam. Code § 102.003(a)(9)

SAPCR may be filed by “a person, other than a foster parent, who has had **actual care, control, and possession** of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.”



In re H.S.

- The court of appeals held that “standing under TFC § 102.003(a)(9) cannot be gained by a nonparent exercising care, control, and possession over a child in the absence of evidence that **the child’s parent is unfit or has abdicated** his or her own care, control, and possession over the child to the nonparent for the statutory period.



In re H.S.

On Petition For Review:

- The primary focus was whether the MGPs had “actual care [and] control” of the child for the requisite time period.



In re H.S.

SCOTEX agreed with the statute's **plain language** reasoning articulated in *Jasek v. TDFPS*, 348 S.W.3d 523 (Tex. App.—Austin 2011, no pet.):

- “[A]ctual control’ is ‘the actual power or authority to guide or manage or the actual directing or restricting of the child,’ ‘without regard to whether [the nonparent] had the legal or constructive power or authority’ to do so.”
- Legislature could have said “legal control” but it did not. Nor does it require that the nonparent’s care and control of the child be exclusive.



In re H.S.

SCOTX held that MGP showed that, for the statutory time period, they:

1. shared a principal residence with child,
2. provided for child’s daily physical and psychological needs, and
3. exercised guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children.

Accordingly, MGPs “had actual care, control, and possession” of child for the requisite period and therefore had standing to file their petition.



In re A.G., No. 05-18-00725-CV
 (Tex. App.–Dallas Dec. 12, 2018, no pet.) (mem. op.)

- Aunt appealed the trial court’s denial of her petition in intervention. She argued that she had standing under TFC § 102.004(a)(2) because Mother and Father consented to the intervention.



Tex. Fam. Code § 102.004(a)(2)

Providing that original suits brought by grandparents or other persons and permits such original suits if, among other things, the person bringing suit proves both parents consented to the suit.



Tex. Fam. Code § 102.004(b)

Under this provision, the trial court may grant leave to intervene to grandparents and those “*deemed by the court to have had substantial past contact with the child.*”



In re A.G.

- The appellate court concluded that **TFC § 102.004(b)** applies to Aunt's attempt to intervene in the underlying suit **even if she may have had standing to bring an original suit.**
- Mother and Father's consent was not relevant to the issue of whether Aunt had standing under TFC § 102.004(b).

*HAGUE CONVENTION*

In re T.M.E., 565 S.W.3d 383
(Tex. App.—Texarkana Nov. 7, 2018, no pet.)

Father was a Mexican national living in Mexico.

- 2013 - Department became involved based on Mother's conduct.
- July 2015 - Father's parental rights were terminated, despite a finding from the court that he had not been served with the petition, had not been notified of trial, and had not appeared at the final hearing.



In re T.M.E.

- July 2017 - Department petitioned the trial court to vacate its termination order as to father due to a lack of personal jurisdiction - simultaneously filed a new petition seeking termination of his parental rights.
- With its petition, the Department submitted an affidavit in which a CPS supervisor attested that father had **sent a letter** in June 2016 that indicated he wanted an extension and provided an email address and physical address.
- The caseworker attempted to reach him through those provided addresses, but he did not respond.



In re T.M.E.

- Father was appointed an attorney. The clerk's office subsequently tried to mail citation to the father at the address he provided, but sent the citation to the wrong address twice.
- Nevertheless, in September 2017, father mailed a letter indicating he had received a "judicial letter" notifying him of "this situation that these minors are confronting."
- In the letter Father claimed paternity of the children and wished for reunification.
- The Court of Appeals noted that his letter did not indicate that he was aware that the Department sought to terminate his parental rights. It also provided an incomplete address for him and phone number.



In re T.M.E.

The clerk's record in the case indicated that:

1. The Department had sent service paperwork to the Mexican Consulate, but no paperwork was ever returned.
2. There were absolutely no returns of service in the file.
3. Father was never sent notices of any hearings, including the final hearing.
4. The Department had sent the petition and service plan by certified mail, but did not indicate the address to where it was sent, and the return receipt was signed by a person other than the father.
5. Father did not appear at trial.



In re T.M.E.

- After the trial court again terminated his parental rights, Father challenged the order based on a lack of personal jurisdiction.



In re T.M.E.

- The Hague Service Convention provides for service of process upon a person located in a signatory country through a 'Central Authority' designated by the country.
- Mexico is a party to the Hague Convention, which means that service on a Mexican national **must be perfected** through the General Direction of Legal Affairs of the Ministry of Foreign Affairs. Further, these documents must be served in Spanish or accompanied by a corresponding translation.



In re T.M.E.

The Department argued that father's letter constituted an answer to the lawsuit, that he appeared through his court-appointed counsel, and that he had actual knowledge of the suit.

The Court of Appeals disagreed and reversed. It found that:

1. Father was not properly served under the Hague Convention.
2. Father's letter was not an answer as it did not indicate knowledge of the termination pleadings and did not address the allegations in the Petition.
3. Father did not waive personal service by appearing through an attorney, as he never spoke to the attorney and there was no indication that he understood the mandates of the Hague Convention. Therefore, he did not knowingly waive those rights.
4. Father's knowledge of the lawsuit did not excuse the Department's failure to strictly comply with the rules for service of citation.



PRE-TRIAL ISSUES



Appointment of Counsel



In re B.C., No. 13-18-00440-CV (Tex. App.—Corpus Christi-Edinburg Jan. 28, 2019, pet. filed) (mem. op.)

- At the adversary hearing, Mother was admonished of her right to a court-appointed attorney if she submitted an affidavit of indigency.
- Throughout the pendency of the case, Mother was admonished that her parental rights were subject to termination if she did not complete her service plan.



In re B.C.

- During the case, Mother never filed an affidavit of indigency, did not ask for an attorney, and did not appear at the final hearing. No attorney was appointed for Mother.
- Mother's parental rights were terminated in July 2018.
- In August 2018, Mother appeared before the trial court requesting an attorney to appeal the termination judgment. After Mother submitted an affidavit of indigency application, she was appointed an appellate attorney.
- On appeal, Mother argued in part, that she was wrongfully denied the assistance of counsel.



Tex. Fam. Code § 107.013(a)(1)

“In a suit filed by a governmental entity . . . In which termination of the parent-child relationship or the appointment of a conservator for a child is requested, **the court shall appoint an attorney ad litem to represent the interests of an indigent parent of the child who responds in opposition to the termination or appointment.**”



In re B.C.

IMPORTANT UNDISPUTED FACTS

- The trial court “clearly and thoroughly” informed Mother of her right to counsel at the beginning of the case (the adversary hearing).
- Mother never filed an affidavit of indigency.



In re B.C.

The court of appeals found that “**there was sufficient indication**” in the record of Mother’s indigency such that the trial court **should have “conducted further inquiry into her status,”** including:

- Mother’s home lacking running water and power at the beginning of the case; and
- Mother was working at a fast food restaurant during the case and was attempting to secure her own housing.



In re B.C.

The Court of Appeals **reversed** the judgment. It concluded that:

1. Mother had appeared in opposition to termination.
2. The record supported that Mother was indigent.
3. Mother was entitled to appointed counsel.
4. The trial court erred by proceeding without appointing her an attorney.



OTHER SIGNIFICANT CASES

In re A.J., 559 S.W.3d 713, 721 (Tex. App.—Tyler 2019, no pet.) (Father was denied procedural due process when trial court failed to properly admonish him, preventing him from learning that he had right to court-appointed counsel, and therefore denying him ability to be represented by counsel at all critical stages of proceedings.)

In re A.R., No. 07-18-00350-CV, (Tex. App.—Amarillo Jan. 28, 2019, no pet.) (mem. op.) (concluding that “when the father appeared by telephone at the final hearing without a lawyer the trial court immediately should have provided him the notice required by section 107.013(a-1) and continued the hearing to determine indigency, appoint counsel on a showing of indigency, and afford counsel a reasonable time to prepare for the resumption of trial.”)





Jury Issues: Jury Trial on De Novo



In re A.L.M.-F., No. 17-0603 (Tex. May 3, 2019)

- Following a bench trial at which both sides called witnesses, the associate judge terminated Mother's parental rights under (D), (E), and (O), and found that termination is in the best interest of the children.
- Mother filed a **jury demand** and timely filed a **request for de novo hearing**.



In re A.L.M.-F.

The Department moved to strike the jury demand, arguing that:

1. Mother did not have a right to a jury trial for the de novo hearing; and
2. Granting the jury demand would prejudice the Department and the children, especially in light of the need to marshal three expert witnesses and interpreters for fact witnesses.



In re A.L.M.-F.

- The district court **denied the jury demand**, and held a bench trial during which no live witnesses were called to testify. Mother appealed.



In re A.L.M.-F.

- Mother could have objected to the referral to the associate judge and requested a jury trial before the referring court. She did not. TFC § 201.005(b), (c).
- Mother then could have requested a jury trial before the associate judge. She did not.
- On appeal, Mother claimed that TFC § 201.015 **guaranteed** a third opportunity to demand a jury trial in a “de novo” hearing.



In re A.L.M.-F.

- TFC § 201.015, states “A party may not demand a second jury in a de novo hearing before the referring court if the associate judge’s proposed order or judgment resulted from a jury trial.”



In re A.L.M.-F.

- SCOTX interpreted this to mean that the referring court **MAY** offer a jury trial on de novo **if** the trial in front of the associate judge was a **bench trial**.



In re A.L.M.-F.

Three Key Takeaways:

1. A “de novo hearing” under Chapter 201 is **NOT** a “trial de novo.” “A de novo hearing is not an entirely new and independent action, but instead, is an extension of the original trial on the merits.”
2. “The Legislature created a process that is mandatory when invoked but expedited in time frame and limited in scope.”
3. Given the timelines for requesting and conducting a de novo hearing; “an expectation that referring courts would be able to accommodate first-time jury demands in de novo hearings does not comport with the overall statutory scheme.”



In re A.L.M.-F.

As to Mother's Constitutional Right to a Jury trial argument:

1. Mother was afforded the right to demand a jury trial.
2. The distinction between a jury trial that is permissive under the law and one that is available as a matter of right is more than mere semantics. When a jury trial is available as a matter of right, a timely request is presumptively reasonable and ordinarily must be granted absent evidence that granting the request would (1) injure the adverse party, (2) disrupt the court's docket, or (3) impede the ordinary handling of the court's business.



In re A.L.M.-F.

HOLDING:

- Once the parties elect a bench trial before the associate judge, Chapter 201 **does not confer a right** to demand a jury trial in a de novo hearing. If a de novo hearing is requested, the referring court **has discretion** to grant a first-time jury request, but the statute cannot reasonably be read as affording the parties a right to a jury trial at that juncture.





In re R.J., 568 S.W.3d 734
(Tex. App.—Houston [1st dist.] 2019, pet. denied)

On January 17, 2017:

1. the case was called to trial;
2. witnesses were sworn;
3. all parties announced they were “ready” to proceed;
4. the trial court addressed a preliminary issue related to an intervention; and
5. the Department called its caseworker, who briefly testified before the trial court recessed.

In re R.J.

- On appeal, Mother and Father complained that the trial did not commence in January 2017 arguing that an “equivocal” statement from the intervenor’s attorney that the intervenors were not present because they were unaware the January 2017 hearing was to commence the final hearing.

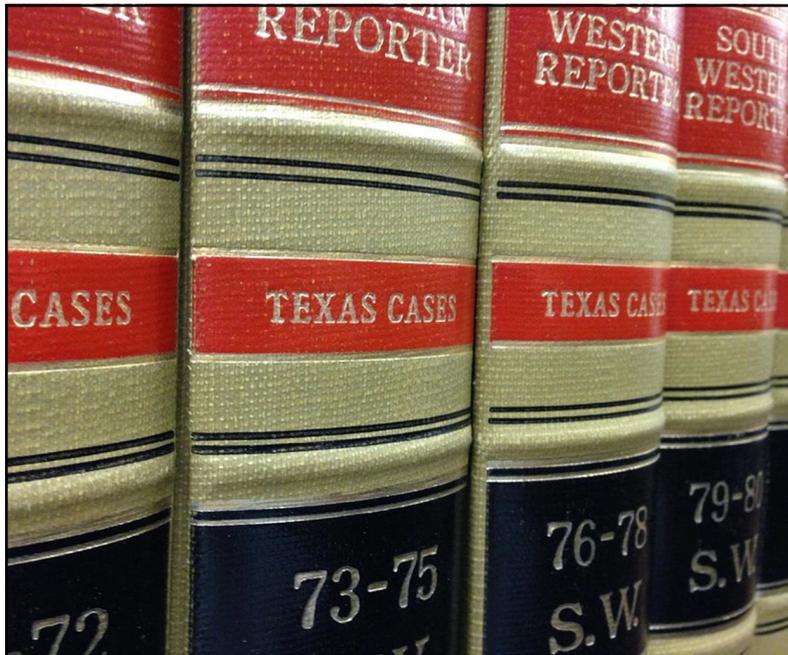


In re R.J.

HOLDING:

- In rejecting this argument, the Court of Appeals found that “this single, somewhat equivocal, statement of second-hand information by a non-party’s lawyer does not establish that it was never the intent to proceed with trial that day.”





Termination Grounds



TFC § 161.001(b)(1)(C): Making Arrangements



In re A.R., A.R., and A.R.,
 No. 02-18-00311-CV, 2019 WL 1186963
 (Tex. App.—Fort Worth Mar. 14, 2019, no pet. h.) (mem. op.)

- Father’s parental rights were terminated under TFC § 161.001(b)(1)(C).
- Subsection (C) provides that termination may occur if the parent has “voluntarily left the child alone or in the possession of another **without providing adequate support** of the child and remained away for a period of at least six months.”



In re A.R., A.R., and A.R.

BACKGROUND:

- Mother and Father are the parents of three children born in February 2012, January 2014, and December 2014.
- Mother and Father never lived together and had “on-again/off-again relationship” while Mother was married to another man.
- Father had “minimal contact” with the children according to Mother.
- Father claimed he “spent time with them every day” while he lived in Wichita Falls and remained in contact with them through Mother for some time thereafter.
- January 2017 - Department investigates Mother; Mother places children with relative; Relative can no longer care for children; Children placed in foster care on January 25, 2017.



In re A.R., A.R., and A.R.

KEY FACTS:

- 2013 - Child support order for the oldest child.
- 2014 - Father moves to Dallas.
- March 2015 - Father stops paying child support.
- April 2015 - Father moves to Mexico and had not seen children since. He has never met youngest child.



In re A.R., A.R., and A.R.

- On appeal: Father argues that the Department did not prove that he failed to provide adequate support for the children. He contends that he is allowed to “**arrange for the children’s support by another person**” and he asserts that the Department did not prove that Mother did not have sufficient resources to support the children.



In re A.R., A.R., and A.R.

- Under TFC § 161.001(b)(1)(C), a parent may provide for a child's support by making arrangements for their support rather than by personally providing support.
- *See Holick v. Smith*, 685 S.W.2d 18, 21 (Tex. 1985).



In re A.R., A.R., and A.R.

Court of Appeals concluded:

No evidence that when Father left the children with Mother, she was able to support them or expected to do so without his assistance:

- Mother had never held a full-time job (which Father more than likely knew after their three years together).
- Father was ordered to pay child support for oldest child.
- Mother expected support and never waived her entitlement to it.



In re A.R., A.R., and A.R.

*** IMPORTANT ***

“[T]he court order to provide support for one of the three children is a judicial finding that no such arrangement existed as to that child, even before the birth of the third child created the need for additional support.”



TFC § 161.001(b)(1)(L)



In re S.G. and D.D.-G.P., No. 01-18-00728-CV
(Tex. App.—Houston [1st], April 2, 2019, pet. Filed) (mem. op.)

TFC § 161.001(b)(1)(L) allows a trial court to terminate parent rights if it finds by clear and convincing evidence that the parent “has been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child” under specific provision of the Texas Penal Code.*

*Under Penal Code § 22.021(a)(1)(B), “a person who engages in a sexual act with a child less than 14 years of age commits an aggravated sexual assault.”



In re S.G. and D.D.-G.P.

KEY FACTS:

- Father convicted of aggravated sexual assault of a child.
- Father was twenty years old at the time he committed the offense. The victim was a thirteen year old girl.
- Father was initially placed on deferred adjudication but was later incarcerated after violating the terms of his community supervision.
- Father was required to register as a sex offender for the rest of his life.



In re S.G. and D.D.-G.P.

On appeal, Father argued* that the sexual encounter was consensual and that there was no evidence presented that the victim suffered a “serious injury.”

* In rejecting this argument, the Court of Appeals stated that “**the victim’s age categorically precluded consent**” based on the longstanding judgment that “**children under fourteen lack the capacity to understand the significance of agreeing to sex.**”



In re S.G. and D.D.-G.P.

- The Court of Appeals also rejected the assertion that Father’s offense did not cause “serious injury” as “[s]exual activity is **always accompanied by a possibility of important or dangerous consequences**, including emotional or psychological hurt, and the possibility of realizing these consequences is magnified where children under the age of 14 are concerned due to their inability to meaningfully apprehend the nature of sex and its possible outcomes.”



In re S.G. and D.D.-G.P.

- Father also argued that his conviction for aggravated sexual assault occurred 18 years prior to trial and was therefore “too distant or remote in time” to constitute sufficient evidence under subsection (L).
- The Court of Appeals also rejected this argument, pointing out that Father was required to register as a sex offender for life. The Court noted that in creating a lifetime sex offender for registry, “**the Legislature has made a policy decision that the crime for which [Father] was convicted will never be so remote that it will no longer be a matter of legitimate public concern.**”



*TFC § 161.001(B)(1)(N):
NO REASONABLE EFFORTS*



In re M.A.S.L. and K.J.L., No. 04-18-00496-CV
(Tex. App.—San Antonio, Dec. 19, 2018, no pet.) (mem. op.)

- Father contested the sufficiency of the evidence supporting the trial court's (N) finding, **specifically challenging the reasonable efforts finding.**



In re M.A.S.L. and K.J.L.

- During Father's incarceration, the children were removed from Mother's care after she exposed them to drug users and felons.
- The children were placed with Father's sisters.



In re M.A.S.L. and K.J.L.

Three Department Caseworkers:

- Caseworker #1: Handled the referrals-no personal contact with Father, sent “courtesy worker” to the jail where he was incarcerated to interview him. Record silent as to whether Father was interviewed.
- Caseworker #2: Did not meet with Father despite making two visits to the jail. She sent Father his service plan—did not know if he received it, and did not have any information about Father’s participation in services. She also sent Father letters updating him about the case.
- Caseworker #3: Made no attempt to visit with Father during the case.



In re M.A.S.L. and K.J.L.

- Father testified that he received paperwork from the Department - it was about Mother and that he received one letter mentioning service plan but did not receive service plan.



In re M.A.S.L. and K.J.L.

In holding that the Department's actions did not constitute reasonable efforts to return the child to Father, the appellate court considered that:

1. None of the caseworkers met with Father in person to discuss the family service plan;
2. Although the second caseworker testified that she emailed Father's family service plan to the facility where he was incarcerated, there is no evidence that Father actually received the plan;
3. The second caseworker also failed to provide the date that she mailed the family service plan to Father; and
4. Father testified that he received correspondence addressed to him less than two months before trial.



TFC §
161.001(b)(1)(R)



In re A.M.S., No. 04-18-00650-CV
(Tex. App.—San Antonio Jan. 9, 2010, no pet) (mem. op.)

- Under TFC § 161.001(b)(1)(R), the trial court may order termination if it finds that the parent **has been the cause of the child being born addicted to alcohol or a controlled substance**, other than a controlled substance legally obtained by prescription.



In re A.M.S.

- The child was born drug-positive at birth and suffered from “withdrawal symptoms including tremors and violent shaking.”
- As a result, the child was required to remain in the hospital for an extended period of time.
- Mother also admitted to the Department investigator that she used heroin and methamphetamine a few days prior to the child’s birth.



In re A.M.S.

- In challenging the legal and factual sufficiency of the trial court's subsection (R) finding, Mother argued that "the trial court could not have found that she caused the child to be born addicted to a controlled substance **because there was no evidence that the drugs she admitted to taking before the child's birth were controlled substances.**"



In re A.M.S.

- The Court of Appeals concluded that Mother was the cause of the child being born addicted to a controlled substance that she had not legally obtained by prescription, **reasoning that heroin and methamphetamine are identified in the Texas Health and Safety Code as controlled substance.** Tex. Health & Safety Code § 481.102.
- The Court also "took judicial notice of the facts that heroin and methamphetamine are controlled substances."





TFC §
161.001(d):
Affirmative
Defenses



In re N.W.L.T., No. 14-18-00497-CV
(Tex. App.—Houston [14th] Nov. 29, 2018, pet. denied)
(mem. op.)

- The Department became involved with mother due to death of six-month old child. Mother had been intoxicated and was co-sleeping with the child.
- The Department removed mother's older children and prepared a service plan for her.

In re N.W.L.T.

Mother failed to comply with the following court ordered services by NOT:

- submitting to random drug and alcohol tests;
- completing substance abuse counseling;
- demonstrating successful participation in services by becoming and remaining drug and alcohol free.



In re N.W.L.T.

TFC § 161.001(d) establishes a defense to subsection O. That section provides that a trial court may not terminate the parent-child relationship under subsection O if the parent proves by a **preponderance of the evidence** that:

1. the parent was unable to comply with specific provisions of the court order, and
2. the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent.

On appeal, Mother challenges (O), attempting to claim that she had met her affirmative defense.



In re N.W.L.T.

- Mother claimed that she had met her affirmative defense that she was unable to complete substance abuse counseling **due to a lack of transportation**.
- The appellate court rejected this argument, stating **Mother's claim did not address each of the orders she failed to comply with**. The court elaborated that "[e]ven if she had proven the defense with respect to the failure to complete substance abuse counseling, Mother has nonetheless not attempted to invoke the defense as to her failure to remain alcohol-free during the case and thus has not challenged all possible grounds supporting the trial court's judgment."



In re B.L.H., No. 14-18-0087-CV (Tex. App.—Houston [14th] jul. 12, 2018, no pet.) (mem. op.)

Mother failed to complete her service plan by NOT:

- Attending all court hearings and all visitations;
- Submitting to random drug testing; and
- Completing parenting classes or counseling as recommended by the drug and alcohol assessment.



In re B.L.H.

- Mother argued that the failure to meet all the requirements of the family service plan is excused by her lack of transportation and inability to pay for certain services.
- Specifically, she claimed that she missed drug tests, court hearings, and some visitations because she did not have a working car or money for bus fare.
- However, Mother's relative testified that she had agreed to drive Mother to her appointments and would have given Mother bus fare if she had asked. There was testimony that the Department would have also assisted Mother had she communicated her difficulty with transportation.



In re B.L.H.

- The Court of Appeals held that the trial court was entitled to believe the relative and the Department caseworker, and could have disbelieved Mother.



In re L.L.N.-P., No. 04-18-00380-CV
(Tex. App.—San Antonio Nov. 21, 2018, pet. denied)
(mem. op.)

- In challenging the termination of his parental rights pursuant to subsection (O), Father relied on his testimony at trial that **no services were offered at the jail where he was incarcerated during the pendency of the case.**



In re L.L.N.-P.

- The Court of Appeals rejected this argument, stating, “[t]his reliance disregards that [Father’s] incarceration is attributable to his fault in committing criminal offenses.”
- Importantly, the Court noted that before the affirmative defense provision was enacted, appellate courts had held that incarceration is not a valid excuse under subsection (O).
- The Court then stated, “By requiring a parent to prove the failure to comply with the court ordered service plan is not attributable to any fault of the parent, **we believe the Texas Legislature did not intend to make the affirmative defense available to parents who are unable to complete service plans because they are incarcerated through their own fault.**”





Best Interest of the Child: Parenting Abilities



In re C.W., D.T., J.T., and A.T., No. 14-18-00427-CV
(Tex. App.—Houston [14th] Nov. 13, 2018, no pet.) (mem. op.)

- Children were removed due, in part, to Mother's drug use, her leaving the children unattended, and her drug-related arrest.
- During the case, Mother did not complete parts of her service plan, but did complete her psychological evaluation, parenting classes, and a substance abuse assessment.



In re C.W., D.T., J.T., and A.T.

Testimony established:

- The children were previously removed from the home based on allegations of frequent incarcerations, unsanitary home conditions, and prescription drug abuse.
- The children were returned after Mother completed her services and passed drug tests. When the children were removed in the present case, Mother was incarcerated on three felony drug charges.
- At the time of trial, Mother was again incarcerated. She admitted the charges resulting in her incarceration included: (1) failure to identify; (2) having an unrestrained child under the age of five in a vehicle; (3) possession of a controlled substance, and assault by threat.



In re C.W., D.T., J.T., and A.T.

In its analysis of the **parenting abilities of the parties seeking custody**:

- The Court of Appeals noted that while the evidence showed Mother had completed a parenting class, there was also evidence demonstrating that Mother continued to engage in criminal conduct since taking the class.
- The Court pointed out that within one year of the children's return to Mother after the initial removal, the Department received allegations of neglectful supervision and Mother was arrested on drug-related charges.



In re C.W., D.T., J.T., and A.T.

- As such, the Court concluded that “[w]hatever parenting abilities Mother may have acquired in the class have not transferred to her day-to-day living and interaction.”



MSA and
Stipulations
Supported
Best Interest
Finding

In re A.C., 560 S.W. 3d 624 (Tex. 2018)

Mediated Settlement Agreement:

- Parents stipulated to termination under (N) and (O)
- In two separate places, parties collectively agree that termination is in the children's best interest
- Department appointed PMC, parents appointed as non-parent possessory conservators with limited visitation rights



In re A.C.

The MSA **also** included the following:

- "Absent unforeseen circumstances," the Department was to consent to adoption by certain individuals.
- If no adoption, PMC was to be transferred to those individuals "absent unforeseen circumstances."
- Termination was not contingent on either adoption or placement.



In re A.C.

After the execution of the MSA:

- Placement for two of the children backed out.
- Mother filed motion to invalidate and modify the MSA, requesting new placement for those children and the right to designate placement.
- Mother did not repudiate her termination.
- Trial court denied Mother's motion.



In re A.C.

The Termination Trial:

- Mother does not show up for trial.
- Trial court takes judicial notice of MSA. CW testifies about contents of MSA. GAL and AAL represent that agreement is in the children's best interest.
- Trial court rendered final order. Mother appeals, challenging legal and factual sufficiency of the evidence.



In re A.C.

- The Court of Appeals affirmed the trial court's judgment, holding that the stipulations and placement plans in the MSA were sufficient evidence of several factors relevant to the best interest determination.
- On petition for review to the SC, Mother asserted that the clear and convincing evidence standard negated the evidentiary value of her best interest stipulations on the MSA and the best interest testimony at trial, which she characterized as conclusory.



In re A.C.

HOLDING:

- The SC held that “a parent’s voluntary and affirmative statements that termination of parental rights is in the child’s best interest in a mediated settlement agreement binding on the parties under TFC § 153.0071(d) **can satisfy, and does here**, the requirement that a best-interest finding be supported by clear and convincing evidence.”





Possessory Conservatorship

 TEXAS CENTER
FOR THE JUDICIARY

In re C.L.J.S., No. 01-18-00512-CV
(Tex. App.—Houston [1st] Nov. 29, 2018, no pet.) (mem. op.)

- At trial, the Department was named sole managing conservator of the child, while Mother was named as possessory conservator.
- The trial court's order decreed that Mother have no visitation or contact with the child. Mother appealed.

In re C.L.J.S.

- Under **TFC § 153.193**, the terms of an order limiting a parent's access to her child may not exceed those that are required to protect the child's best interest.
- The Appellate Court noted that in naming Mother as possessory conservator, the trial court “implicitly found that the mother's appointment to this more limited role was in the child's best interest and that the mother's access to the child would not endanger the child's physical or emotional welfare.”
- The Court reasoned that numerous authorities have held the complete denial of access is only for “extreme cases of parental unfitness” because it is “tantamount to the termination of parental rights.”



In re C.L.J.S.

- Here, the Court noted that the Department caseworker testified at trial that the child's therapist believed that Mother should be able to have regular visitation. The Court further noted that the record was void of evidence demonstrating that supervised visitation would be inadequate to safeguard the child.
- The Appellate Court concluded that “there has not been a showing of parental unfitness so extreme as to render even limited parental contact or visitation against the child's best interest, the total and indefinite denial of parental access is improper.”
- Accordingly, the case was **reversed and remanded** for proceedings regarding the mother's access.





Ineffective Assistance of Counsel



TEXAS CENTER
FOR THE JUDICIARY

In re B.H., No. 05-18-00291-CV
(Tex. App.—Dallas Sept. 18, 2018, no pet.) (mem. op.)

- Children were removed due to drug use and neglect, and were appointed attorneys. Approaching trial, the parties were ordered to mediation and the parties and attorneys all participated. The parties reached a mediated settlement agreement (MSA).
- This MSA allowed for father's termination under (O) and best interest, and that the Department would conduct home studies on the children's grandfathers.



TEXAS CENTER
FOR THE JUDICIARY

In re B.H.

- At the final hearing, the Department caseworker testified about Father's failure to complete drug testing. She also testified that both home studies of the children's grandfathers were not approved and the children were not placed with them. The CASA supervisor also testified that the parents had failed to complete services and could not provide a safe and stable environment for the children.
- Father was present but his counsel was not. The trial court indicated to Father that his attorney had withdrawn, although the Appellate Court noted that there was not a withdrawal in the clerk's record. The trial court terminated Father's parental rights.
- Father appealed claiming ineffective assistance of counsel.



In re B.H.

- The Court of Appeals adopted a holding from the Austin Court that **"the hearing at which a mediated settlement agreement is presented that results in termination of parental rights is a critical stage of the litigation,"** at which a parent is entitled to representation.
- It noted that representation is necessary to ensure the requirements of the MSA are followed and that no defense applies.



In re B.H.

- The Court considered that Father’s attorney was not present at the final hearing and Father was not given the opportunity to present evidence, testify, or examine witnesses.
- The Court found that Father was “denied counsel when his appointed attorney did not appear at the final hearing presenting the mediated settlement agreement. It was at this hearing that the merits of the State's case was presented. Counsel's failure to appear was not mere strategy; it left Father unrepresented at the hearing that would determine whether his parental rights would be terminated.”
- Therefore, the Father had no representation at a critical stage of litigation and lacked effective assistance of counsel. The case was **reversed and remanded**.



OTHER SIGNIFICANT CASES

- Trial counsel was ineffective for failing to be present during a “critical stage” of litigation, i.e. almost all of the trial to tend to an “actual client” in another court room. *In re J.A.B.*, 562 S.W.3d 726, 730 (Tex. App.—San Antonio 2018, pet. denied).
- Mother denied effective assistance of counsel when her attorney was not present on the first day of trial. *In re G.N.H.*, No. 04-18-00154 (Tex. App.—San Antonio Nov. 14, 2018, no pet.) (mem. op.).



ICWA: EXPERT WITNESS



In re D.E.D.L., 568 S.W.3D 261 (Tex. App.—EASTLAND 2019, no pet.)

- Father claimed that the termination of his parental rights in an ICWA case should be reversed because no one expressly designated as a qualified expert witness testified against him.



In re D.E.D.L.

- Under **25 U.S.C. § 1912(f)**, a court may not terminate the parental rights to an Indian child unless it finds beyond a reasonable doubt that the evidence, including the testimony of a qualified expert witness, demonstrated that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.



In re D.E.D.L.

- Here, the Choctaw Nation of Oklahoma intervened in this case. The notice of intervention was filed by Ms. Drinnon, who was identified as a “Choctaw nation ICWA specialist.” Ms. Drinnon participated at trial via Skype.
- Although the trial court never expressly designated Ms. Drinnon as a qualified expert witness, it did indicate in its order of termination that its decision was based on the testimony of a qualified expert witness.



In re D.E.D.L.

- The Court of Appeals noted that ICWA does not define “qualified expert witness”, but the Bureau of Indian Affairs’ guidelines provides that a qualified expert witness includes a member of the tribe who his recognized by the trial community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices. **80 Fed. Reg. 10146-02, 1-157 at D.4 (b)(1) (Feb. 25, 2015).**



In re D.E.D.L.

HOLDING:

- The Court held that the trial court could have determined that Ms. Drinnon was a qualified expert witness even though the Department did not specifically designate her and the trial court did not expressly certify her as a qualified expert witness.



ICWA: FINDINGS NOT REQUIRED IN TEMPORARY ORDERS



In re A.M., 570 S.W.3D 860 (Tex. App.—EL Paso 2019, no pet.)

- The child was a registered member of the Ysleta Del Sur Pueblo Tribe.
- Mother's parental rights were terminated under TFC § 161.001(b)(1)(D), (N), and (O). The final order also made findings beyond a reasonable doubt in accordance with 25 U.S.C.A. § 1912(d) and (E).



REFRESHER

Section 1912(a) requires that a party seeking termination of the parental rights to an Indian child provide notice of the proceeding to the child's tribe.

Section 1912(d) requires that a party seeking to effect a foster placement of or termination of parental rights of an Indian child must satisfy the court that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Under **Section 1912(e)**, the trial court may not order foster care placement unless the court determines by clear and convincing evidence, including the testimony of a qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.



In re A.M.

- Mother argued on appeal that because these findings were not included in the emergency orders, temporary order, status order, and permanency orders entered during the case, the termination order must be reversed.



In re A.M.

SECTION 1922:

- The Court of Appeals looked to section 1922 of ICWA, which provides that “Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child . . . In order to prevent imminent physical damage or harm to the child.”
- As such, the Court held that “[g]iven Section 1922’s directive that nothing in ICWA shall prevent the emergency removal of an Indian child when necessary to prevent imminent physical damage or harm to the child, we conclude that the requirements of Section 1912(a), (d), and (e) did not apply to the emergency removal of the child.”



Appellate Issues



In re N.G., No. 18-0508 (Texas May 17, 2019)

Parents have history of drug use, criminal conduct, failure to comply with court-ordered services, and they failed to submit to drug testing on multiple occasions.

- Their parental rights were terminated pursuant to TFC § 161.001(b)(1)(D), (E), (O), and a finding that termination of their parental rights is in the children's best interest.
- Both parents appeal the termination of their parental rights.
- Mother also asserted that the trial court failed to specify the actions necessary for her to obtain return of the child.



In re N.G.

- The appellate court affirmed finding sufficient evidence of TFC § 161.001(b)(1)(O) and **declined to review the sufficiency of the evidence under subsections (D) or (E).**



In re N.G.

Issue One:

- Whether a parent, whose parental rights were terminated by the trial court under multiple grounds, is entitled to appellate review of the TFC § 161.001(D) and (E) grounds because of the “collateral consequences” these grounds could have on their parental rights to other children - even if another ground alone is sufficient to uphold termination.



In re N.G.

- **TFC § 161.001(b)(1)(M)** provides that parental rights may be terminated if clear and convincing evidence supports that the parent “had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state.” *Id.* TFC § 161.001(b)(1)(M).



In re N.G.

- SCOTX held that in affirming, courts of appeal did not have to specify the relevant evidence, but because section 161.001(b)(1)(M) alone provides a sufficient basis to terminate parental rights based on a previous TFC § 161.001(b)(1)(D) or (E) finding, the due process concerns, coupled with the requirement for a meaningful appeal, mandate that if a court of appeals affirms the termination on either of these grounds, **it must provide the details of its analysis.**



In re N.G.

Issue Two:

- Whether the court of appeals erred in failing to address whether the trial court's order was sufficiently specific to warrant termination under TFC § 161.001(b)(1)(O).



In re N.G.

- SCOTX found that the appellate court did not review the specificity of the order.
- Because a trial court must necessarily decide that a court order is sufficiently specific for the parent to comply before terminating a parent's rights under TFC § 161.001(b)(1)(O), a trial court cannot terminate parental rights for failure to comply without first considering the order's specificity.
- The court of appeals erred in failing to address the specificity of the order, which included the service plan.



OTHER SIGNIFICANT CASES

- *See In re Z.M.M.*, No. 18-0734, — S.W.3d —, —, 2019 WL 2147266, at *2 (Tex. May 17, 2019) (per curiam) (“due process requires an appellate court to review and detail its analysis as to termination of parental rights under [(D) or (E)] **when challenged on appeal.**”
- *See In re P.W.*, No. 14-18-01070-CV, 2019 WL 2352443 (Tex. App.—Houston [14th Dist.] June 4, 2019, no pet. h.)(mem. op.)(Mother concedes N and best interest and challenges only (D) and (E), appeal would not undo the termination of mother’s parental rights but would prevent termination under (M)—did not address failure to challenge (D) or (E)).



In re Z.M.R. and Z.D.B., 562 S.W.3d 783
(Tex. App. – Houston [14th Dist.] 2018, no pet.)

Mother did not attend trial.

- Mother’s attorney announced that Mother had been at the courthouse earlier that day, at which time she executed an irrevocable affidavit of relinquishment.
- Mother’s attorney told the court that she explained the affidavit to Mother and that she understood and had no questions.
- Mother, through new counsel, filed a motion for new trial alleging “newly discovered evidence” and that she “reportedly suffers from bipolar disorder, depression and other mental health conditions and had not taken her prescribed medication for six years.” As a result, Mother claimed her affidavit was involuntary.



In re Z.M.R. and Z.D.B.

ON APPEAL:

- Mother argued that her “diminished mental capacity rendered her relinquishment involuntary.”



In re K.M.L., 443 S.W.3d 101, 113 (Tex. 2014)

Voluntariness “fully litigated” at trial.

- Here Mother, signed her affidavit on the day of trial and alleged the affidavit was involuntary two months after signing it.



In re K.M.L.

- Record contained “several” pieces of evidence about mother’s mental abilities “around the time she signed the affidavit”, including testimony from mother’s psychiatrist and counselor regarding her “comprehension challenges”.
- In contrast, in this case, most of the evidence of Mother’s mental abilities came from an evaluation from “MHMRA” records **six years before** her relinquishment.



In re K.M.L.

“[A]bsolutely no evidence in the record, other than the language of the affidavit itself,” that the mother understood the consequences of signing the affidavit of relinquishment.”

1. Mother’s trial attorney stated that she had explained the affidavit to Mother and Mother understood it;
2. Mother brought someone from the Department to evaluate as placement, from which the trier of fact could infer that Mother “understood she would be giving up her rights to the children and wanted the Department to appoint someone she knew as their managing conservator”;
3. GAL testified in detail about Mother’s execution of the affidavit;
4. Mother engaged in a long discussion with trial judge in which she confirmed she understood that: (1) she signed the affidavit, and (2) the “benefits of relinquishment over termination on another ground.”



In re K.M.L.

- Accordingly, the Court of Appeals concluded that Mother **did not** establish that her affidavit of relinquishment resulted from fraud, duress, or coercion.



Thank You



TEXAS CENTER
FOR THE JUDICIARY