TERMINATION CASE LAW UPDATE

PREPARED BY:

ERIC T. TAI, MICHAEL BECKER, JERRY REYES,
REBECCA L. SAFAVI, LESLIE CAPACE,
KELLIE STARR PRICE, CAROLINE CAROW

APPELLATE SECTION, DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

I. PRE-TRIAL ISSUES

A. MINOR MOTHER AND PERSONAL JURISDICTION

The Department filed an original petition for conservatorship and to terminate fifteen-year-old Mother's parental rights. No citation directed to Mother was issued or served on her. Mother appeared personally with her court-appointed attorney at the adversary hearing. Mother filed an answer to the Department's suit. At trial, Mother testified and asked the jury not to terminate her parental rights. At the conclusion of trial, the court signed an order terminating Mother's parental rights pursuant to the jury's verdict. Mother appealed, arguing the order terminating her parental rights was void; she argued the court lacked personal jurisdiction over her because she was never served.

The Department agreed that Mother was never personally served, but argued that Mother personally appeared with her counsel in court before citation could be issued and continued to appear and participate in the proceedings. Tex. R. Civ. P. 120 (providing that a defendant may "in person, or by attorney, or by his duly authorized agent, enter an appearance in open court" and that such appearance has "the same force and effect as if citation has been issued and served as provided by law").

The Court of Appeals agreed that in general, the issue of personal service is waived where a defendant enters a general appearance. The Court of Appeals then noted that "[i]t is well established, however, that a minor is *non suis juris*, meaning a minor is considered to be under a legal disability and therefore lacks the capacity to sue or consent to suit". The Court accordingly held that "a minor cannot by her voluntary appearance waive service or consent to the jurisdiction of the court." The Court went on to note that when a minor is named in a suit, the minor must generally be served with process, but a minor can be properly served through a legal guardian or next friend. When a minor is served through a guardian or next friend, whether the court has personal jurisdiction depends on "whether the minor's interests have been properly protected and whether a deficiency in notice or due process has been shown."

The Court concluded that the record showed neither Mother nor Mother's parent, guardian, or "next friend" was served with citation of the Department's suit. The record also did not reveal any person appeared in the trial court in the capacity of Mother's next friend. Likewise, the trial court did not appoint a guardian *ad litem* to represent Mother's interests.

Because Mother was a minor throughout the trial court proceedings, including when the trial court signed the order terminating Mother's parental rights, the Court of Appeals rejected the Department's contention that Mother had waived the issue of personal jurisdiction by entering a general appearance, reversing the trial court's judgment and remanding the case for a new trial. *N.J. v. Tex. Dep't of Family and Protective Servs.*, 613 S.W.3d 317 (Tex. App.—Austin Oct. 2020, pet. filed).

B. NEW TRIAL TO COMMENCE 180 DAYS AFTER MANDATE ISSUES

Mother contended the "Order for Termination after De Novo" was void because the trial court lost jurisdiction when it did not hold the de novo hearing within 180 days after the Court of Appeals issued its order remanding the case, as required by TFC § 263.401(b-1). The Court of Appeals disagreed.

The trial court made an oral report recommending termination of Mother's parental rights. Before a final order was entered, Mother filed a notice of appeal and a request for a de novo hearing before the referring district court. Mother subsequently moved to abate the premature appeal so the district court could hold the de

novo hearing and render its final order. However, the district court declined to proceed with the de novo hearing because the Court of Appeals had not yet ruled on Mother's motion to abate the appeal, and instead signed a final order terminating Mother's parental rights.

After the district court signed the final order, but before the Court of Appeals received notice of the order, the Court of Appeals abated the appeal for thirty days. Mother filed a petition for writ of mandamus asking the Court of Appeals to vacate the order of termination and order the trial court to hold the de novo hearing.

The Court of Appeals consolidated Mother's original appeal and mandamus proceeding, vacated the termination order, and remanded the case, ordering the trial court to hold the de novo hearing. The Court issued its opinion and judgment on August 27, 2019, and the mandate issued on November 8, 2019. On February 24, 2020, 180 days from the date the Court of Appeals issued its opinion and judgment remanding the case, Mother filed a "Notice of Automatic Dismissal" pursuant to TFC § 263.401(b-1).

Without addressing whether TFC § 263.401(b-1) applied to the case, the Court of Appeals rejected Mother's argument that the 180-day dismissal deadline should be calculated from the date the Court issued its opinion and judgment remanding the case. The Court noted "[t]he Supreme Court of Texas adopted Rule of Appellate Procedure 28.4 to implement procedures for the accelerated disposition of appeals from final termination orders."

The Court stated that Rule 28.4 contains a provision controlling remand for a new trial: "If the judgment of the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to commence the new trial no later than 180 days *after the mandate is issued* by the appellate court." The Court wrote that "[c]ourts have consistently applied this rule in the context of deadlines for further proceedings in the trial court upon remand."

The Court concluded that because the mandate issued on November 8, 2019, and the trial court held the de novo hearing 111 days later, on February 27, 2020, even if TFC §263.401(b-1) applies, the trial court retained jurisdiction over the case at the time it rendered its order of termination. *In re E.O.*, No. 01-20-00212-CV (Tex. App.—Houston [1st Dist.] Aug. 4, 2020, no pet.) (mem. op.).

C. Hague Convention and Personal Jurisdiction

The children were removed from Mother's care in October 2018 due to Mother's methamphetamine use. Father is a Mexican National who was not present and was not served with the Department's petition. In January 2019, the district court appointed Father counsel, who stated at trial that she had spoken with Father around that time using a phone number provided by Mother.

In February 2019, the Department caseworker called and spoke with Father using the same phone number. She prepared an affidavit stating that she told Father about the pending case and reasons for the children's removal. Father denied knowledge of mother's drug use, said he could not return to the United States, and wanted the children to live with him in Mexico. The Department also sent Father his service plan by certified mail on that same day, but no return receipt appeared in the record. The trial court ordered him to complete this plan.

Father filed an answer and counterpetition. His counsel announced ready at the October 2019 final hearing and cross-examined witnesses.

Father's parental rights were terminated and he appealed, challenging the trial court's personal jurisdiction over him. Settled authorities establish that service of process of a defendant in Mexico is governed by the Hague Service Convention. The Court of Appeals agreed that the record contained no evidence that the Department served Father pursuant to the Hague Convention. However, it noted that a party can waive defects in service by entering a general appearance; even when the Hague Convention is implicated.

Distinguishing this case from other recent cases involving service of parents under the Hague

Convention, the Court noted that here "Father knew of the Department's suit and that he needed to complete his service plan to avoid termination of his parental rights." And further, Father "spoke with his counsel early in the case", had numerous contacts with the Department caseworker discussing the removal and service plan, and asked the court for more time to work on his services. The Court of Appeals concluded that the Hague Convention "does not preempt the rules of civil procedure concerning general appearances" and accordingly held that Father waived any defects in service by filing an answer. *J.O. v. Tex. Dep't. of Family and Protective Servs*., 604 S.W.3d 182 (Tex. App.—Austin Jun. 1, 2020, no pet).

II. TFC § 263.401

A. COVID EXTENSION

TFC § 263.401(b) states, in pertinent part:

> If the court retains the suit on the court's docket, the court shall render an order in which the court: (1) schedules the new date on which the suit will be automatically dismissed if the trial on the merits has not commenced, which date must be not later than the 180th day after the time described by Subsection (a); (2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and (3) sets the trial on the merits on a date not later than the date specified under Subdivision (1).

Here, the initial dismissal date pursuant to TFC § 263.401(a) was February 10, 2020. However, prior to the dismissal date, the trial court granted an extension for 180 days to August 8, 2020 in accordance with TFC § 263.401(b) because of issues surrounding a delay in paternity testing. There were trial settings for dates in June and in July, but the trial was reset until August 11, 2020 without objection.

At the last permanency hearing in July 2020, the trial court and the parties discussed what arrangements would be made at trial. This included a discussion about the difficulties of finding a time where a courtroom with adequate space was available due to the limitations imposed due to COVID-19. The trial court and the attorneys also discussed potential witness appearances at the trial to be conducted on August 11-12, 2020. However, no written order extending the trial court's jurisdiction beyond August 8, 2020 was signed.

On August 10, 2020, Father filed a motion to dismiss the suit asserting that the trial court had lost jurisdiction by failing to commence trial prior to the written dismissal date of August 8, 2020. Father also raised this issue at the beginning of the August 11, 2020 trial. The trial court determined that it retained jurisdiction to proceed because it had extended its jurisdiction under the Supreme Court's emergency orders relating to COVID-19.

Father argued that a written order extending the proceedings was required in order for the trial court's jurisdiction to be extended, pursuant to the Supreme Court's Emergency Orders, and that the extension order was required to contain the same elements as required by TFC §263.401(b).

The Supreme Court's Eighteenth and Twenty-second Emergency Orders both state, in relevant part:

> Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent: (a) except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020; (b) in all proceedings under Subtitle E, Title 5 of the Family Code: (i) extend the initial dismissal date as calculated under Section 263.401(a) or (b-1); (ii) for an case previously retained on the court's docket pursuant to Section 263.401(b) or (b-1), or for any case whose dismissal date was

> previously modified under an Emergency Order of this Court related to COVID-19, extend the dismissal for an additional period not to exceed 180 days from the date of this Order; . . .

In overruling Father's argument, the Court of Appeals acknowledged that the provisions of TFC § 263.401(b) are mandatory and the exclusive mechanism to extend a trial court's jurisdiction in a proceeding in which the Department has removed a child from his or her parents. However, the Court determined that while the Supreme Court's emergency orders do expressly require compliance with TFC § 263.401(a) regarding an initial extension, they do not expressly require such compliance with a subsequent extension.

The Court of Appeals concluded that "the trial court extended the jurisdiction of the trial court as it was required to do pursuant to the emergency orders". Accordingly, the Court held that the failure to enter a written order or to specifically set a dismissal date, did not affect the validity of the trial court's extension such as to deprive it of jurisdiction. *In re J.-R.A.M.*, No. 10-20-00221-CV (Tex. App.—Waco Dec. 30, 2020, pet. filed) (mem. op.)*;see also In re A.W. a/k/a A.R.W.*, No. 10-20-00336-CV, __ S.W.3d __ (Tex. App.—Waco April 14, 2021, no pet. h.) (holding that because the requirements of TFC § 263.401 are still applicable if the case has not yet been extended, the trial court's order did not meet the requirements of TFC § 263.401 despite the deadline being extended as a result of the COVID pandemic).

B. "UNJUST" INCARCERATION NOT EXTRAORDINARY CIRCUMSTANCES

On appeal, Mother asserted that the trial court abused its discretion when it denied her request for an extension of the dismissal date so that she could complete her service plan. She specifically contended that her "unjust" four-month incarceration, followed by the time it took her to find employment, a place to live, and transportation, was an "extraordinary circumstance," and that it was in the child's best interest to allow her to complete the plan.

In a Department-initiated suit, if the trial court does not either commence the trial on the merits or grant an extension, its jurisdiction terminates, and the suit is automatically dismissed on the first Monday after the anniversary of the date on which the trial court rendered a temporary order in which it appointed the Department as temporary managing conservator. *See* TEX. FAM. CODE § 263.401(a). The trial court may grant an extension of up to 180 days if it finds that extraordinary circumstances necessitate that the child remain in the temporary managing conservatorship of the Department and that continuing the appointment of the Department as temporary managing conservator is in the child's best interest. TFC.§ 263.401(b).

Mother argued that she established extraordinary circumstances existed because she was unjustly incarcerated for the burglary of her own house and the charges against her were ultimately dismissed. The Court of Appeals noted, however, that Mother did not dispute that her actions led to the incarceration, and actions considered to be a parent's fault will generally not constitute extraordinary circumstances.

The Court further observed that although Mother signed her service plan shortly after the child's removal, Mother made no significant attempt to comply with the plan prior to trial, in that she had several positive and presumed positive drug tests which resulted in her loss of visitation. Further, Mother did not locate suitable housing until after her incarceration and then faced eviction two months later. While she claimed to have obtained employment and completed a parenting class, Mother failed to provide the Department with verification of either. She also failed to comply with counseling, domestic violence, and substance abuse programming.

Accordingly, the Court of Appeals determined the trial court did not abuse its discretion when it denied Mother's request for an extension of the dismissal date. *In re K.T.R.*, No. 11-20-00031-CV (Tex. App.—Eastland July 30, 2020, no pet.) (mem. op.)

C. TFC § 263.403(b) NOT JURISDICTIONAL

Mother contended the trial court lost jurisdiction when it ordered a monitored return of the child to her, but failed to expressly retain the cause on its docket and schedule a new dismissal date pursuant to TFC § 263.403(b)(2). She argued that the original dismissal

date remained effective and lapsed before the trial court commenced trial or extended the dismissal date. The Court of Appeals disagreed.

TFC § 263.403 provides, in relevant part:

> (a) Notwithstanding Section 263.401, the court may retain jurisdiction and not dismiss the suit or render a final order as required by that section if the court renders a temporary order that:
>
> (1) finds that retaining jurisdiction under this section is in the best interest of the child;
>
> (2) orders the department to:
>
> (A) return the child to the child's parent; or
>
> (B) transition the child, according to a schedule determined by the department or court, from substitute care to the parent while the parent completes the remaining requirements imposed under a service plan and specified in the temporary order that are necessary for the child's return;
>
> (3) orders the department to continue to serve as temporary managing conservator of the child; and
>
> (4) orders the department to monitor the child's placement to ensure that the child is in a safe environment.
>
> . . . .
>
> (b) If the court renders an order under this section, the court shall:
>
> (1) include in the order specific findings regarding grounds for the order; and
>
> (2) schedule a new date, not later than the 180th day after the date the temporary order is rendered, for dismissal of the suit unless a trial on the merits has commenced.
>
> (c) If before dismissal of the suit or the commencement of the trial on the merits a child placed with a parent under this section must be moved from that home by the department or the court renders a temporary order terminating the transition order issued under Subsection (a)(2)(B), the court shall, at the time of the move or order, schedule a new date for dismissal of the suit. The new dismissal date may not be later than the original dismissal date under 263.401 or the 180th day after the date the child is moved or the order is rendered under this subsection, whichever date is later.

TFC § 263.403 (Westlaw 2021).

The original dismissal date under TFC § 263.401 was April 20, 2020. The trial court ordered the monitored return of the child to Mother on February 11, 2020. The Court of Appeals noted that although the monitored return order did not expressly schedule a new dismissal date, it did schedule a final hearing for April 21, 2020, and stated that placing the child in Mother's home ***while retaining jurisdiction*** was in the best interest of the child.

The trial court signed a written order ending the monitored return on April 29, 2020. The order scheduled a new dismissal date of October 17, 2020, which fell within 180 days of April 29, 2020. The final hearing commenced on October 5, 2020.

The Court of Appeals acknowledged that TFC § 263.403(b)(2) required the trial court to set a new dismissal date but noted that "[e]qually apparent is the legislature's failure to provide a consequence for a court neglecting the task. When faced with such a situation, sister courts have hesitated to read consequences into the statute."

The Court relied on two analogous cases holding that the failure to schedule a new dismissal date as required by TFC § 263.403(c) at the time of removal of a child from a monitored return did not require dismissal as a remedy. The Court went on to say that although neither case is directly on point because each concerns noncompliance with § 263.403(c), they "are analogous to our situation and insightful. Creating a consequence, like dismissal, when statute provides none is tantamount to donning legislative garb." The Court reasoned "the legislature knows how to create a consequence for inaction, as depicted by the 'automatic dismissal' provided in § 263.401. Yet, it did not do so when considering default related to § 263.403(b) and (c)."

Further, the Court relied on "indicia that the trial court implicitly retained jurisdiction and extended the dismissal date when placing [the child] in monitored return":

> First, it determined that "placing [the child] in the home of [Mother] ***while retaining jurisdiction*** [was] in the best interest of the child." (Emphasis added). Without retaining jurisdiction over the cause, the court could hardly have found that retaining jurisdiction when coupled with the placement was in the child's best interests. Second, the court also set a date for final hearing in its February 11th order. That date was April 21st or one day after the original dismissal date. This, at the very least, denotes the trial court's intent to forgo the original dismissal date and undertake the very thing expressly permitted by § 263.401(a) (i.e., "retain jurisdiction and not dismiss the suit").

The Court of Appeals concluded that given these factual circumstances, "the statutory language specifying that jurisdiction may be retained and dismissal forgone, 'notwithstanding section 263.401,' when a child is placed in monitored return", and "the absence of legislatively mandated consequences for the failure to specify a new dismissal date", "the trial court did not lose jurisdiction over the cause through noncompliance with § 263.403(b)." *In re J.J.*, No. 07-20-00361-CV (Tex. App.—Amarillo, Apr. 30, 2021, no pet. h.) (mem. op.)

D. Defects in Requirements Not Jurisdictional; Must be Preserved

The Department filed its original petition for termination on September 21, 2017, alleging physical abuse of the two-month-old child. The dismissal date was September 24, 2018. On August 27, 2018, the Department filed both a *Motion for Continuance* and a *Motion to Retain Suit on the Court's Docket and Set a New Dismissal Date*, the latter expressly stating that extraordinary circumstances necessitated that the children remain in the temporary managing conservatorship of the Department and that continuing the Department as the child's temporary managing conservator was in the child's best interest. The Department submitted a proposed order, but the trial court did not sign it.

The trial court made a docket entry on August 29, 2018 indicating that the parties agreed to a continuance, agreed to a trial date of October 17, 2018 and that an extension was granted to reach that date. On October 17, 2018, the trial court noted on the record that all parties were "[h]ere for trial," and heard testimony from one witness before recessing. The trial resumed on December 18, 2018, at which time Father requested a continuance due to his recent arrest on charges related to the child's injuries, which was denied. The trial court terminated Mother's and Father's rights pursuant to TFC § 161.001(b)(1)(D), (E), and (O) and signed the Final Decree two days later.

Parents appealed, arguing that the Final Decree was void because the trial on the merits had not commenced before the September 24, 2018 dismissal date. The Court of Appeals agreed and reversed. The Department filed a *Motion for Rehearing En Banc*, arguing for the first time that the trial court granted an extension pursuant to TFC § 263.401(b) and retained jurisdiction. The Court of Appeals denied the Department's motion without opinion and the Department sought review, arguing that the docket sheet entry was sufficient to satisfy section 263.401(b).

First, regarding Mother's and Father's assertion that the Department failed to preserve its argument that the

trial court properly granted an extension, the Supreme Court held that a party who prevails in the trial court does not waive an issue by failing to raise an argument in its appellee brief and can raise it for the first time in a motion for rehearing or petition for review.

The Supreme Court then noted that TFC § 101.026 expressly provides that in a SAPCR, the court may pronounce or render an order on its docket sheet. Mother and Father complained that any extension was invalid because the findings required by § 263.401(b) do not appear in the record. However, it was Mother's and Father's burden to provide the record on appeal. The Supreme Court held that where a trial court grants an extension after conducting an oral hearing on the record and the record of that hearing is not made part of the record on appeal, it is implied that the TFC § 263.401(b) findings were made on the record at the oral hearing. Claimed defects relating to the specific requirements of § 263.401(b) are not jurisdictional and must be preserved for appellate review. The Supreme Court accordingly reversed the Court of Appeals. *In re G.X.H., Jr. and B.X.H.*, No. 19-0959, __S.W.3d __ (Tex. 2021); *see also In re A.F.R. aka Baby Boy R*, No. 01-20-00355-CV (Tex. App.—Houston [1st Dist.] Oct. 20, 2020, pet. denied) (mem. op.) (holding that the plain language of TFC § 263.401(b) does not require the trial court to hold a hearing before granting an extension nor does it require the trial court to explain the factual basis of the required findings).

III. APPOINTMENT OF COUNSEL

A. SELF-REPRESENTATION REQUEST

Mother's court-appointed counsel filed a motion to withdraw, alleging that good cause existed because Mother no longer wished to be represented by him. In a hearing on the motion, Mother informed the trial court that she wished to represent herself and have her current counsel act in an advisory role. The trial court entered a pre-trial order relieving counsel of representing Mother and ordering counsel to be available to answer Mother's legal questions.

Before trial began, counsel continued to serve in an advisory role and advised Mother that she would be held to the same standards as an attorney; Mother indicated that she understood and would abide by the rules. The trial court instructed counsel to continue acting in an advisory role during trial, and counsel agreed. During trial, Mother cross-examined witnesses, and counsel assisted her. On the same day, the trial court entered the termination order and an order finding that good cause existed for counsel to withdraw.

On appeal, Mother argued that she received ineffective assistance of counsel and complained that the trial court failed to admonish her regarding the dangers of self-representation, and that she was substantially disadvantaged at trial. The Court of Appeals rejected her arguments, noting that Mother's court-appointed counsel continued to serve as an attorney *ad litem* for Mother throughout trial. and the trial court did not grant counsel's motion to withdraw until trial had concluded. The Court went on to say that because Mother requested that the trial court allow her to represent herself at trial with counsel acting in an advisory role, she cannot complain on appeal that the trial court granted her request. *In re L.J.*, No. 09-19-00457-CV (Tex. App.—Beaumont June 9, 2020, no pet.) (mem. op.).

B. INEFFECTIVE ASSISTANCE OF RETAINED COUNSEL

Mother argued on appeal that her retained counsel provided her ineffective assistance. The Court of Appeals noted that indigent parents in parental termination cases have a statutory right to appointed counsel and that this right necessarily "embodies that right to effective counsel." However, the Court considered authorities from numerous courts of appeals which reached the conclusion that "[a] parent who hires his or her own attorney in lieu of the attorney appointed by the court cannot raise an ineffective assistance of counsel challenge to [a] parental[-rights] termination order." As Mother's counsel was retained, the Court overruled her issue. *In re D.T.,* 593 S.W.3d 437 (Tex. App.—Texarkana Dec. 13, 2019, pet. granted—oral argument heard Jan. 7, 2021); *see also In re A.P., M.P., N.J., F.J., and A.J.*, No. 05-19-01536-CV (Tex. App.—Dallas Jun. 10, 2020, no pet.) (mem. op.) ("[A] parent who hires her own attorney in a parental termination action cannot raise an ineffective assistance of counsel challenge to the termination order.").

IV. TRIAL ISSUES

A. DEPARTMENT FAILS TO SHOW JURY TRIAL UNDULY BURDENSOME

Mother and Father both appealed the trial court's order terminating their parental rights. On appeal both argued that the trial court abused its discretion in denying their request for a jury trial.

The Court of Appeals noted that "to perfect one's right to a jury trial in a civil case, a jury demand must be filed in writing within a 'reasonable time before the date set for a trial of the cause on the non-jury docket, but not less than thirty days in advance.' " If a scheduling order establishes a different timeline for filing a jury demand, the scheduling order controls. The Court of Appeals found that Mother filed her jury demand nearly three weeks before the October 29, 2019 deadline specified in the scheduling order, and accordingly, Mother's jury demand was timely filed.

The Department argued: 1) Mother failed to pay the jury fee and did not file an official affidavit of indigency; and 2) Mother's "repeated silence before the trial court about her request for a jury trial was subterfuge designed to deny the trial court jurisdiction over this case in order to avoid a fair determination of the merits of the Department's concerns." The Court of Appeals rejected the Department's first argument, noting that Mother perfected her right to a jury trial. It explained that the jury demand itself requested the jury fee be waived pursuant to Rule 217, as she had previously been found indigent and noted that Mother's indigency was not actually in dispute. The Court of Appeals accordingly declined to find Mother failed to perfect her jury demand by failing to file an affidavit of indigence.

The Court of Appeals then explained that because Mother perfected her right to a jury trial, the Department was required to prove that conducting a jury trial would disrupt the court's docket, impede the ordinary handling of the court's business, or injure the Department in some way. The Court of Appeals held that the record did not support the trial court's finding that a jury trial would disrupt the docket.

The trial court considered Mother's motion for jury trial on January 14, 2020. At that hearing, the Department did not put forth any evidence as to how it would be injured by the jury trial, instead relying exclusively on the argument that the jury demand was not timely filed. The Department also argued that the dismissal date was February 17th, stating it was "a concern because it doesn't give us a lot of time to, actually, get the jury trial." The Court of Appeals held, "[t]his conclusory argument is insufficient to meet the Department's burden that it would have been injured in some way if the case proceeded to trial by jury." The Appellate Court rejected the Department's argument on appeal that it would have been injured by the "impossibility" of setting the trial on a jury docket, noting the record did not show the trial could not have been commenced before the dismissal deadline.

The Court of Appeals declined to infer from the record that the trial court's docket would have been disrupted by resetting the matter for a jury trial. It pointed out that neither the trial court nor the Department discussed available upcoming jury dates before the dismissal deadline. To the contrary, the trial court noted it would "be back on February 10th", which was seven days before the dismissal deadline. The Department's conclusory statement that there was not "a lot of time" to set the trial on a jury docket was not sufficient to demonstrate harm to the Department or disruption to the court.

The Court of Appeals then rejected the Department's argument that Mother waived her right to a jury trial by "lying behind the log" after she requested a jury trial "early in the case." The Department also argued that Mother appeared to accept a scheduling order that did not anticipate the need for a jury trial, waiting until the day of the final hearing to raise the issue again. The Court of Appeals explicitly rejected the Department's contention that Mother "did anything improper by timely filing a jury demand pursuant to the trial court's own scheduling order deadline." The Court held that once Mother perfected her right to a jury trial, she was entitled to proceed "as if the clerk's office had properly placed the cause on the jury docket; she was not required to take further action to ensure that right."

Although the Department claimed Mother assented to the non-jury setting at two earlier hearings, the

Appellate Court pointed out that the Department did not provide any reporter's records of those hearings to support its argument. The Court of Appeals also rejected the Department's argument that Mother waited too long to set the matter for a jury trial. The clerk's record showed that on December 16, 2019 the district court clerk provided notice to the parties that the matter had been set for final hearing on January 14, 2020. Mother filed her request to set the matter for jury trial just a few days later, apparently having gleaned that the court had removed the matter from the jury docket and instead set it for a bench trial. Once Mother was unsuccessful in getting the matter reset on the jury docket, she brought the issue before the court again at the beginning of the trial.

The Court of Appeals stated, "Under the circumstances, we fail to see what more she could have done to indicate to the trial court that she was standing on her perfected right and was not, in fact, waiving it." The Court held that Mother preserved her right to a jury trial because: 1) her motion to set the case for a jury trial indicated an affirmative intention to stand on her perfected right, and 2) she obtained an adverse ruling on the issue. The case was reversed and remanded for a new trial. *L.C. and S.B.-N. v. Tex. Dep't of Family and Protective Servs.*, No. 03-20-00481-CV (Tex. App.—Austin Mar. 26, 2021, pet. filed) (mem. op.).

B. Evidence Did Not Violate Rule 605

On appeal, Mother argued that the trial court erroneously admitted evidence in violation of TRE 605, claiming it constituted an improper comment on the weight of the evidence. TRE 605 provides that "[t]he presiding judge may not testify as a witness at trial. A party need not object to preserve the issue."

Mother first argued that the "line of questioning specifically regarding the visits being reinstated, the visits being stopped" violated the limine order regarding any references to findings made by the trial court because "asking that question and asserting that the visits were reinstated, indicating that they had been stopped" invaded the province of the jury.

The Court of Appeals concluded that this testimony did not violate TRE 605. In reaching this conclusion, the Court observed that the caseworker did not testify as to any findings contained in the Status Hearing Order, nor did she reference that or any other court order. The Court noted that the caseworker's testimony focused on a therapist serving as the gatekeeper of the children's visitation with Mother, and although a question posed to the caseworker asked about visits being reinstated, "neither the question nor the answer informed the jury that a judge, as opposed to a therapist, held the keys to visitation."

The Department also moved to admit a copy of the Status Hearing Order into evidence. Most of the paragraphs under "findings" had been redacted from the Status Hearing order in accordance with the limine order. Mother's attorney joined in Father's attorney's objection that the handwritten language restricting visitation could be construed as a comment on the evidence. Contrary to Mother's contention, the Court determined that the admission of the Status Hearing Order with the written language regarding visitation limitations, even with the redacted findings, was not the functional equivalent of witness testimony. Instead, it was essential to the judge's judicial function of reviewing and modifying a visitation plan and did not provide testimony as to facts disputed during the trial. As such, the Court concluded that the trial court's admission of the redacted Status Hearing Order also did not violate TRE 605. *In re K.E., K.E., D.T., and K.E.*, No. 02-20-00045-CV (Tex. App.—Fort Worth July 30, 2020, pet. denied) (mem. op.).

C. Rule 11 Agreement Judicial Admission of Conservatorship Finding

In a suit affecting the parent-child relationship, the Department entered into a Rule 11 agreement with Mother in which the Department was appointed the child's managing conservator and Mother was named a possessory conservator. After the terms of the Rule 11 agreement were recited on the record, the trial court found that its terms were in the child's best interest and incorporated the agreed terms in its final order. On appeal, Mother argued that the trial court erred in appointing the Department as managing conservator because no independent evidence was elicited at trial showing that her appointment would significantly impair the child's physical health or emotional development.

Pursuant to TFC § 263.404, a trial court may render a final order appointing the Department as managing conservator of the child without terminating the rights of the parent upon finding that: (1) appointment of a parent as managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development; and (2) it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator.

The Court noted that the trial court heard that Mother was living in a shelter, that the fourteen-year-old child wished to remain in her foster home, and that Mother agreed that appointing the Department managing conservator was in the child's best interests. Thus, the Court reasoned the trial court could have found that, in entering into the Rule 11 agreement, Mother and her counsel were aware of all requirements for the Department's appointment as managing conservator and agreed that those requirements were met. That is, "the Rule 11 agreement was sufficient evidence of the requirements because it constituted '[a] judicial admission ... that dispense[d] with the production of evidence on [this] issue and bar[red] the admitting party from disputing it.'"

As a result, the Court concluded that the trial court's entry of a judgment based on Mother's Rule 11 agreement at trial was not an abuse of discretion. *In re A.R.*, No. 06-20-00016-CV (Tex. App.—Texarkana July 24, 2020, no pet.) (mem. op.).

D. Associate Judge Required to Have Court Reporter

An associate judge presided over the contested final termination hearing and made an electronic recording of the hearing instead of providing a court reporter to make a record. At the close of the hearing, the associate judge terminated Father's parental rights pursuant to TFC § 161.001(b)(1)(D), (E), and (N). Father requested a *de novo* hearing before the referring court. At the *de novo* hearing, the Department offered all of the exhibits that were admitted during the final trial before the associate judge along with the recording of the hearing, all of which were admitted. The Department then rested, and the defense offered brief testimony from the caseworker, Father, and Mother, and then also rested. The trial court took the case under advisement and later issued a letter ruling terminating Father's rights pursuant to TFC §§ 161.001(b)(1)(D), (E), (N), and (O) and appointing Mother the child's sole managing conservator. Father appealed, arguing the evidence was insufficient to support the trial court's findings. He argued that it was evident there was additional evidence introduced at the trial before the associate judge, but the recording was of such poor quality that its "evidentiary value . . . [was] nil."

The Court of Appeals noted that the recording of the final trial before the associate judge, which was admitted in the de novo hearing as an exhibit, was often barely audible or completely inaudible, and during the parts of the recording that were audible, it was unclear who was speaking when objections were made.

TFC § 201.009(a) states in relevant part, "A court reporter is required to be provided when the associate judge presides over a jury trial or a contested final termination hearing." The Court of Appeals held that while there was a transcript of the de novo hearing, there was error because the final termination hearing before the associate judge was not recorded as required by TFC § 201.009(a), thus depriving Father of a proper record, as the inaudible recordings were the key exhibits admitted at the *de novo* hearing. This error, therefore, "probably prevent[ed] the appellant from properly presenting the case to the court of appeals." The Court reversed the termination and remanded for a new trial. *In re E.F.*, No. 02-20-00228-CV (Tex. App.—Fort Worth Nov. 12, 2020, no pet.) (mem. op.)**;** *see also In re J.L.*, No. 02-20-00114-CV (Tex. App.—Fort Worth Sept. 3, 2020, no pet.) (mem. op.) (holding that § 201.009(a) makes no exception to the requirement that the associate judge provide a court reporter at a contested final hearing and provides for no other method of preserving the record).

V. TERMINATION GROUNDS

A. TFC § 161.001(b)(1)(D) and (E)

1. Incarceration Before and After Child's Birth

In the Texas Supreme Court, Father argued that the evidence supporting the termination of his parental rights under subsection (E) was legally insufficient because his "incarceration alone" cannot support this finding. TFC § 161.001(b)(1)(E) provides for termination where the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child."

The evidence demonstrated that Father had been convicted of drug offenses and was a fugitive at the time of the child's birth. He reported to prison when the child was an infant, served eighteen months, then "almost immediately" committed robbery and was incarcerated for another seven and a half years. He "made almost no contact" with the child while he was incarcerated and was unaware of the endangering circumstances the Department removed the child from. Father was released from prison toward the end of the Department's case—while the child was a pre-teen and happily situated with a foster family and half-sisters. His rights were shortly thereafter terminated.

The Supreme Court noted that Texas cases "have held that mere imprisonment will not, standing alone, constitute engaging in conduct which endangers the emotional or physical well-being of a child"; but the Court has "nevertheless held that incarceration does support an endangerment finding 'if the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child.'"

The Court elaborated that "[a] parent's criminal history—taking into account the nature of the crimes, the duration of incarceration, and whether a pattern of escalating, repeated convictions exists—can support a finding of endangerment." Thus, a parent's imprisonment "is certainly a factor" the trial court may weigh under (E).

The Court noted that the trial court could have fairly considered Father's convictions and corresponding periods of imprisonment for "increasingly serious crimes—among them, possession of a controlled substance, sale of marijuana, and robbery." It further found that the record showed a "pattern of escalating conduct" that did not end after the child was born "when he would (or should) have been aware that criminal conduct, like committing robbery, risked separating him from [the child] for years, as, in fact, it did." The child had turned eleven at the time of trial and Father was imprisoned for more than eight years of the child's life—last seeing her when she was four. The Court stated that, "[n]ot all incarceration means that a parent will be absent from a child's life for a lengthy duration." But here, the child's "life was placed at risk while her father was completely absent from her life for more than eight years" and that this "disruption" was not normal.

The Court concluded that it is "imperative that courts recognize the constitutional underpinnings of the parent–child relationship, but courts must not sacrifice a child's emotional and physical well-being to preserve those rights when their corresponding obligations go unfulfilled for years." Thus, the Court declined "to draw a bright-line rule that incarceration cannot support an endangerment finding under subsection (E)." *In re J.F.-G.*, No. 20-0378, __ S.W.3d __ (Tex. 2021).

2. Failure to Take Action and Awareness of the Child's Conditions and Surroundings

In August 2016, the Department received an allegation regarding Mother's probable drug use, an allegation that the child and his four siblings were exposed to domestic violence, and an allegation that two of the children were being physically abused. The case was subsequently transferred to the Department's Family-Based Unit.

Following his release from prison, Father began a weekly or bi-weekly routine of contacting Mother's boyfriend by telephone. Father believed Mother's boyfriend had been to prison and knew that he "was really good at lying." Mother's boyfriend consistently refused to let Father speak with the child on any

telephone call. Father knew Mother had been removed from the home for using drugs, but Mother's boyfriend blamed Mother for the decision to refuse contact with the child. Father also expressed concern that he could not hear children's voices in the background during his calls with Mother's boyfriend. These suspicions about the child's environment were such that Father reached out to a Department caseworker to request her opinion but learned that her work in the matter had closed. Father took no further action to investigate his suspicion that information about the child was being withheld.

In November 2018, the Department received a report alleging that Mother's boyfriend used illegal drugs in the presence of the children, that Mother (who was prohibited from being around the children) hits the children, and that there was no food in the home. The Department removed the children after Mother's boyfriend and two of the children tested positive for methamphetamine.

In its analysis of the trial court's finding terminating Father's parental rights pursuant to TFC § 161.001(b)(1)(D), which allows a trial court to order termination if it finds by clear and convincing evidence that the parent has knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child, the Court of Appeals considered that Father was aware of the Department's 2016 Family-Based case and Mother's exclusion from the home because of probable drug use. The Court explained that Mother's boyfriend blaming Mother for denying Father's contact with the child permitted an inference that Mother was still in contact with Mother's boyfriend and the child. As such, the Court rejected a conclusion that Father believed Mother to be living apart from the child as it showed Father believed the child was in the possession of Mother's boyfriend, a nonparent, who would not allow Father to speak with the child. Accordingly, the Court concluded that "the circumstance of a nonparent curiously refusing to provide a parent access to his child (correctly) raised Father's suspicions to the point that he inquired with a Department caseworker . . . But when the caseworker was unable or unwilling to provide insight, Father took no further action and turned a blind eye to the child's condition and living environment."

After reviewing the evidence, the Court concluded that a reasonable factfinder could have formed a firm belief or conviction that Father was aware of the child's circumstances suggesting that the child was placed in conditions or surroundings that placed the child's physical or emotional well-being at risk, yet Father allowed the child to remain in those conditions or surroundings. *In re A.F.*, No. 07-19-00435-CV (Tex. App.—Amarillo May 29, 2020, pet. denied) (mem. op.).

3. Environmental Danger Alone

Mother challenged the termination of her parental rights under TFC § 161.001(b)(1)(D). The caseworker testified at trial that the trailer in which Mother, Father, and the children resided had holes in the ceiling and the roof was incomplete. Mother and Father covered the holes in the roof with a tarp and nailed wood on it to hold the tarp down. The caseworker also noted that there were holes in the door frames where pests could enter. "The trailer had one main electrical line, but it had extension cords throughout to power lights in the living room, bedrooms, and other areas." The initial referral also indicated that one of the children was not going to school and all of the children had untreated bedbug bites. Mother admitted that when the children came into the Department's care, they had "insect bites all over them that were infected."

In affirming termination under subsection (D), the Court of Appeals stated, "the trial court could have concluded that the electrical extension cords exposed the children to fire, electrical shock, and trip hazards . . . The children's untreated, infected insect bites were evidence of medical neglect, which likewise endangered the children's physical well-being." *In re J.A.J., L.F.S., and R.M.G.*, No. 04-20-00156-CV (Tex. App.—San Antonio, July 29, 2020, no pet.) (mem. op.).

4. Conclusory Testimony Insufficient

Father appealed the termination of his parental rights, arguing the evidence was insufficient to support the trial court's order under TFC §§ 161.001(b)(1)(D) and (E).

The Department argued the trial court's findings were supported by evidence that showed (1) Father was physically abusive toward Mother; (2) Mother was physically abusive toward Father and the child; and (3) Father did not make sufficient efforts to locate and remove the child from Mother's possession when he knew of Mother's violent conduct. The Court of Appeals disagreed.

The Court of Appeals noted that the only testimony that Father was physically abusive to Mother came from the Department's investigator, and there was no testimony detailing any specific instance of abuse by Father. The Court stated, "[t]here was no evidence of the factual circumstance comprising the alleged abuse or how often it occurred. Thus, this statement is conclusory …. it is not more than a scintilla of evidence of physical abuse committed by [Father]."

Similarly, the Court stated that the only testimony Mother was violent toward the child was a single statement made by Father. The Court noted, "[a]gain, there was no testimony detailing any specific instance of violence against [the child], the factual circumstance comprising the alleged violence, or how often it occurred. In addition, there was no testimony [the child] exhibited any physical or emotional signs that she had been physically abused by the violent acts of [Mother]." The Court concluded that because Father's statement was not supported by any factual evidence showing Mother was violent toward the child, it was conclusory.

The Court likewise concluded that Father's statement that Mother had been violent to him was conclusory. The Department investigator testified to Father's claim that Mother had tried to kill him with too much medication, and Father testified that he had been in the hospital because of an accidental overdose, where he had asked Mother to give him his medication and afterward he awoke in the hospital. The Court noted that, "[t]here was no testimony regarding what medication [Mother] had given [Father], how much she had given him, whether or not she knew the proper dosage to give him, or how [Father] got to the hospital." The Court concluded that Father's statement regarding the incident, without more factual support, was conclusory and would not support an inference that Mother intentionally or knowingly gave him an overdose of medication.

The Court also determined that allegations of domestic violence in the case were conclusory and unsupported by any facts demonstrating that domestic violence had occurred. The Court concluded, "[t]herefore, the trial court's finding under statutory grounds (D) and (E) cannot be supported on the basis of domestic violence or [Father's] failure to remove [the child] from a violent household." *In re L.G.*, No. 06-18-00099-CV (Tex. App.—Texarkana July 24, 2020, no pet.) (mem. op.).

5. Participation in Services Does Not Negate Endangering Conduct

In challenging subsections (D) and (E), Father did not argue that there was no evidence at trial to support a finding that he engaged in conduct that endangered the children. Instead, he argued that his inability to participate in the recommended services prevented him from negating the trial court's endangerment findings. In overruling Father's argument, the Court held that Father's participation in services is "unrelated to whether he engaged in conduct constituting child endangerment; i.e. conduct that exposed the children to loss or injury or jeopardized their emotional or physical well-being." *J.B., Jr. and Y.R., v. Tex. Dep't of Family and Protective Servs.*, No. 03-19-00881-CV (Tex. App.—Austin May 6, 2020, pet. denied) (mem. op.).

6. Limited Mental Capacity and Scienter

On appeal, Mother challenged the sufficiency of the evidence to support the trial court's finding under TFC § 161.001(b)(1)(D).

The evidence established that Mother had brought the child, then two months old, to the emergency room, and told medical staff that she witnessed the child's father sexually abuse her. That same day, she told a Department investigator that while visiting Father, she walked into a room and saw him "masturbating and trying to insert his penis in the child's vagina", and Father "told her that he would kill her if she told anyone." Mother indicated she waited to report the abuse due to Father's threat and because she had to rely

on Father to bring her back to her residence. Mother took the child to the hospital two days later, after she reportedly considered killing Father or killing Father and then herself. Mother told medical staff that Father had probably inflicted the child's healed rib fractures revealed on an X-ray, and also stated a physician previously told her that the child showed signs of sexual abuse and advised her to call the police, but she did not. She gave conflicting statements about her mental health issues and whether she was treating them.

The Court of Appeals noted that Mother did not dispute that exposing the child to Father placed the child in danger of sexual abuse, rather she asserted that she "did not have the capacity" to appreciate the danger and so could not have "knowingly" disregarded it. In support of her argument, she pointed out that a psychologist who evaluated her for the Department diagnosed her with borderline intellectual functioning, and that her therapist noted she was "naïve" and stated that it was "not clear how much she understands" the allegations.

The Court observed, however, that Mother told the Department investigator she was aware that Father was a registered sex offender and that his offenses involved children. Further, Mother indicated she was not concerned about the child because Father's victims were teenagers. The Court also noted that Mother confirmed at trial that she "understood the situation" regarding Father's past offenses, yet still allowed him to watch the child alone. Moreover, Mother told hospital staff that a physician told her a month earlier that the child showed signs of sexual abuse after Father had watched her. While Mother gave a different reason for that hospital visit during her trial testimony, the Court determined that the trial court could have reasonably disregarded her testimony as not credible given her willingness to allow Father access to the child.

Accordingly, the Court concluded that the trial court could have reasonably found by clear and convincing evidence that Mother knowingly placed the child in conditions or surroundings that endangered her. *C.C. v. Tex. Dep't. of Family and Protective Servs*., No. 03-20-00351-CV (Tex. App.—Austin Nov. 20, 2020, no pet.) (mem. op.).

7. Insufficient Evidence to Support Endangerment

Mother and Father appealed termination of their parental rights, challenging the sufficiency of the evidence supporting termination under TFC § 161.001(E). The Department argued the parents engaged in endangering conduct by (1) failing to visit the NICU with enough regularity to bond with the child; (2) failing to complete the hospital's requirements for learning how to insert and maintain a nasogastric tube (NG tube); and (3) failing to attend a majority of the child's medical appointments during the case. The Court of Appeals disagreed with the Department.

The child was removed from the custody of the parents while she was still in the NICU. There was no allegation or evidence that any act or omission by the parents caused the child to be born premature or that the child suffered any physical harm in the NICU. The Court of Appeals stated that the only evidence presented that Father engaged in endangering conduct was that the parents: (1) did not regularly visit the child in the NICU, including their failure to visit during an entire month; (2) failed to complete three successful placements of the child's NG tube; (3) the hospital social worker was concerned about whether the parents could adequately bond with or provide consistent care for the child due to what she considered to be their inconsistent involvement; and (4) failed to attend all of the child's medical appointments during the pendency of the case.

While the Court of Appeals agreed the trial court could have reasonably inferred from the evidence that Mother and Father failed, without a valid reason, to regularly visit the child in the neonatal unit and they failed to learn how to insert and maintain the child's NG tube, it disagreed that this conduct, standing alone, supports termination under subsection (E). The Court noted that "to the extent [the social worker] suggested that the parents irregular visitation was generally inadequate for proper bonding and to learn to care for [the child], the record does not include any evidence as to what minimum visitation schedule would have been necessary for Mother and Father to 'properly bond'

with [the child] or how a failure to 'properly bond' in the NICU was endangering to [the child]."

Although the Court recognized the NICU staff's concerns with discharging an infant to parents who, in their professional opinion, lack the skills necessary to care for a special-needs infant, it stated that the primary concern at the time of discharge was the parents' ability to proficiently use the NG tube. It determined, however, that "[t]he undisputed evidence shows that both Mother and Father attempted to demonstrate placement of the NG tube at the hospital, and nothing in the record suggests that their inability to demonstrate proficiency—as measured by three successful placements—was a 'voluntary, deliberate, and conscious course of conduct.'"

Thus, the Court held that "the evidence demonstrating that the parents failed to visit [the child] at the NICU with a frequency satisfactory to NICU staff and that the parents failed to demonstrate proficiency with [the child's] NG tube before the scheduled date of her discharge is legally insufficient, standing alone, to support a finding by clear and convincing evidence that the parents engaged in an "voluntary, deliberate, and conscious course of conduct" that endangered [the child]." Further, the Court held that "even upon considering this evidence along with evidence concerning the parents' failure to attend all of [the child's] medical appointments during the pendency of this case, we cannot conclude that the evidence is legally sufficient to support the trial court's finding regarding subsection (E)." Because this was the only evidence identified as Father's endangering conduct, the Court reversed the trial court's endangerment finding under subsection (E) against Father and rendered judgment deleting that portion of the judgment. *M.D., Jr. and C.A. v. Tex. Dep't of Family and Protective Servs.*, No. 03-20-00531-CV (Tex. App.—Austin Apr. 30, 2021, no pet. h.) (mem. op.).

8. Inability to Console Child During Visits

Mother appealed termination of her parental rights under various theories, including the sufficiency of the evidence supporting termination under TFC § 161.001(b)(1)(E). Testimony at trial showed Mother was not able to appropriately console the child, and this inability could emotionally impair the child. The Court of Appeals found that Mother's inability to properly console the child supported termination of her parental rights under subsection (E). *In re E.M.*, No. 09-20-00246-CV (Tex. App.—Beaumont Apr. 15, 2021, no pet.) (mem. op.).

9. Prior Endangerment Findings Eliminate Need for N.G. Review

In a Department suit, the trial court terminated Father's parental rights pursuant to subsections 161.001(b)(1)(E) and (M) of the Family Code, among others. The Court of Appeals observed that the trial court's subsection (M) finding was based on the previous termination of Father's parental rights with respect to two other children based on (D) and (E) findings, which both involved child endangerment. The Court concluded that the trial court's subsection (M) finding, which was both supported by the record and unchallenged on appeal, satisfied the predicate act requirement for termination.

Citing *In re N.G.*, 577 S.W.3d 230 (Tex. 2019), the Court explained that ordinarily an appellate court must review a subsection (E) finding even if another predicate act or omission supports the trial court's order because of the collateral consequences of endangerment findings. The Court concluded, however, that such a review was unnecessary here. The Court reasoned, "[t]he trial court's current endangerment finding does not impose any consequences to which the father is not already subject as a result of the 2018 decree terminating his parental rights with respect to his other two sons. That decree likewise contains endangerment findings, which are grounds for termination of the father's parental rights in any future suit. Thus, the current endangerment finding does not impose any additional consequence and does not require review." *In re R.S., Jr.*, No. 01-20-00126-CV (Tex. App.—Houston July 28, 2020, no pet.) (mem. op.); *see also In re K.F. and S.F.*, No. 07-20-00159-CV (Tex. App.—Amarillo Oct. 5, 2020, pet. denied) (mem. op.) (concluding similarly after finding "[t]he logic expressed in R.S. is persuasive" and further noting that subsection (M) does not impose a time limit on the implications arising from the earlier (D) and (E) findings).

10. Leaving Children in the Care of Developmentally Delayed Caregivers

On appeal, Mother challenged the legal and factual sufficiency of the evidence supporting the trial court's finding under TFC § 161.001(b)(1)(D).

The Appellate Court noted a record "replete with evidence" demonstrating that the child had "extensive dental, medical, and educational problems" that included an "unaddressed speech impediment, developmental delay, educational issues, and dental issues." Significantly, Mother had left the child with "developmentally delayed" aunts without providing them with the necessary documentation needed for them to care for the child's extensive needs. At the time of the child's removal from her aunts, Mother was using drugs and the Department could not locate her.

The Court affirmed the trial court's (D) finding, concluding that Mother had exposed the child to risk of loss or injury, and she had "disregarded the potential danger to [the child] created by leaving [the child] in this environment." *In re N.P.*, No. 09-20-00218-CV (Tex. App.—Beaumont Jan. 21, 2021, pet. denied) (mem. op.).

B. TFC § 161.001(b)(1)(L)

In a Department suit, the trial court terminated Father's parental rights to the child pursuant to TFC § 161.001(b)(1)(L), among other grounds. Subsection (L) provides that the trial court may order termination of the parent-child relationship if the court 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 the following sections of the Penal Code. . . (iv) Section 21.11 (indecency with a child)".

On appeal, Father challenged the legal and factual sufficiency of the evidence supporting the trial court's (L) findings, and the Court of Appeals found the evidence was legally insufficient to support it. The Supreme Court of Texas granted the Department's petition for review, reinstated the trial court's ground (L) finding, and remanded the case so that the Appellate Court could conduct a factual sufficiency review of the evidence regarding predicate ground (L). *In re Z.N.*, 602 S.W.3d 541 (Tex. 2020) (per curiam).

The trial record reflects that Father was convicted of three acts of sexual indecency with a child for touching the genitals of child victims who were four, ten and eleven years old on the date of the offenses. TEX. PENAL CODE § 21.11. He was ultimately sentenced to concurrent ten-year terms for each offense. The evidence that Father was convicted of committing these acts was undisputed, though the Department caseworker testified she did not know the details or circumstances of Father's offenses. In reversing the (L) finding for legal insufficiency, the Court of Appeals concluded that but for the evidence of the conviction, the Department failed to produce any evidence of death or some serious injury that was sustained by any of Father's three victims.

In its May 2020 per curiam opinion, the Supreme Court disagreed with the Appellate Court. While noting "the simple illegality of the act does not in itself indicate that a trial court may infer serious injury," the Court held that evidence of Father's convictions for indecency with a child permitted the finder of fact to make the "reasonable and logical inference" that the children suffered serious injury:

> Here, the record shows that Father was convicted of indecency with a child with three children ages four, ten, and eleven. Specifically, he was charged with and convicted of intentionally and knowingly engaging in sexual contact with the children by touching their genitals. From those convictions, a trier of fact could reasonably infer that those children suffered serious injury for the purpose of ground (L), and no evidence was introduced to refute that inference. Because a reasonable trier of fact could have formed a firm belief or conviction that its finding was true, we hold that the evidence was legally sufficient to support the trial court's finding as to ground (L).

Turning to its review of factual sufficiency, the Court of Appeals observed that the Supreme Court placed importance on the fact that Father presented no evidence to refute the reasonable and logical inference that his criminal conduct caused serious injury to his child victims. The Court explained that in *In re Commitment of Stoddard*, 619 S.W.3d 665 (Tex. 2020), the Supreme Court noted in *dicta* that when appellate courts review evidence for factual sufficiency of findings that must be proven by clear and convincing evidence, "[t]he assumption that the factfinder resolved disputed evidence in favor of the finding if a reasonable factfinder could do so remains." In so doing, the Court held that the Court of Appeals' assessment of the trial evidence largely failed to apply the required presumption in favor of the jury's determinations and "created a risk of injustice too great to allow the verdict to stand." *Id*. at 676.

Thus, in reviewing the evidence for factual sufficiency in this case, the Court of Appeals held that the finder of fact was the sole judge of the witnesses' credibility, and was permitted to infer from the undisputed evidence that the children suffered serious injury from Father's criminal conduct. Accordingly, in light of the entire record, the court could not say there existed any evidence contrary to the finding that was so significant it would have reasonably prevented a factfinder from forming a firm belief or conviction that Father's criminal acts caused serious injury to his child victims for the purpose of ground (L). *In re Z.N.*, 616 S.W.3d 133 (Tex. App.—Amarillo 2020, no pet.).

C. TFC § 161.001(b)(1)(M)

Mother's parental rights to the child were terminated under Texas Family Code section 161.001(b)(1)(M) based on a prior Arkansas judgment that terminated her parental rights to another child. TFC § 161.001(b)(1)(M) authorizes termination if the trial court finds that the parent has "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 provision of the law of another state."

Mother argued that the Arkansas judgment failed to show that her parental rights to the other child were terminated based on a finding that she violated a provision of Arkansas law that was substantially equivalent to Texas subsections (D) or (E). After reviewing the Arkansas termination judgment and relevant provisions of the Arkansas Family Code, the Court of Appeals disagreed.

In support of the subsection (M) finding under which the trial court terminated the parent-child relationship between Mother and the child in this case, the trial court judicially noticed and considered a certified copy of a 2013 Arkansas judgment that terminated Mother's rights to another child. The Court of Appeals detailed that the Arkansas judgment recited that the Arkansas Department provided services to remedy the conditions causing the child's removal, but Mother failed to comply because she did not successfully complete rehabilitation, parenting classes or counseling, and had positive drug tests. Further, the Arkansas judgment showed that Mother failed to support and had abandoned the child, that the child's return was "contrary to [his] health, safety, or welfare", and the child "would be at risk of potential harm if returned to the parents." The Court concluded that, when examined in accordance with the Arkansas Family Code, which requires dependency-neglect findings prior to trial, the findings in the Arkansas judgment were substantially equivalent to Texas subsections (D) and (E).

The Court explained that, as required by Arkansas law, a separate adjudication hearing before trial had determined that the child was "dependent-neglected"—meaning "at substantial risk of serious harm as a result of' neglect or parental unfitness, among other things." The adoptive mother of the child whose parental relationship with Mother was terminated in Arkansas, who was also the placement of the child in this case, testified that the child in the prior Arkansas proceeding was removed from Mother at the hospital because there was cocaine in his system and the hospital was surprised the child survived. The Court concluded that "[t]his evidence, coupled with the 'dependent-neglected' finding and the Arkansas Judgment showing that drugs played a role in [the child's] removal, showed that Mother's drug use had endangered [the child's] physical health." It stated that the Arkansas judgment's additional finding that Mother continued using drugs during the pendency of

the case showed the Arkansas court terminated Mother's parental rights based on findings substantially equivalent to subsection (D) findings. Further, the Court concluded that the Arkansas judgment's findings that "Mother failed to support [the child], had abandoned him, failed to remedy the home and correct the conditions causing removal and did not obtain 'safe and stable' housing and that his return to Mother was contrary to his health, safety, or welfare" showed that "Mother had engaged in a course of conduct that endangered [the child's] physical well-being" and were also substantially equivalent to subsection (E) findings.

Consequently, the court affirmed the (M) finding, holding the Department proved Mother's parent-child relationship was terminated with respect to another child based on findings that she violated provisions of Arkansas law that were substantially equivalent to Texas subsections (D) and (E). *In re H.H.*, No. 06-20-00037-CV, __ S.W.3d __ (Tex. App.—Texarkana Sept. 25, 2020, no pet.).

D. TFC § 161.001(b)(1)(N)

TFC § 161.001(b)(1)(N) allows termination of parental rights where a parent:

> Constructively abandoned the child who has been in the permanent or temporary conservatorship of the Department of Family and Protective Services for not less than six months, and:
>
> > (i) the department has made reasonable efforts to return the child to the parent;
> >
> > (ii) the parent has not regularly visited or maintained significant contact with the child; and
> >
> > (iii) the parent has demonstrated an inability to provide the child with a safe environment.

On appeal, Father challenged the trial court's finding under TFC § 161.001(b)(1)(N)(i) that the Department made reasonable efforts to return the child to him. Generally, "[i]mplementation of a family service plan by the Department is considered a reasonable effort to return a child to its parent if the parent has been given a reasonable opportunity to comply with the terms of the plan." Here, Father was presented a service plan five months before trial, which was explained to him by the Department caseworker. Shortly thereafter, Father was incarcerated and remained in jail when trial occurred in September 2020.

Father complained, in part, that because he was not adjudicated as the child's father until shortly before trial, the Appellate Court was mandated to reverse the trial court's finding. The Court disagreed, noting that other appellate courts have rejected the argument that trial courts cannot terminate parental rights under (N) when paternity is not adjudicated until shortly before trial.

Here, the Department filed its petition alleging Father as the child's father in January 2020 and that he "became aware of that allegation by April of 2020 at the latest." Further, Father had "also denied he was waiting on the determination of his paternity before he started working his services." The Court affirmed the trial court's (N) finding. *In re Z.F.S.*, No. 04-20-00489-CV (Tex. App.—San Antonio Feb. 17, 2021, no pet.) (mem. op.).

E. TFC § 161.001(b)(1)(O)

1. Specificity of Order

Mother's rights were terminated pursuant to TFC §161.001(b)(1)(O). Mother argued, in part, that the court-ordered service plan "was not sufficiently specific because it required her to maintain a 'positive support system' and 'follow all recommendations' without defining those terms."

TFC § 161.001(b)(1)(O) allows for termination of parental rights where a parent:

> Failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of

> Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.

The Court of Appeals stated that "[a] court order establishing the actions necessary for a mother to obtain the return of her child is sufficiently specific if it sets forth the terms for compliance with certainty so that the mother knows what duties and obligations it imposes." The Court went on to conclude that Mother's court-ordered service plan met this standard because it "provided context for its requirement that mother maintain a 'positive support system' by stating that the 'positive support system' must be 'safe, crime-free, drug/alcohol free, and … not inflict abuse or neglect of her child.'"

The Court of Appeals further noted that "the phrase 'follow all recommendations,' though itself undefined, is incorporated three times in the context of specific requirements of mother" and therefore meets the standard. In particular, the Court pointed to examples from Mother's service plan, including a requirement to attend counseling and "follow all recommendations which may include further services", where the service plan specifically named the counseling center, as well as requirements that Mother participate in a psychological evaluation and domestic violence classes and "follow all recommendations", where specific service providers were identified for both requirements. The Court concluded that "[t]he undefined term is thus not devoid of context which informed mother of the requirements for reunification with [the child]" and the court-ordered service plan "was sufficiently specific that mother's failure to comply with its requirements warranted termination under TFC § 161.001(b)(1)(O)." *In re G.M.M.*, No. 01-20-00159-CV (Tex. App.—Houston [1st Dist.] Aug. 27, 2020, no pet.) (mem. op.).

2. Testimony Regarding Failure to Complete Services Not Conclusory

The Department caseworker testified that, pursuant to the service plan, Mother was ordered to complete a parenting class, a domestic violence class, a drug assessment, drug treatment, random drug testing, individual counseling, and a psychological evaluation. Mother also was required to maintain stable housing and employment, to remain in contact with the Department, and to visit the child. The caseworker testified that the only service Mother completed was a "psychosocial assessment[,] which is typically required when a client needs to start individual counseling." The caseworker also testified that Mother did not complete a drug assessment because she failed to attend several scheduled appointments. Finally, the caseworker testified that she was not aware of whether Mother was able to obtain assistance related to her substance abuse.

Mother argued that the evidence was insufficient to support the trial court's TFC § 161.001(b)(1)(O) finding because the caseworker's testimony regarding Mother's failure to complete court-ordered services was conclusory as the caseworker did not offer specific evidence regarding which services Mother engaged in and Mother's level of engagement.

The Court determined that the caseworker's testimony that Mother did not complete any required services other than a psychosocial assessment was not conclusory because it was "a statement of purported fact that could be readily controverted". In addition, the Court noted that the caseworker also explained certain specific failings, including Mother's failure to take a drug assessment and Mother's admitted methamphetamine use. Accordingly, the Court concluded that although "[the caseworker] did not elaborate on Mother's level of completion, if any, as to every required service, we do not require such detail to support a subsection O finding." In doing so, the Court held that the evidence was legally and factually sufficient to sustain the trial court's TFC § 161.001(b)(1)(O) finding. *In re S.N.P.*, No. 04-20-00372-CV (Tex. App.—San Antonio Dec. 16, 2020, pet. denied) (mem. op.).

3. Affirmative Defense Not Proven

On appeal, Mother argued that the trial court erred in terminating her parental rights pursuant to TFC § 161.001(b)(1)(O) by finding that she did not establish the affirmative defense to failing to complete her court-ordered service plan by a preponderance of the evidence. TFC § 161.001(d) provides:

> A court may not order termination under Subsection (b)(1)(O) based on the failure by the parent to comply with a specific provision of a court order if a parent proves by a preponderance of 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.

Mother conceded that she was ordered to successfully complete individual counseling, family counseling, and protective parenting. She further conceded that she was unsuccessfully discharged from these services. She also conceded that she was discharged by two therapists due to her minimization of the domestic violence that led to the child's removal and her alleged mental health issues. Mother argued that the Department failed to find a counselor qualified to meet her therapeutic needs, but the Court of Appeals noted that Mother also denied having any mental health issues that required therapeutic intervention at all. The Court noted that the therapists had terminated services due to Mother's denial that there were any issues to address, and that Mother failed to address how her denial of the issues was "not attributable to *any* fault" of hers. The Court concluded that Mother failed to meet her burden of proving the affirmative defense by a preponderance of the evidence. *In re G.A.*, No. 10-21-00001-CV (Tex. App.—Waco Apr. 28, 2021, no pet. h.) (mem. op.).

VI. BEST INTEREST

A. EMOTIONAL AND PHYSICAL NEEDS AND EMOTIONAL AND PHYSICAL DANGER

1. Significant Unmet Needs

The Court of Appeals concluded that the second *Holley* factor, the child's emotional and physical needs now and in the future, weighed in favor of termination. The undisputed testimony of the foster mother established that both times the child was placed with them after she had been in Mother's care, the child arrived with significant unmet needs. The foster mother testified that the child had been undersized, malnourished, and "covered in scrapes and cuts" when they received her as an infant. When they again provided placement for the child seven years later, the foster mother described that the child could not distinguish between curse words and regular words, and was a horrible eater with a very limited diet of food her family only consumed on a scarce basis. The child's counselor reported that Mother had allowed the child to subsist on a junk-food diet consisting of only ramen noodles, bagel bites, and frozen pizza.

Further, the foster mother reported that the child struggled with doing anything independently, even simple tasks that a child her age should be able to do. The child's counselor testified the child reportedly wet the bed frequently and summarized her behavior at approximately age seven as that typically seen in a two or three-year-old child. A Department provider testified that she found the child "in desperate need" of dental care, which Mother refused to facilitate by withholding the insurance card necessary for the Department to obtain that care. Accordingly, the Court concluded that this evidence suggested that "the child's physical, emotional, psychological, and academic needs are not met in Mother's care." *M.J. v. Tex. Dep't. of Family and Protective Servs*., No. 03-20-00527-CV (Tex. App.—Austin Mar. 21, 2021, no pet.) (mem. op.).

2. Instability and PTSD

While in the Department's care, both children had psychological evaluations and were diagnosed with Post-Traumatic Stress Disorder (PTSD). At trial, the children's therapist testified that they suffered from PTSD as a result of the trauma sustained from the instability of their living conditions while with the parents, including Father's incarceration and involvement with drugs. The caseworker testified that when the children were able to remain in one placement with routine and clear expectations, they were able to work through their trauma and behavioral problems. The children's therapist stressed the importance of routine and structure for children with

PTSD. The Court of Appeals determined that this evidence supported the trial court's determination that the children's current and future emotional and physical needs were better served by termination of parental rights. *J.B., Jr. and Y.R. v. Tex. Dep't. of Family and Protective Servs.*, No. 03-19-00881-CV (Tex. App.—Austin May 6, 2020, pet. denied) (mem. op.)

B. Programs Available

In its analysis of the Fifth Holley Factor, the Court noted that although there were several programs offered to assist Mother, she failed to participate in her family service plan. The Court concluded that: (1) Mother's parental rights to her two other children were terminated based on her failure to complete the family service plan in that case; (2) counsel's acknowledgment that she spoke with Mother before trial; and (3) Mother's failure to appear at trial, could support a fact-finder's inference that Mother knew the importance of participating in services but made a conscious decision not to. *In re D.B.*, No. 06-21-00003-CV (Tex. App.—Texarkana Apr. 13, 2021, no pet. h.) (mem. op.).

C. Plans for the Children

The Department originally became involved with Mother and Father in 2015, removing the oldest child following Mother's arrest on drug-related charges. The oldest child was eventually reunited with Mother and Father in 2017, and the youngest child was born that same year. The children were then removed in January 2019 after the Department learned that Father was homeless and Mother had been arrested on charges of possession of cocaine. The trial court terminated Mother's and Father's parental rights pursuant to TFC §§ 161.001(b)(1)(D), (E), and (O) and found that termination was in the children's best interest. Both parents appealed, challenging only the trial court's best interest findings.

On appeal, both Mother and Father acknowledged their history of drug addiction and proposed plans that would allow them to complete their drug rehabilitation programs while the children remained in their current placement with a relative. The Department's plan for the children was adoption by the relative caregiver, where they had been safely placed for over a year. The Court concluded the evidence showed that during the children's lives, "the parents go through cycles of drug abuse, periods of sobriety, and then relapse," and the trial court had to balance the children's needs for safety and stability against Mother's and Father's rights. The Court determined that the trial court was reasonable to conclude that the Department's plan for the children was superior and affirmed the termination. *In re R.A.S. and J.R.S.*, No. 09-20-00140-CV (Tex. App.—Beaumont Oct. 22, 2020, pet. denied) (mem. op.).

D. Other Considerations

1. Failure to Prove Best Interest for All Children

The three children, a five-year-old and sixteen-month-old twins, were removed due to the repeated failure of Mother and Father to properly supervise the children, resulting in the oldest child repeatedly leaving the home and being found wandering in the area. The oldest child was nonverbal with significant developmental delays when she entered care, and she was later diagnosed with autism. There was testimony the twins entered care with unspecified delays.

The Court of Appeals concluded that sufficient evidence supported the findings that termination of Mother's and Father's parental rights was in the best interest of the oldest child. The Court emphasized that the evidence of the oldest child's young age and special needs weighed in favor of the best-interest finding. It stated that there was evidence the oldest child "requires consistent, specialized care", received several types of therapy, and coordinating her care required planning and organization. The Department caseworker and supervisor testified they did not believe Mother and Father were prepared to provide the care the oldest child needed. This was supported by Mother's and Father's testimony that they did not have any concerns about the oldest child's developmental delays before removal, despite her being nonverbal at age five, and Father's testimony showing his continued belief the oldest child's autism was not a severe concern. The Court concluded the evidence showing that the oldest child was doing well in her foster placement, had made significant progress in addressing her special needs

and meeting development milestones since entering Department care, and had bonded with the foster mother, who was meeting all her needs and was willing to adopt her, supported the best-interest finding.

In contrast, the Court held that the evidence was factually insufficient to support the trial court's finding that termination was in the best interest of the twins. The Court recognized that the evidence regarding the oldest child was relevant to the best interests of the twins; the twins' age and vulnerability weighed in favor of the trial court's best-interest finding; and the evidence of the parents' endangering conduct and failure to comply with their court-ordered service plan by failing drug tests constituted "some evidence" supporting the best-interest finding.

The Court acknowledged that the Department also presented some evidence that the twins were delayed and required therapy, and that the caseworker raised concerns about Mother's and Father's ability to provide the consistent care the twins needed. Significantly, however, the Court pointed out that "much of this evidence was general or conclusive in nature, and the bulk of the best-interest evidence focused on [the oldest child], not the twins."

The court stated that the caseworker's testimony regarding the neglect that resulted in removal "focused almost exclusively on the parents' failure to supervise [the oldest child]." Although the neglect of the oldest child was relevant in the best-interest analysis, the Court observed that:

> [the oldest child's] special needs complicated her care in way that does not necessarily apply to the twins. There was almost no evidence regarding either Mother's or Father's ability to parent the twins or the twins' condition at the time they came into care. The twins' foster mother testified that they were "delayed" when they arrived in her care and identified several areas of concern. However, nothing in the record specified the nature of the "delays." The foster mother noted that [one of the twins], who was less than two years old when she was first removed from her home, did not speak when she first arrived in the foster home, but there was no evidence by which the trial court could have judged whether this was a serious concern for a child of [her] age. She testified that the twins were also "very angry" and would yell, had emotional issues, and were sometimes aggressive or inappropriate. But, again, there was no evidence by which the trial court, or this Court, could determine the extent to which this behavior was atypical for children their age.

Additionally, the court emphasized that the evidence about concerning interactions during visits "almost exclusively pertained to [the oldest child]." It stated that the caseworker testified the parents' interactions with the twins were appropriate, and nothing in the record shows "any concern that the parents failed or were unable to interact appropriately with [the twins]." The court concluded, "Although the DFPS supervisor and others testified that they were concerned the parents would not be able to provide for [the oldest child's] special needs, there was no evidence that the same concerns applied to the twins, nor was there evidence that Mother and Father would be unable to provide adequate supervision and care for the twins, who did not have the same special needs as [the oldest child]."

Accordingly, the Court held that the evidence was factually insufficient to support the findings that termination of Mother's and Father's parental rights was in the best interest of the twins, reversed the termination order as to the twins, and remanded for further proceedings. *In re D.G., E.G., and V.G.*, No. 01-20-00720-CV (Tex. App.—Houston [1st Dist.] Apr. 6, 2021, no pet. h.) (mem. op.).

2. Family Violence Does Not Require Indictment or Criminal Conviction

Mother argued that shooting Father should not be considered "family violence" under TFC § 153.131(b) because she was not convicted of a crime and the assault charge against her regarding the incident was no-billed. TFC § 153.131(b) rebuts the presumption

that the appointment of the parents of a child as joint managing conservators is in the best interest of the child when there is a finding of a history of family violence involving the parents.

The Court of Appeals rejected Mother's argument. Citing to *Rachal v. State*, 917 S.W.2d 799, 807 (Tex. Crim. App. 1996), the Court noted that a no-bill from a grand jury "is merely a finding that the specific evidence brought before that particular grand jury did not convince them to formally charge the accused with the offense alleged." The Court went on to conclude that "[i]t does not mean that the incident did not occur or that it cannot qualify as an act of 'family violence' for purposes of the Family Code. Furthermore, the Family Code does not require an indictment or criminal conviction for a trial court to find that an act constitutes family violence, thus, indicating that unadjudicated acts can satisfy the definition." *In re R.S., R.S., and R.S.*, No. 01-18-00058-CV (Tex. App.—Houston [1st Dist.] June 18, 2020, no pet.) (mem. op.).

3. Insufficient Evidence

The Department removed the children because Mother was arrested for child endangerment after leaving the children alone in her filthy home without proper supervision. The Court of Appeals affirmed the termination of Mother's parental rights, holding that sufficient evidence supported the findings that she engaged in endangering conduct under subsection (E) and that termination was in the children's best interest.

Father had been diagnosed with schizophrenia, lived with his mother who was his guardian, had contact with the child until the child was three, but disappeared and did not reenter the child's life until the child was seven or eight. The Court found there was factually insufficient evidence to support the trial court's finding that termination of Father's parental rights was in the child's best interest.

Considering the child's desires, the court stated there was no evidence presented indicating the child desired termination of his relationship with Father. Instead, the Court pointed to evidence that the child knows that Father is his father; Father had visits with the child when the child was young; Father had visits with the child during a period of the case in 2020 when the child was placed with Father's sister; and there was no evidence Father did anything during his visits that would have endangered the child or that the Department tried to stop the visits.

Regarding the child's current and future needs, the Court determined the Department presented no evidence to show that Father's current living arrangement was unstable or that he had again disappeared after he and the child had bonded. Although the record showed the child had special needs that were not met in Mother's care, the Court stated there was no evidence about Father's knowledge of the child's needs or his inability to meet those needs, nor did the Department request Father to take parenting classes or any other action to better understand the child's special needs, and there was no evidence that termination would improve the outlook for the child's needs. Thus, the Court held there was no evidence that the child's emotional and physical needs would be sacrificed or that the child would be negatively affected by contact with Father in a possessory conservator role with supervised visits. The Court went on to say, "the record reveals [the child] needs stability in his life and [the child] and Father formed a bond. And there is no evidence that [the child's emotional and physical needs would be negatively affected with Father in a possessory conservator role with supervised visits."

Regarding current and future danger to the child, the court stated there was no evidence Father ever physically harmed the child, endangered the child during visits, or knew of the unsanitary conditions in which the child lived or the physical and medical neglect the child experienced in Mother's care. The Court stated that although there was evidence Father was diagnosed with schizophrenia and did not take his prescribed medication, the Department presented no evidence the child would suffer physical and emotional danger if Father retained his parental rights, particularly as only a possessory conservator.

The Court determined the "[Department] presented no evidence of Father's parental abilities or lack thereof." The caseworker testified that Father's mother was his guardian but never provided anything

indicating she had decision-making capacity over Father. The Court found the caseworker's statement that Father could not take care of himself, without providing any supporting context or detail, was merely conclusory and insufficient to support the best interest finding. The Court stated, "[s]ignificantly, [the Department] did not offer father the opportunity to participate in any meaningful services, like it did with mother, if it believed father's parental abilities were lacking" and noted that Father had completed the requirements of his service plan.

The Department's proposed permanent placement was another relative of Father who the child knew and on whom a home study had been completed. The Court stated, "[a]lthough the [proposed permanent placement] was willing to adopt [the child], there is no evidence in the record that [she] would not be willing to provide [the child] with a safe environment in which to live if Father's parental rights were not terminated." Thus, the Court concluded there was no evidence that the child's stability in his proposed placement would be negatively affected by contact with Father in a possessory conservatorship role with supervised visits.

The Court accordingly held the evidence was factually insufficient to support the best interest finding, reversed the order terminating Father's parental rights, and remanded that portion of the case for a new trial. *In re M.A.A., A.M.V., N.A.V., and J.A.V.*, No. 01-20-00709-CV (Tex. App.—Houston [1st Dist.] Mar. 25, 2021, no pet.) (mem. op.).

VII. TFC § 161.004

A. In General

The oldest children were removed in January 2015 due to drug use by Mother and Father, inappropriate living conditions, neglectful supervision, physical abuse, and domestic violence. The youngest child was removed following her birth, and the two cases were later consolidated. The trial court denied termination in a previous trial, based upon a finding that the Department had failed to meet its burden of proof. The Department later sought termination pursuant to both TFC §§ 161.001 and 161.004. The trial court made findings that Father committed the acts described in predicate termination grounds TFC §§ 161.001(b)(1)(E) and (N), that termination was in the children's best interest, and that there had been a material and substantial change in circumstances of the children and the parents since the trial court's denial of the prior termination petition. On appeal, Father challenged only the sufficiency of the evidence to support termination of his parental rights pursuant to § 161.004, asserting that because the Department had failed to meet its burden of proof in the previous trial, the trial court was prohibited from considering any conduct committed by Father prior to the date of the previous order denying termination.

TFC § 161.004(a) provides that:

> The court may terminate the parent-child relationship after rendition of an order that previously denied termination of the parent-child relationship if:
>
> (1) the petition under this section is filed after the date the order denying termination was rendered;
> (2) the circumstances of the child, parent, sole managing conservator, possessory conservator, or other party affected by the order denying termination have materially and substantially changed since the date that the order was rendered;
> (3) the parent committed an act listed under Section 161.001 before the date the order denying termination was rendered; and
> (4) termination is in the best interest of the child.

TFC § 161.004(b) then authorizes the trial court to consider evidence presented at a previous hearing in a suit for termination of the parent-child relationship with respect to the same child.

Father asserted that in the previous trial, the court found that the Department failed to meet its burden of proof with respect to Father's *conduct*. The Court of Appeals disagreed, stating that nothing in the record supported such an assumption, and the trial court could have denied termination based on the children's best interest. The Court then concluded that § 161.004(b) specifically allows the trial court to consider evidence

presented at a previous hearing, and that this section has been interpreted to bar res judicata complaints about the relitigation of issues previously tried in a termination case. The Court of Appeals determined it was proper for the trial court to have considered Father's conduct committed prior to the denial of the previous petition to terminate his rights. *In re J.P.*, No. 11-20-00209-CV (Tex. App.—Eastland Mar. 9, 2021, pet. filed) (mem. op.).

B. Nonsuit Is Not an Order Denying Termination

Mother challenged the sufficiency of the evidence supporting the trial court's best interest finding. In that context, Mother pointed out that much of the evidence introduced at trial was from Mother's 2015 and 2016 removal cases. She argued that the Department's reliance on these facts was barred by TFC § 161.004. The Court of Appeals determined it was unnecessary to reach the issue of whether the court was precluded from considering Mother's conduct before the orders were entered in the prior cases. "Under the plain language of Section 161.004, it is applicable only when the trial court has rendered 'an order that previously denied termination of the parent-child relationship.'" Here, there was nothing in the record to show that the trial court had previously rendered an order denying termination of Mother's parental rights. The only testimony regarding the prior cases was that the Department voluntarily dismissed its cases against her. Therefore, TFC § 161.004 did not apply. *In re Z.T.*, No. 06-20-00023-CV (Tex. App.—Texarkana Aug. 5, 2020, pet. denied) (mem. op.).

VIII. Post-Trial

A. Appellate Jurisdiction and Late Notice of Appeal

Mother argued that application of the rules governing accelerated appeals to her late notice of appeal would violate her due process rights. The Court of Appeals agreed.

Mother's rights were terminated on May 6, 2020. Mother was not present at trial, but she was represented by trial counsel. On May 14, 2020, the trial court entered an order appointing Mother appellate counsel. The trial court did not send a copy of the order to appellate counsel, and there is no indication in the record it sent a copy to Mother. Appellate counsel did not become aware of his appointment until he received an email from the court reporter on July 8, 2020, in connection with filing the reporter's record. He then discovered the trial court had entered its termination order on June 2, 2020.

On July 9, 2020, Mother's appellate counsel filed a notice of appeal and motion of extension of time to do so on behalf of Mother. Mother's appellate counsel conceded that Mother's motion for extension of time was not timely filed, but argued that given the lack of notice of her appellate counsel's appointment, application of the rules governing accelerated appeals would violate Mother's due process rights. "Given the unique nature of this proceeding, the elevated interests involved, and that the delay [was] entirely the product of state action," the Appellate Court agreed.

The Court stated that the trial court appointed counsel to represent Mother on appeal, as required by Family Code section 107.301(a)(1), but it "did not notify the individual charged with representing Mother's interests on appeal of the appointment, and that counsel was not afforded any opportunity to timely file a notice of appeal or a timely motion for extension of time to file the notice." The Court opined that "the accelerated deadline to file a notice of appeal in parental termination cases is a trap for the unwary." It warned that because of the accelerated nature of termination cases, "trial courts *must* act expeditiously when appointing new counsel for the appeal", and "it is imperative that the court notify court appointed counsel of the fact of appointment." The Court reasoned that "[f]ailure to do so creates the risk, realized in this case, that counsel will not have the ability under our rules to timely file the notice of appeal. Worse still, where the parent is informed of the appointment, or even where the parent is merely deemed to be on notice of it, the appointment order would affirmatively discourage the parent from pursuing a timely *pro se* appeal or retaining separate counsel."

The Court concluded, "The statutory right to appointed counsel gives rise to constitutional considerations of due process in the administration of that right. And

yet, the trial court, another State actor, in appointing counsel failed to give notice of the appointment. In effect, the trial court failed to provide Mother with counsel, as mandated by statute, and foreclosed her right to appeal within the rules." Accordingly, the Court held that "section 263.405 of the family code (acceleration of appeals of termination orders) and the appellate rules concerning the perfection of appeals, as applied in this particular case, with respect to Mother, are unconstitutional and do not preclude this Court from considering Mother's appeal." *In re D.P.G.*, No. 05-20-00652-CV (Tex. App.—Dallas Dec. 9, 2020, pet. filed) (mem. op.).

B. UCCJEA AND INVALIDATION OF (K)

Father filed two petitions for bill of review challenging the agreed order terminating his parental rights. Father's rights had been terminated pursuant to TFC § 161.001(b)(1)(K) after he executed an affidavit of voluntary relinquishment. The Texas Supreme Court noted that when parental rights are terminated after voluntarily relinquishing those rights, TFC § 161.211(c) limits collateral attacks on the termination order to the specific grounds of fraud, duress, or coercion in the execution of the affidavit. Father did not argue any of the grounds under TFC § 161.211(c). Instead, Father argued that the order was invalid because Texas was not the child's "home state" as required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The Texas Supreme Court rejected this argument. The Court noted that the plain language of TFC § 161.211(c) forecloses any collateral attack based on any grounds except those specifically enumerated. The legislature clearly made a policy choice when enacting TFC § 161.211(c) to limit collateral attacks to grounds relating to whether a parent's relinquishment was knowing and voluntary. Because Chapter 152 jurisdictional defects are not an enumerated ground by which to challenge a voluntary affidavit of relinquishment, Father could not effectively challenge the termination of his parental rights under TFC § 161.001(b)(1)(K) under that theory. Father's request for relief was accordingly rejected. *In re D.S.*, 602 S.W.3d 504 (Tex. 2020).

IX. CONSERVATORSHIP

A. FIT-PARENT PRESUMPTION

This case involved a private custody dispute between Father, Maternal Grandparents, and Mother's Fiancé following Mother's death. As articulated by the Supreme Court of Texas, the question presented in this case was whether the presumption that fit parents act according to the best interest of their children applies when modifying an existing order that names a parent as the child's managing conservator.

The child was born in 2014, and the parents lived together for several years though never married. In 2016, Father filed a suit requesting that a court determine conservatorship, possession, and child support for the child. When that proceeding concluded, the trial court named both parents the child's joint managing conservators, granted the child's mother the right to designate her primary residence and gave Father regular periods of possession pursuant to the parents' "custom possession order" that divided possession almost equally. In 2017, Mother and the child moved into Fiancé's home where they remained until Mother died in a car accident the following year. At the time of her death, Mother's modification proceeding in which she sought to increase child support and to modify the child's possession schedule remained pending. The child began exclusively living with Father and he sought to dismiss the modification suit. Fiancé and Grandparents intervened, seeking joint managing conservatorship and court-ordered visitation with the child. Over Father's objection, the trial court entered temporary orders naming Fiancé a possessory conservator of the child with specified periods of possession.

Father sought mandamus relief, asserting that no evidence showed, and no one contended, that he was an unfit parent and therefore the trial court had no basis to name Fiancé as the child's possessory conservator or order periods of possession over his objection. Relying on *Troxel* and decisions from the Texas Supreme Court, Father argued that he had a "fundamental due process right to the presumption that, as a fit parent, he is acting in the best interests of his child and should be able to do so free from state interference." Father contended that because Fiancé

did not rebut this presumption, the trial court's orders were an abuse of discretion.

The Court observed that the "United States Supreme Court has long held that the Constitution 'protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.'" *Troxel v. Granville*, 530 U.S. 57 (2000). Five years before *Troxel*, the Texas Legislature added a statutory parental presumption, contained in TFC § 153.131(a), to original custody determinations:

> [U]nless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

The Court noted, however, that the general statute applicable to custody modification cases does not include that presumption. Recognizing the similarities between the facts in *Troxel* and those present here, the Court held that because the U.S. Supreme Court in *Troxel* struck down as unconstitutional a similar Washington statute that allowed for grandparent custody rights to be granted over parental objection even when the parent was fit, the trial court in a custody modification proceeding must still make a predicate finding of parental unfitness before granting a nonparent custody rights over the objection of the presumptively fit managing conservator parent. Thus, the Court concluded that in the absence of such a finding, the statute would unconstitutionally restrict parental rights and subject parental decision-making to improper state interference in violation of *Troxel*.

In conditionally granting the petition for writ of mandamus, the Court explained as follows:

> When a nonparent requests conservatorship or possession of a child, the child's best interest is embedded with the presumption that it is the fit parent—not a court—who makes the determination whether to allow that request. No party alleges, no evidence demonstrates, and no court finding exists that [Father] is unfit to be her parent. Nor is there evidence or findings rebutting the resulting presumption that [the child's] father acts in her best interest. The trial court thus abused its discretion in ordering, over the objection of [Father], that [Fiancé] be named [the child's] possessory conservator with rights to possession of the child.

In re C.J.C., 603 S.W.3d 804 (Tex. 2020); *see also In re C.D.C.*, No. 05-20-00983-CV (Tex. App.—Dallas Feb. 2, 2021, orig. proceeding) (In upholding trial court's temporary appointment of grandparents as joint managing conservators, in conjunction with both parents, the Court concluded that evidence of Father's past drug use and drug-related convictions was sufficient to overcome the fit-parent presumption and to distinguish the judgment from "a situation where the trial court substituted its judgment for a fit parent's judgment"); *but see In re B.B.*, No. 08-20-00247-CV, __ S.W.3d __ (Tex. App.—El Paso Feb. 11, 2021, orig. proceeding) (holding fit parent presumption did not apply to removal proceedings in a Department suit where Father was not previously named as the child's managing conservator, instead he held only the equivalent of possessory conservatorship under California court's previous custody order).

B. Insufficient Evidence to Appoint Grandmother Managing Conservator

The Department filed its termination suit against Mother and Father on May 3, 2016. At the time the suit was filed, the children were placed with maternal Grandmother pursuant to a family-based safety services case. On June 27, 2016, the trial court awarded temporary managing conservatorship to the Department, and the children remained in Grandmother's care. Father subsequently discontinued his relationship with Mother and began to work his court-ordered service plan. Grandmother filed a petition in intervention in March 2017. On August 21, 2017, the trial court ordered the children to

be placed with Father in a monitored return pursuant to TFC § 263.403.

At trial in November 2017, the Department recommended that Father be appointed sole managing conservator of the children and that Grandmother be appointed possessory conservator, which Father opposed. Father testified that he had no intention of discontinuing contact between Grandmother and the children, but he was concerned Grandmother would permit Mother to have contact with the children. Grandmother requested court-ordered visitation for certain weekends and alternating holidays and testified about her belief that Father would not allow regular visitation if it was not ordered. The trial court signed a judgment appointing Father sole managing conservator and Grandmother possessory conservator.

On appeal, Father argued that the trial court abused its discretion in appointing Grandmother as a nonparent possessory conservator. The Court of Appeals, in light of the Supreme Court's decision in *In re C.J.C.*, *supra*, determined that in order for the trial court to have properly exercised its discretion in ordering visitation with Grandmother over Father's objection, there must have been sufficient evidence to overcome the presumption that Father acts in the children's best interest. In this case, the Department recommended that Father be appointed sole managing conservator and no party presented evidence that Father contributed to the need for the Department's involvement. The Court also noted that there was no evidence that the amount of access Father intended to allow Grandmother would impair their emotional well-being, nor was there evidence that Father planned to prevent Grandmother from having a meaningful relationship with the children. The Court concluded that the trial court abused its discretion in appointing Grandmother possessory conservator of the children and reversed and rendered. *In re S.K. and L.K.*, No. 13-19-00213-CV (Tex. App.—Corpus Christi-Edinburg August 13, 2020, pet. filed) (mem. op.).

C. Parent May Not Advance Request to Name Relative of Children a Conservator

On appeal, Father argued that the trial court erred in denying his request to amend his pleadings to request that a relative, instead of the Department, be appointed as the children's managing conservator.

The Department responded by arguing that Father does not have standing to request that his mother should have been appointed managing conservator because only his mother herself could advance that request.

The Court considered prior authority in which it held that "a challenge asserting that a child's grandmother who had not intervened or attempted to intervene in the case, should have been appointed conservator must be raised by the grandmother herself"; prior authority in which it dismissed an appeal for lack of standing because appellant's parents did not have standing to "challeng[e] the trial court's ruling concerning the child's paternal grandmother's petition in intervention" seeking conservatorship; and prior authority from the Tyler Court in which that Court overruled appellant parent's issues challenging the denial of intervenor grandparents' request for conservatorship because the denial affected only grandparents' rights.

In holding that the trial court did not abuse its discretion by denying the requested pleading amendment, the Court concluded that Father could not have advanced a conservatorship request on behalf of his mother or any other relative of the children because neither his mother nor any other relative intervened or attempted to intervene in the suit. *S.C. and L.C. v. Tex. Dep't of Family and Protective Servs.*, No. 03-20-00039-CV (Tex. App.—Austin July 10, 2020, no pet.) (mem. op.).

D. Trial Court Has Discretion to Order a Parent's Access to the Child Be Only at Discretion of Managing Conservator

The trial court's final order stated that Mother "shall have possession of the children at times mutually agreed to in advance by the parties." In the absence of mutual agreement, the trial court ordered that Mother was ordered to have "supervised visitation with the children under the terms and conditions agreed to in advance by the managing conservator," with forty-eight hours' advance notice. In handwriting, the trial court added, "[o]nly if the managing conservator

agreed to visitation. Sole discretion." The trial court orally stated that its order was in the children's best interest.

Mother appealed, arguing there was insufficient evidence to support the order, the order was void for vagueness, and TFC § 262.201(o) is facially unconstitutional. The Court of Appeals affirmed. The Appellate Court determined that the trial court had good cause to deviate from the standard possession order because Mother's "failure to attend visits was harming the children emotionally." The Court of Appeals stated that a "severe restriction or limitation, even one that amounts to a denial of access is permissible if it is in the best interest of the child." Thus, it held that "requiring specific times and conditions for Mother's possession and access was not in the children's best interest." In holding that the trial court did not abuse its discretion, the Court of Appeals concluded that the evidence was legally and factually sufficient to support the order.

The Supreme Court granted Mother's petition for review. She argued, in part, that the Court of Appeals erred in holding that vesting Aunt and Uncle with complete discretion over her access rights to the children was not permissible under the Family Code. Specifically, Mother argued that the final order effectively denied her the right of access to the children.

The Supreme Court noted that TFC § 153.006(c) provides that a court must "specify and expressly state in the order the times and conditions for possession of or access to the child, *unless* a party shows good cause why specific orders would not be in the best interest of the child." Because neither party argued that the trial court lacked good cause to deviate from the standard possession order, the Court considered whether TFC § 153.006(c) "relaxes" the specificity requirement for possession and access orders to the point of permitting an "as agreed" order as the one issued by the trial court.

Mother also argued that the effect of the trial court's order was a total denial of her access to the child. Mother argued that TFC § 153.193 permits the trial court "to den[y] possession of a child to a parent" but it may only impose "restrictions or limitations" on a parent's access to a child." However, the Court disagreed with Mother's characterization of the trial court's order as a "denial of access". In reaching this determination, the Court reasoned that "[b]y its terms, Mother can obtain access to her children either (a) when she and the managing conservators agree or, if they cannot reach an agreement, (b) when the managing conservators consent to access." The Court then examined the definitions of "deny" and "restrictions", concluding that "a denial is an outright refusal to allow certain conduct to occur, whereas a restriction or limitation confines conduct to certain bounds." The Court stated, "[i]n other words, the order *restricts* and *limits* Mother's access to her children to supervised visitation at the managing conservators' discretion." It added that, "[t]he restriction is undoubtedly a severe one, permissible only if necessary to protect the children's best interest, but it is not an outright denial that forecloses all access."

In this case, the evidence at trial established that: (1) prior to their removal, the children had been out of school for nearly two years and showed signs of social and emotional developmental issues; (2) the incident leading to the children's removal involved Mother soliciting with an armed boyfriend while the children waited in another motel room; (3) evidence collected from the scene included drug paraphernalia that could have been accessible by the children; (4) after the Department's suit was filed, Mother failed to participate in or acknowledge the lawsuit for eight months; (5) Mother refused all drug tests, failed to complete any part of her service plan, and failed to obtain stable housing or a job throughout the entirety of the lawsuit; (6) Mother attended only four scheduled visits with the children; and (7) Mother's failure to attend most visits was very hard on the children, causing one of the children to worry about Mother's safety and wonder if she was hurt. Accordingly, the Court concluded that the record contained legally sufficient evidence to support a finding that it was in the children's best interest to impose a severe restriction on Mother's access, holding that "Texas Family Code sections 153.006(c) and 153.193, read in conjunction, permit the kind of 'as agreed' order at issue in this case in the narrow circumstance where such a severe restriction is necessary to protect the children's best interest." *In re J.J.R.S. and L.J.R.S.*, No. 20-0175, ____S.W.3d ____ (Tex. 2021).