# Preserving Your Record for Appeal

SUPREME COURT OF TEXAS CHILDREN'S COMMISSION

NOVEMBER 22, 2024

# Preservation Generally

# Prerequisites to Presenting a Complaint for Appellate Review

Tex. R. App. P. 33.1(a)(1) requires that the record show that the complaint was made to the trial court by a timely request, objection, or motion that:

- Stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
- Complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure.

# Prerequisites to Presenting a Complaint for Appellate Review, cont.

Additionally, Tex. R. App. P. 33.1(a)(2) requires that the trial court:

- Ruled on the request, objection, or motion, either expressly or implicitly; or
- Refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

# Requirements for Objections

- It must be made at the earliest possible opportunity.
- It must be specific (not a shotgun approach) and must be the same objection as the issue on appeal.
- An objection by one parent does not preserve the issue for the other parent.

# Exceptions to the Preservation Requirement

- The record on its face shows that the court rendering the judgment lacked subject matter jurisdiction;
- The alleged error occurs in a juvenile delinquency case and falls within a category not requiring preservation of error;
- The error directly and adversely affects the interest of the public generally, as that interest is declared by a Texas statute or the Texas Constitution; or
- The appellant has been denied the right to counsel at a critical stage of the proceedings.

# Parenting is a constitutional right. Doesn't that excuse the preservation requirement?

No. The Supreme Court of Texas (SCOTX) has held that excusing the failure to preserve error would undermine the Legislature's dual intent to ensure finality and to expedite their resolution.

# Preserving Issues Involving Jury Selection

# The Judge Didn't Let an Attorney Ask a Question to Venire Panel

- A record of the mere subject of the potential line of questioning is not enough to preserve error.
- The attorney must have on the record the specific and proper questions they intended to ask, the basis for asking the question, and the adverse ruling.

# A Challenge for Cause Is Denied

The party must:

- Use a preemptory strike against the veniremember,
- Exhaust its remaining challenges, and
- Notify the court that a specific objectionable veniremember will remain on the jury list.

# A Challenge for Cause Is Erroneously Granted

A party only needs to object to the trial court's grant of challenge for cause.

# Preserving Issues Involving Evidence

# I Object!

- Your objection not only has to be appropriate and timely, but you must object each and every time a piece of evidence is introduced.
- If you objected to a question and your objection has been sustained, you must ask that the response (if one was given) be struck from the record.
- If you ask about the piece of evidence yourself, you may have waived the objection.

# Preserving a Claim That Evidence Was Erroneously Admitted

- A pretrial motion to exclude preserves error without an objection during trial.
- A motion in limine preserves nothing for appeal.
- The problem: sometimes a "motion in limine" is actually a motion to exclude.

# *In re D.W.G.K.*, 558 S.W.3d 671 (Tex. App.—Texarkana 2018, pet. denied).

- "Motion in limine" asked the trial court for order preventing the Department and the ad litem from calling any witnesses who had not been properly disclosed in discovery.
- Court of appeals held that this was functionally a motion to exclude and therefore did preserve error.
- Best practice: movant should assume no error was preserved. Respondent should presume that it was.

# Running Objections

- A running objection is a single objection to all the questions in a given line of questioning.
- A judge may allow a lawyer to make a running objection to save time when the judge has overruled an objection applicable to many questions, and the lawyer wants to preserve the objection for the appellate record.

# Running Objections Can Be a Good Idea

- Can promote orderly trial.
- You don't have to object to every question.
- Running objections must be specific and unambiguous.
  - This means they must identify the source of the objectionable testimony, the subject matter of the witness' testimony, and the ways the testimony would be brought before the jury.

# But, Make Sure That the Running Objection is not Ambiguous

Example:

*In re A.D.K.*, No. 06-19-00019-CV, 2019 Tex. App. LEXIS 5295, 2019 WL 2607599 (Tex. App.—Texarkana Jun. 26, 2019, pet. denied).

# *In re A.D.K.*, No. 06-19-00019-CV (Tex. App.—Texarkana Jun. 26, 2019, pet. denied).

| Caseworker Testimony: | CASA Volunteer Testimony: |
| --- | --- |
| Children said Father made them fight each other for his entertainment. **(objection)** | Children said Father made them fight each other for his entertainment. |
| Children loved placement and wanted to be adopted. | Children loved placement and wanted to be adopted. |

# *In re A.D.K.*, No. 06-19-00019-CV (Tex. App.—Texarkana Jun. 26, 2019, pet. denied).

| Caseworker Testimony: | CASA Volunteer Testimony: |
| --- | --- |
| Children said Father made them fight each other for his entertainment. **(objection)** | Children said Father made them fight each other for his entertainment. |
| Children loved placement and wanted to be adopted. | Children loved placement and wanted to be adopted. |

Father's claimed scope of running objection

# *In re A.D.K.*, No. 06-19-00019-CV (Tex. App.—Texarkana Jun. 26, 2019, pet. denied).

| Caseworker Testimony: | CASA Volunteer Testimony: |
| --- | --- |
| Children said Father made them fight each other for his entertainment. **(objection)** | Children said Father made them fight each other for his entertainment. |
| Children loved placement and wanted to be adopted. | Children loved placement and wanted to be adopted. |

Department's claimed scope of running objection

# *In re A.D.K.*, No. 06-19-00019-CV (Tex. App.—Texarkana Jun. 26, 2019, pet. denied).

| Caseworker Testimony: | CASA Volunteer Testimony: |
| --- | --- |
| Children said Father made them fight each other for his entertainment. **(objection)** | Children said Father made them fight each other for his entertainment. |
| Children loved placement and wanted to be adopted. | Children loved placement and wanted to be adopted. |

Court held that this was the scope of the running objection. The issue on appeal was the children's desire for adoption so, it was not preserved.


OFFER OF PROOF

# When Do You Make an Offer of Proof?

- Tex. R. Evid. 103(c): "as soon as practicable."
- Best practice: when possible, immediately after evidence was excluded.
- Deadline: before the charge is read to the jury.

# An Offer of Proof May be Made by Counsel

- Attorney can reasonably and specifically summarize the evidence offered and state its relevance unless already apparent.
- A short, factual recitation of what the evidence would show is sufficient but must be specific enough to allow the reviewing court to determine admissibility and harm.

# Advantages and Disadvantages to an Attorney Making an Offer of Proof

## ADVANTAGES

1. Short and to the point
2. Get in what you want; avoid what you don't want in record
3. Evidence probably more complete

## DISADVANTAGES

1. Client doesn't get to have say.
2. Witness can be more emotional, which might sway trial court.

# A Question & Answer Offer of Proof is Mandatory, Except When It Isn't

- "At a party's request, the court must direct that an offer of proof be made in question-and-answer form." Tex. R. Evid. 103(c)
- However, it is not reversible error to deny this request if the appellant was allowed to make an offer of proof through the attorney or the appellant was denied the opportunity for a bill of exception. *E.J. v. Tex. Dep't of Family & Protective Servs.*, No. 03-18-00473-CV (Tex. App.—Austin Dec. 18, 2018, pet. denied) (mem. op.).

# Formal Bills of Exception

# Formal Bills of Exception
## Tex. R. App. P. 33.2

- A formal bill of exception is used to complain on appeal about a matter that would not otherwise appear in the record.
- It is most often used for complaints about the trial court's erroneous exclusion of evidence, but not used often.

# Formal Bill of Exception: Trial Court Process
## Tex. R. App. P. 33.2 (c)

- The bill of exception does not require a particular form of words, but the objection must be stated with sufficient specificity to make the trial court aware of the complaint.
- The complaining party must first present the bill of exception to the trial court.

# Formal Bill of Exception: Trial Court Process, cont.
## Tex. R. App. P. 33.2 (c)

- If the parties agree on its contents, the trial judge signs the bill and files it with the clerk.
- If the parties disagree, at a duly noticed hearing, the judge may sign and file the bill of exception, suggest corrections and sign and file the corrected version, or, if the complaining party refuses the corrections, prepare, sign and file a bill that accurately reflects what occurred in the trial court.

CAUSE NO.

| | | |
|---|---|---|
| IN THE INTEREST OF | X | IN THE FAMILY DISTRICT COURT |
| | X | |
| K. O., O. O. AND A. O., | X | IN AND FOR ___ COUNTY 307TH |
| | X | |
| CHILDREN | X | JUDICIAL DISTRICT |

**BILL OF EXCEPTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JRB, Respondent herein, and pursuant to Rule 33.2, TEX.R.APP.P., files this Bill of Exception, respectfully showing unto the Court as follows:

I.

Trial to the court, without jury, was held herein on October 30, 2015. Respondent was at that time incarcerated in the TDCJ at a location in Galveston County.

II.

Respondent had attempted to communicate with her trial counsel her desire to be present at the trial by writing a letter or letters to him.

III.

As seen by trial counsel's representations to the court at the hearing on the "Motion for New Trial," he was unaware that Respondent was giving birth to a child in a facility different than the one to which he had sent correspondence; that Respondent did not receive his correspondence until about a week before the trial; that Respondent's reply did not reach him until just a couple of days before trial, perhaps upward of a week before trial, thereby lending him little time to communicate with her. Attached hereto as Appendix A are page 1 (title page), pages 4-5, and the Certificate page from the Reporter's Record herein from Volume 8 of that record, whose contents are incorporated herein by reference for all purposes.

IV.

As set forth further in the Affidavit of JB, Respondent at all times wished to participate in the trial for termination, and was ready, willing, and able to do so either in person, through the issuance and service and return of a bench warrant for her appearance, or appearing telephonically with the assistance of a telephone appearance, something that is a part of the procedures available in the 307th Family District Court through a service called "Court Call." The Affidavit of JB is incorporated herein by reference for all purposes as Appendix B. As to the availability of court appearance telephonically via "Court Call," Respondent refers to the Affidavit of _____, counsel for Respondent, as Appendix C, concerning those procedures, and incorporates that affidavit herein by reference for all purposes.

V.

Respondent, therefore, requests the court to include this Bill of Exception in the record on appeal herein, with the above-recited facts as a part of the record.

WHEREFORE, PREMISES CONSIDERED, Respondent JB requests that this Bill of Exception shall be approved by the Court and included in the papers constituting the appeal herein, and for such other and further relief to which Respondent is justly entitled.

Respectfully submitted,

Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing document has been served on this 31 day of December, 2015, by hand-delivery to all interested parties and/or by first class mail to the mailing address of those parties or their counsel, respectively, and/or by electronic transmission in co liance wi the Tex Rules of Civil Procedure.

Foregoing "BILL OF EXCEPTION" APPROVED pursuant to Rule 33.2, TEX. R. CIV. PROC.

DATE: ___ day of January, 2016

_____

JUDGE PRESIDING

# Formal Bill of Exception: Appellate Process

- In a civil case, a formal bill of exception must be filed no later than 30 days after a party files their notice of appeal. Tex. R. App. P. 33.2 (e)(1)
- The appellate court may extend the time to file a formal bill of exception if, within 15 days after the deadline for filing the bill, the party files in the appellate court a motion complying with Tex. R. App. P. 10.5(b). Tex. R. App. P. (e)(3)
- When the appellate record contains the evidence needed to explain a bill of exception, the bill itself does not need to repeat it, and a party may attach and incorporate a transcript of the record containing the evidence. Tex. R. App. P. 33.2 (b)

# Filing a Bill of Exception Does Not Excuse the Requirement to Timely Raise Issues Before the Trial Court

# *In re K.O.*, 488 S.W.3d 829 (Tex. App. Texarkana—2016, pet. denied)

- An incarcerated mother used a bill of exception and its supporting memorandum—filed after her motion for new trial was denied—to assert for the first time that her due process rights were violated when the trial court tried the case and heard the motion for new trial in her absence.
- Hearing: trial court noted these issues were novel, no request for a bench warrant had been received, nor had counsel asked to secure his client's presence by telephone.

# *In re K.O.*, 488 S.W.3d 829 (Tex. App. Texarkana—2016, pet. denied), cont.

- The trial court nevertheless found and approved the bill of exception that stated Mother was incarcerated at the time of trial and her attorney was unaware she had been moved to another facility shortly before the trial to give birth, among other things.
- The court of appeals held, however, that because Mother waited until after the notice of appeal was filed to raise novel issues in her bill of exception, she failed to preserve her due process complaints for appellate review.

# Preserving Legal and Factual Sufficiency Challenges

# Preserving Legal and Factual Sufficiency Challenges

- Most appeals from parental termination cases involve a challenge to the legal and/ or factual sufficiency of the evidence.
- Sufficiency challenges arising from bench trials do not have to be preserved.
- However, there are strict preservation requirements governing jury trials.
  - If these requirements are not met, the sufficiency challenge is deemed to be waived on appeal.

# Preserving Legal and Factual Sufficiency Challenges in a Jury Trial

- When arguing legal sufficiency:
  - File a motion for instructed verdict;
  - Object to the submission of a jury question;
  - File a motion for judgment notwithstanding the verdict (JNOV);
  - Move to disregard the jury's answer to a vital fact question; or
  - File a timely motion for new trial.
- When arguing factual sufficiency:
  - File a timely motion for new trial.

Note: A motion for new trial filed by one parent does not preserve sufficiency review for the other parent.

NOTICE: THIS DOCUMENT
CONTAINS SENSITIVE DATA

NO.

| | | |
|---|---|---|
| IN THE INTEREST OF B. P. | § | IN THE DISTRICT COURT |
| | § | |
| A CHILD | § | JUDICIAL DISTRICT |
| | § | |
| | § | COUNTY, TEXAS |

**MOTION FOR NEW TRIAL**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW Respondent-Mother, B. B., in the above cause and by her attorney and files this motion for new trial pursuant to rule 329b(b) of the Texas Rules of Civil Procedure. In support thereof, B. B. would show:

**I. The Evidence was Legally and Factually Insufficient**

**A. Texas Family Code 160.001(b)(1)(D) Grounds**

The evidence is legally and factually insufficient to support the Court's finding that Respondent, B. B., knowingly placed and knowingly allowed the child, B. P. to remain in conditions and surroundings which endangers the physical and emotional well-being of the child.

**B. Texas Family Code 160.001(b)(1)(E) Grounds**

The evidence is legally and factually insufficient to support the Court's finding that Respondent, B. B., engaged in conduct or knowingly placed the child, B. P. with persons who engaged in conduct which endangered the physical or emotional well-being of the child.

**C. Texas Family Code 160.001(b)(1)(N) Grounds**

The evidence is legally and factually insufficient to support the Court's finding that Respondent, B. B., has constructively abandoned B. P. who has been in the temporary managing 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.



**D. Texas Family Code 160.001(b)(1)(O) Grounds**

The evidence is legally and factually insufficient to support the Court's finding that Respondent, B. B., has 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, B. P., who has been in the permanent or temporary managing conservatorship of the Texas Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent for abuse and neglect of the child.

**E. Reasonable Efforts to Return the Child Findings**

The evidence is legally and factually insufficient to support the Court's finding by clear and convincing evidence that the Department of Family and Protective Services made reasonable efforts to return the child to B. B. before commencement of the trial on the merits, and despite those reasonable efforts, a continuing danger remains in the home of the parents that prevents return of the child. The evidence is further legally and factually insufficient to support the Court's finding that the Department made the following reasonable efforts, or that the following were reasonable efforts to return the child to B. B.:

i. The Department created a family service plan that was narrowly tailored to address any specific issues identified;

ii. The Department made referrals for services, provided services, or paid for services;

iii. The Department made the following reasonable efforts offering services, maintaining contact with B. B. and attempting to visit B. B.'s home.

**F. Best Interest of the Children**

The evidence is legally and factually insufficient to support the Court's finding that the termination of the parent-child relationship between Respondent, B. B. and each of the children is in the best interest of each of said children, B. P., J. M. IV, Z. M., and X. M. individually, and collectively.

**II. New Trial**

The above errors probably caused rendition of an improper judgment in the case. B. B. has a meritorious defense to the cause of action alleged in this case. The granting of a new trial would not injure Petitioner or the Child the subject of this suit. Justice will not be properly served unless a new trial is granted.

# Preserving Legal and Factual Sufficiency Challenges: Reasonable Efforts

- Parental termination orders resulting from a DFPS suit filed on or after September 1, 2023, must include a finding that the Department made reasonable efforts to return the child to the parent, and despite those efforts, a continuing danger remains in the home that prevents the child's return to the parent. Tex. Fam. Code § 161.001(f).
- Unless waived by an aggravated circumstances finding under Tex. Fam. Code § 262.2015.

# Preserving Legal and Factual Sufficiency Challenges: Reasonable Efforts, cont.

- The court may not order the termination of parental rights unless "the court finds by clear and convincing evidence and describes in writing with specificity in a separate section of the order…"
- Fact question: the Department submits the question of reasonable efforts to the factfinder (jury or judge, if bench trial); as with grounds and best interest, the trial court encompasses this finding in its order in accordance with the jury verdict.
- Preservation is required.

# Preserving Factual Sufficiency Challenges in Jury Trials

- The failure to preserve a meritorious factual sufficiency complaint in a parental termination case may constitute ineffective assistance of counsel.
- SCOTX held in *M.S.* that a trial counsel's failure to preserve a factual sufficiency challenge in a termination of parental rights case "may constitute ineffective assistance of counsel." *In re M.S.*, 349 S.W.3d 548 (Tex. 2010).
- SCOTX then remanded the case to the court of appeals to "determine whether counsel's failure to preserve the factual sufficiency issue was not objectively reasonable, and whether this error deprived [the mother] of a fair trial." *Id.*

# Should the Appellee Raise the Issue of Preservation?

- The appellee should always raise the issue of preservation in its responsive brief.
- In the context of an appeal from a jury trial in a parental termination case, the Dallas Court noted "[i]t is unclear from existing case law whether an appellate court must, should, or may raise the issue of preservation on its own." *In re K.D.S.P.*, No. 05-22-00456-CV, 2022 WL 17090187, at *3 (Tex. App.—Dallas Nov. 21, 2022, no pet.) (mem. op.).
- Indeed, many opinions that overrule sufficiency challenges based on the failure to adhere to preservation rules do not mention whether the appellee raised the issue of preservation, or the appellate court did so on its own.

# Jury Trials and Termination of Parental Rights under Tex. Fam. Code §§ 161.001(b)(1)(D) and (E)

- In *N.G.*, the SCOTX held that due process requires a heightened standard of review of a trial court's finding under Tex. Fam. Code §§ 161.001(b)(1)(D) and (E), even when another ground is sufficient to uphold the termination judgment, because of the potential consequences to another child pursuant Tex. Fam. Code § 161.001(b)(1)(M). *In re N.G.*, 577 S.W.3d 230, 235-37 (Tex. 2019).
- The Court further decided that due process and due course of law requirements mandate that an appellate court detail its analysis for an appeal under subsections (D) and (E).

## *B.S. v. the Texas Department of Family and Protective Services*, No. 03-22-00279-CV (Tex. App.–Austin Nov. 10, 2022, no pet.) (mem. op.)

- In *B.S. v. the Texas Department of Family and Protective Services*, the Austin Court examined *N.G.'s* holding in the context of an appeal from a jury trial in which neither parent preserved their sufficiency challenges.
- Relying on *In re N.G.*, 577 S.W.3d 230 (Tex. 2019), the father argued that they were not required to preserve a legal or factual sufficiency challenge so long as the parents "present the issue" to the court of appeals by raising it in their briefing. He contended that to allow these endangerment grounds to remain unchallenged would violate their due process rights.

## *B.S. v. the Texas Department of Family and Protective Services*, No. 03-22-00279-CV (Tex. App.–Austin Nov. 10, 2022, no pet.) (mem. op.), cont.

- The Court disagreed, explaining Father overreads *N.G.*, which requires such a review when the parents have "presented the issue on appeal," and did not involve parents who had failed to preserve their challenge. As such, the Supreme Court did not address preservation nor exclude predicate statutory grounds from that requirement.
- "At most, the ruling in *N.G.* 'presupposes that the appellant has preserved the issues for appeal in the first instance.'"
- Accordingly, the Court "decline[d] to except factual and legal sufficiency challenges in parental-rights termination cases decided by a jury from the longstanding requirement of error preservation for appellate review."

# Jury Trials and Subsections (D) and (E): Other Courts

- Other appellate courts that have considered the issue have reached the same conclusion:
  - *In re A.R.S.*, No. 05-21-00655-CV (Tex. App.–Dallas Jan. 26, 2022, no. pet.) (mem. op.);
  - *In re M.X.R.*, No. 04-20-00042-CV (Tex. App.–San Antonio May 27, 2020, no pet.) (mem. op.);
  - *In re D.T.*, 593 S.W.3d 437, 439 n. 3 (Tex. App.–Texarkana 2019), *aff'd*, 625 S.W.3d 62 (Tex. 2022); and
  - *In re S.C.*, No. 02-18-00422-CV (Tex. App.–Fort Worth June 13, 2019, pets denied) (mem. op.).

# Notable Challenges Requiring Preservation

# Tex. Fam. Code § 161.001(d)

- Provides a possible defense for parents who fail to comply with provisions of a court order.
- The parent must establish by a preponderance of the evidence that they were unable to comply, that they made a good faith effort to comply, and that their failure to comply was not attributable to any fault on their part.

# Affirmative Defenses
## Tex. R. Civ. P. 94

- Requires a party to affirmatively plead any "matter constituting an avoidance or affirmative defense."
- At least two courts of appeals (Houston 14th Court and Tyler) have concluded that Tex. Fam. Code § 161.001(d) is an affirmative defense that is waived if not pled or otherwise raised in the trial court.

# Affirmative Defenses, cont.

- No appellate courts have decided that Tex. Fam. Code § 161.001(d) does not have to be pled.
- "Even if we assume without deciding that Father did not waive the section 161.001(d) defense for failure to specifically plead it, we conclude that he failed to meet his burden of proof to establish it." *In re H.G.*, No. 07-21-00278-CV (Tex. App.—Amarillo Apr. 22, 2022, pet. denied) (mem. op.).
- A parent's attorney should always plead the defense per Tex. Fam. Code § 161.001(d) if predicate ground (O) is sought by the Department.

NOTICE: THIS DOCUMENT
CONTAINS SENSITIVE DATA

**CAUSE NO.**

| | | |
|---|---|---|
| **IN THE INTEREST OF** | § | **IN THE DISTRICT COURT OF** |
| | § | |
| **J.J.G. CHILD** | § | **_____ COUNTY, TEXAS** |
| | § | **___TH JUDICIAL DISTRICT** |

**RESPONDENT MOTHER, J.G.'S ORIGINAL ANSWER**

J.G., Respondent Mother, files this original answer and counter-petition. The last three numbers of Respondent Mother's state ID or driver's license number are unknown. The last three numbers of the Respondent Mother's Social Security number are xxx.

*Denial of Allegations*

Respondent Mother enters a general denial.

*O Ground Affirmative Defense*

Termination is not permitted under Tex. Fam. Code § 161.001(b)(1)(O) because Respondent Mother: (1) was unable to comply with specific provisions of the court order and (2) Respondent Mother 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 Respondent Mother. Tex. Fam. Code § 161.001(d).

*Prayer*

Respondent Mother prays that all relief prayed for by Petitioner be denied and that Respondent Mother be granted all relief requested in this answer.

Respondent Mother prays for general relief.

# Affirmative Defense to Tex. Fam. Code § 161.001(b)(1)(O)

- Even then, "[s]imply pleading a Tex. Fam. Code § 161.001(d) defense is not enough." *J.G. v. Tex. Dep't of Family and Protective Servs.*, No. 03-22-00790-CV (Tex. App.—Austin May 25, 2023, no pet.) (mem. op.).
- The parent has the burden at trial to prove the elements of the 161.001(d) defense.
- In *J.G.*, although Mother raised this affirmative defense and asserted that she had a disability, the court of appeals concluded that Mother did not meet her burden of proof on her subsection (d) defense.

# *J.G. v. Tex. Dep't of Family and Protective Servs.*, No. 03-22-00790-CV (Tex. App.—Austin May 25, 2023, no pet.) (mem. op.)

- Mother testified that complying with the required drug testing was "harsh on [her] mental and on [her] physical;" that the visitations were "breaking [her] down;" and that she had asked to change visits from the office setting because it was "detrimental," "heartbreaking," and "really depressing" to her.
- Such descriptions of Mother's attempts to comply with specific provisions are not evidence of an *inability* to comply with the orders, whether that inability is allegedly due to disability or to another reason.
- At most, this evidence might *explain* why Mother stopped taking drug and alcohol tests and attending visitations after January 2021, but Subsection (d) requires more than an explanation; it requires proving an inability to comply, and that such failure was not due to *any* fault of the parent.
- Furthermore, although there was some evidence that Mother suffers from depression and seizures and has a low IQ and other unspecified mental-health issues, such evidence did not establish her inability to comply.

## *J.G. v. Tex. Dep't of Family and Protective Servs.*, cont.

- At most, this evidence might *explain* why Mother stopped taking drug and alcohol tests and attending visitations after January 2021, but Subsection (d) requires more than an explanation; it requires proving an inability to comply, and that such failure was not due to *any* fault of the parent.
- Furthermore, although there was some evidence that Mother suffers from depression and seizures and has a low IQ and other unspecified mental-health issues, such evidence did not establish her inability to comply.

# The Trial Court's Findings Under Tex. Fam. Code § 263.401(b)

Tex. Fam. Code § 263.401(b) provides in relevant part that:

- Unless the court has commenced the trial on the merits, the court may not retain the suit on the court's docket after the time described by Subsection (a) unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department and that continuing the appointment of the department as temporary managing conservator is in the best interest of the child.
- In *G.X.H.*, the Texas Supreme Court concluded that "while a trial court's failure to timely extend the automatic dismissal date before that date passes—through a docket-sheet notation or otherwise—is jurisdictional, claimed defects relating to the other requirements of 263.401(b) are not." *In re G.X.H.*, 627 S.W.3d 288, 301 (Tex. 2021).

# *In re J.S.*, 670 S.W.3d 591 (Tex. 2023)

- In *J.S.*, the trial court rendered an oral order on the record extending the dismissal date and found the extension was in the child's best interest but failed to make express findings regarding extraordinary circumstances; no party objected. *In re J.S.*, 670 S.W.3d 591 (Tex. 2023).
- The trial court entered a written extension order containing both Tex. Fam. Code § 263.401(b) findings several weeks after the dismissal deadline passed.
- The court of appeals *sua sponte* determined that the trial court erred by failing to make the extraordinary circumstances finding required by Tex. Fam. Code § 263.401(b) and held that the final judgment was void.

# *In re J.S.*, 670 S.W.3d 591 (Tex. 2023), cont.

- The Department filed a petition for review arguing in part that while failure to enter an extension order on or before the dismissal deadline deprives a court of subject-matter jurisdiction, the findings required by Tex. Fam. Code § 263.401(b) do not implicate the trial court's subject-matter jurisdiction. The Texas Supreme Court agreed with the Department.
- Because the statute does not use any language referencing jurisdiction in subsection (b), the Court reasoned that this subsection should not be construed as jurisdictional and therefore such challenges must be made in accordance with the usual error preservation rules.

# The Trial Court's Findings Under Tex. Fam. Code § 263.401(b): Final Thoughts

- Specifically, the Court concluded, "[b]ecause Mother did not object to the trial court's failure to comply with the non-jurisdictional findings requirement *prior to the initial automatic dismissal deadline*, that error cannot be addressed for the first time on appeal."
- Non-issue: a timely objection will prompt trial court to make the requisite Tex. Fam. Code § 263.401(b) findings.
- Objection should still be made to preserve error regardless; failure to do so could form basis for ineffective assistance claim.

# Judicial Notice

## WRONG WAY TO DO IT

- FAIL TO RECITE A FACT
  - "I ASK THE COURT TO TAKE NOTICE OF THE SUNRISE ON SEPTEMBER 15"
  - "I ASK THE COURT TO TAKE NOTICE OF THE TIME OF SUNRISE IN HOUSTON ON SEPTEMBER 15"



## RIGHT WAY

- "I REQUEST THE COURT TO TAKE JUDICIAL NOTICE THAT THE SUNRISE ON SEPTEMBER 15 OF THIS YEAR, IN HOUSTON, WAS AT 7:33 a.m."

# Judicial Notice

- Any error in taking judicial notice generally must be preserved in the trial court to raise the issue on appeal.
- "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Tex. R. Evid. 201.
- There is a specific provision in Tex. R. Evid. 201 that grants the parties an opportunity to be heard on the propriety of taking judicial notice.
- When evidence concerns "disputed facts and opinions, it should not [be] judicially noticed." *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005).

# Judicial Notice, Take 2

- A trial court may take judicial notice of its own records in matters that are generally known, easily proven, and not reasonably disputed.
- Further, an appellate court may presume that the trial court took judicial notice of its record without any request being made or any announcement that it had done so.
- However, during a sufficiency review, appellate courts are only permitted to consider *factual* statements or allegations that were *admitted* during the final hearing.

# Judicial Notice, Take 3

- In *E.F.*, the trial court took judicial notice of pleadings, service of process documents, orders, service plans, and CASA reports at the termination trial. *In re E.F.*, 591 S.W.3d 138 (Tex. App.—San Antonio 2019, no pet.).
- The court of appeals noted that a court may, for example, take judicial notice that a pleading has been filed, of its own orders, or that it signed an order adopting a service plan and the plan's requirements.
- However, a court may not take judicial notice of allegations contained in such documents and the allegations cannot be used to support a termination order, i.e., a court may not take judicial notice of the truth of allegations in its records.
- Therefore, the Court expressly did not consider the allegations in the documents the trial court judicially noticed in its sufficiency review.

# Judicial Notice, Take 4

- It is inappropriate for a trial judge to take judicial notice of testimony even in a retrial of the same case, such as the trial before the associate judge at a de novo hearing.
- In *C.G.*, in a single issue on appeal, Mother asserts that the district court erroneously took judicial notice of the trial of the matter before an associate judge without formally admitting into evidence a recording or transcript of that trial, resulting in insufficient evidence to support the district court's termination findings. *C.G. v. Tex. Dep't of Family and Protective Servs.*, No. 03-22-00019-CV, 2022 WL 2069128, at *3 (Tex. App.—Austin June 9, 2022, pet. denied) (mem. op.).

# Judicial Notice, Take 5

- In this case, the district court informed the parties at the beginning of the de novo hearing that it was taking judicial notice of "all of the contents" of the trial before the associate judge, "including all questioning and all answers."
- Mother failed to object to this procedure at any point during the hearing.
- Accordingly, the Court decided any error in the district court's taking of judicial notice had been waived.

# Judicial Notice, Take 6

- In *J.B.*, the trial court took "judicial notice of the testimony" from another case at the request of the Department. Appellant's counsel indicated he had no objection. *In re J.B.*, No. 11-22-00305-CV (Tex. App.—Eastland May 3, 2023, no pet.) (mem. op.).
- No reporter's record or transcript of the testimony from the other case was offered into evidence as an exhibit in the case or otherwise made a part of the reporter's record.
- Appellant's parental rights were terminated pursuant to Tex. Fam. Code §§ 161.001(b)(1)(D) and (E).

# Judicial Notice, Take 7

- In her first issue on appeal, Appellant argued that the trial court abused its discretion when it terminated her parental rights based on evidence that was not properly before the trial court.
- The court of appeals agreed that she failed to preserve her issue with respect to the trial court's ruling on the admission of the testimony.
- However, the Court sustained Appellant's issue to the extent that it related to the termination of her rights based upon evidence that was not admitted at the trial.

# Judicial Notice, Take 8

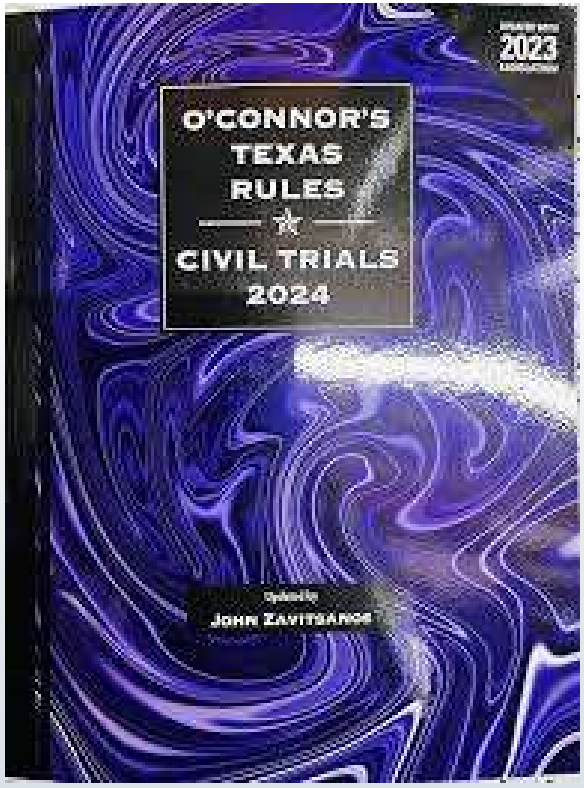
- In Appellant's second and third issues, she challenged the legal and factual sufficiency of the evidence supporting the trial court's Tex. Fam. Code §§ 161.001(b)(1)(D) and (E) findings and its finding that termination was in the children's best interest.
- The Court noted that during a sufficiency review on appeal, it was not permitted to consider factual statements or allegations that were not admitted during a final hearing. Therefore, the Court reviewed only the evidence and testimony presented during the final hearing and contained in the reporter's record in its sufficiency analysis.

# Judicial Notice, Final Take

- The court of appeals reversed after finding the evidence factually insufficient to support the trial court's best interest finding.
- Even though the Appellant waived the improper judicial notice issue, the Department's inappropriate request preserved nothing for the sufficiency review.

# Resources for Additional Information

1. Paper associated with this presentation (available on the Children's Commission On-Demand Training and MCLE webpage).
2. O'Connor's Texas Rules: Civil Trials



# Questions?

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# Thank You!

Questions related to MCLE self reporting may be sent to: cctraining@txcourts.gov