Preserving Your Record for Appeal

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Preserving Your Record for Appeal

a. Preservation Generally

"It's hard to overstate the importance of error preservation at trial."[1] Requiring parties in civil litigation to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds.[2] This is just as true in parental termination cases as it is in any other case involving constitutional rights.[3] In defending this position, the Texas Supreme Court stated the following:

> [A]dhering to our preservation rules isn't a mere technical nicety; the interests at stake are too important to relax rules that serve a critical purpose. As we recently said, 'appellate review of potentially reversible error never presented to a trial court would undermine the Legislature's dual intent to ensure finality in these cases and expedite their resolution.'[4]

This preservation requirement generally also applies to constitutional challenges.[5]

Fundamental error, namely error affecting a substantial right that does not have to be preserved at trial, is available in criminal cases;[6] however, within the civil context it is mostly "a discredited doctrine."[7] The Texas Supreme Court has expressly declined to extend the Fundamental Error Doctrine from the criminal arena to child welfare litigation.[8] The Fundamental Error doctrine has been found to apply:

> (1) when the record shows on its face that the court rendering the judgment lacked judgment on the subject matter;

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[1] Moore, Daryl, "Preservation of Error," p. 1, Handling Your First (Or Next) Civil Appeal, April 25, 2024.
[2] *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999).
[3] *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005).
[4] *In re L.M.I.,* 119 S.W.3d 707, 708 (Tex. 2003) (quoting *B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003)).
[5] *See Tex. Dep't of Protective and Regulatory Servs. v. Sherry,* 46 S.W.3d 857, 860–61 (Tex. 2001) (holding that alleged biological father who sought to establish paternity waived constitutional error, though it was undisputed that father had received no notice or hearing on prior paternity adjudication that created bar); *see also In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005) (concluding Mother waived her contention that statute providing for accelerated appeals in parental rights termination cases was unconstitutional as applied, by failing to raise such contentions before the Court of Appeals).
[6] Tex. R. Evid. 103(e).
[7] *Cox v. Johnson*, 638 S.W.3d 867, 868 (Tex. 1982) (per curiam).
[8] *B.L.D.*, 113 S.W.3d at 351.

(2) when the alleged error occurs in a juvenile delinquency case and falls within a category of error as to which preservation of error is not required; or,

(3) when 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.[9]

In order to present a complaint for appellate review, absent one of the above exceptions, the record on appeal must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) 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

(B) complied with the requires of the Texas Rules of … Evidence or the Texas rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.[10]

A timely objection is made at the earliest possible opportunity. *Guillory v. Boykins*, 442 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Error may be waived if the objection is made later.[11] The "shotgun" approach to objections, that is, making a "prolonged soliloquy" of various objections, might not preserve anything for appeal.[12]

An objection at trial which is not the same objection urged on appeal preserves nothing for review.[13] A party who fails to preserve error forfeits their complaint.[14] An

[9] *In re T.B.*, 641 S.W.3d 535. 537 (Tex. App.—Waco 2022, pet. denied).
[10] Tex. R. App. P. 33.1(a).
[11] *See, e.g., Gaytan v. State*, 331 S.W.3d 218, 229 (Tex. App.—Austin 201, pet. denied).
[12] *See Berry v. State*, 813 S.W.2d 636, 638 (Tex. App.—Houston [14th Dist. 1991, pet ref'd) (approximately thirty distinct grounds for objection failed to preserve any error for appellate review).
[13] *In re M.M.W.*, 536 S.W.3d 611, 613 (Tex. App.—Texarkana Dec. 1, 2017, no pet.).
[14] *In re M.R.J.M.*, 280 S.W.3d 494, 500 (Tex. App.—Fort Worth 2009, no pet.).

objection to the admission of evidence from one parent does not preserve the issue on appeal for the other parent.[15]

i. Exception to Preservation Requirement: Right to Assistance of Counsel

The Texas Supreme Court has clarified that there are certain circumstances where failure to preserve "may very well rise to the level of a due process violation because 'a different calibration of the [ ] *Eldridge* factors could require a court of appeals to review an unpreserved complaint of error to ensure that our procedures comport with due process.' "[16] In the context of parental termination cases, appellate courts have applied this rationale to a parent's right to assistance of counsel.[17]

In *S.C.*, the Ninth Court of Appeals rejected the Department's assertion that Father failed to preserve his due process complaint by not raising the issue in the trial court.[18] In this case, the incarcerated father was not permitted to meaningfully participate in multiple hearings, was not timely admonished about his right to counsel, and was not appointed counsel until the first day of trial.[19] The appellate court explained that this was the kind of situation envisioned by the Texas Supreme Court where preservation rules would necessarily have to give way to due process.[20] The court of appeals

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[15] *In re G.M.G.-U.*, No. 06-16-00075-CV, 2017 Tex. App. LEXIS 2256, at *38 n.9, 2017 WL 1018607, at *14 n.9 (Tex. App.—Texarkana Mar. 16, 2017, pet. denied) (mem. op.)
[16] *In re M.S.*, 115 S.W.3d 534, 546 (Tex. 2003) (*quoting B.L.D.*, 113 S.W.3d at 350-51) (finding court of appeals erred in reviewing unpreserved complaint on jury charge but acknowledging that in a parental rights termination case, a different calibration of the *Eldridge* factors could require an appellate court to review an unpreserved complaint of error to ensure that our procedures comport with due process).
[17] *See In re A.J.*, 559 S.W.3d 713, 717-18 (Tex. App.—Tyler 2018) (holding that the appellant was denied procedural due process because, among other things, "[t]hat despite his representation by counsel at the second half of the termination trial, [the appellant] was effectively without representation during the almost eighteen months of the case"); *In re S.C.*, No. 09-21-00325-CV, 2022 WL 1037912, at *18 (Tex. App.—Beaumont Apr. 7, 2022, no pet.) (mem. op.).
[18] *S.C.*, 2022 WL 1037912, at *14-18.
[19] *Id.*
[20] *Id.* at *18.

expounded, "The facts before us created a perfect storm that ensured Father was unaware of his rights, and even if he had been aware, did not have an opportunity to exercise them until the case was called to trial. '[E]rror preservation in the trial court, which is a threshold to appellate review, necessarily must be viewed through the due process prism.'"[21]

Similarly, in *A.J.*, the father was incarcerated throughout the case and was never informed of his right to be represented by an attorney, nor of his right to court-appointed counsel if found to be indigent, and trial initially began in his absence with the testimony of one witness.[22] On appeal, this father argued that the trial court committed reversible error by failing to inform him of his right to counsel, to bring him before the court prior to the final hearing, and to appoint him an attorney until nine days before the dismissal deadline.[23] The Department responded that the father did not object before or during trial to the timing of the appointment of his trial counsel.[24] The court of appeals, however, reasoned, "[b]ecause some courts have recognized that in certain contexts termination suits are quasi-criminal, we determine that the right of assistance of counsel cannot be waived."[25]

b. Preserving claim in voir dire

Voir dire objections must be timely and plainly presented.[26] A trial court abuses its discretion on the scope of voir dire when "it's denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for cause or denies

[21] *Id.*, *quoting M.S.*, 115 S.W.3d at 547.
[22] *A.J.*, 559 S.W.3d at 717.
[23] *Id.* at 716.
[24] *Id.* at 717.
[25] *Id.* at 718.
[26] *Hyundai Motor Co. v. Vasquez,* 189 S.W.3d 743, 759 (Tex.2006)

intelligent use of preemptory challenges."[27] No error is preserved if counsel merely states a subject area; specific questions are needed to give the trial court an opportunity to make a meaningful ruling.[28] A party preserves error by asking a specific and proper question, stating the basis for asking the question, and obtaining an adverse ruling.[29]

To preserve error when a challenge for cause is denied, a party must use a preemptory strike against the veniremember involved, exhaust its remaining challenges, and notify the court that a specific objectionable veniremember will remain on the jury list.[30] On the other hand, to preserve error when a challenge for cause is erroneously granted, a party need merely object to a trial court's grant of a challenge for cause.[31]

c. Preserving claim evidence was erroneously admitted

Parties should object each and every time a piece of evidence is introduced, or the admission of that evidence will be deemed harmless.[32]

Normally, a ruling on a motion in limine does not preserve error at all.[33] That's because a motion in limine does not seek a ruling on admissibility but "is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury."[34] That means that while a ruling on a motion in limine may be erroneous, it is never reversible error in and of itself.[35]

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[27] *Babcock v. NW. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989).
[28] *In re D.W.*, 498 S.W.3d 100, 122 (Tex. App.—Houston 2016, no pet.).
[29] *In re Commitment of Hill*, 334 S.W.3d 226,
[30] *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 90-91 (Tex. 2005).
[31] *Urista v. Bed, Bath & Beyond, Inc.*, 245 S.W.3d 591 (Tex. App.—Houston [1st Dist.] 2007, no pet.).
[32] *Richardson v. Green*, 677 S.W.2d 497 (Tex. 1984).
[33] *In re R.V.*, 977 S.W.2d 777, 780 (Tex. App.—Fort Worth 1998, no pet.).
[34] *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 920 at n.3 (Tex. 2015).
[35] *Mandeville v. Mandeville*, No. 01-15-00119-CV, 2015 WL 7455436 (Tex. App.—Houston [1st Dist.] Nov. 24, 2015, no pet.) (mem. op.).

A ruling on a pretrial motion to exclude evidence, on the other hand, does preserve error.[36] Under that scenario, the party does not need to renew the objection in front of the jury.[37]

A title of a motion can be misleading, so courts are supposed to look to the substance of the relief requested, not merely the form of title given to the motion.[38] This means an appellate court may hold that trial court's response to a document entitled a "motion in limine" is in fact a pretrial order on a motion to exclude evidence—meaning that error was preserved.[39] In *D.W.G.K.*, while the document was entitled a motion in limine, it specifically asked the trial court for an order preventing the Department and the attorney ad litem from calling any witness who had not been properly disclosed in discovery.[40] The court of appeals held that this was substantively a motion to exclude, and therefore did preserve the issue for appeal.[41]

Running objections are an exception to the rule of objecting in every instance.[42] The Texas Court of Criminal Appeals has stated, "A running objection, in some instances, will actually promote the orderly progression of a trial."[43] Running objections must be specific and unambiguous.[44] To be specific, the objection must identify the source of the objectionable testimony, the subject matter of the witness's testimony, and the ways the testimony would be brought before the jury.[45] If the running objection is broad, the party

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[36] *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 557 (Tex. App.—Houston [1st Dist.] 1996], *aff'd* 972 S.W.2d 35 (Tex. 1998).
[37] Tex. R. Evid. 103(b).
[38] Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc., 659 S.W.3d 424, 441 (Tex. 2023).
[39] *See*, *e.g.*, *In re D.W.G.K.*, 558 S.W.3d 671, 682-83 (Tex. App.—Texarkana 2018, pet. denied).
[40] *Id.* at 682.
[41] *Id.*
[42] *In re A.P.*, 42 S.W.3d 248, 260 (Tex. App.—Waco 2001), *overruled on other grounds by In re J.F.C.*, 96 S.W.2d 256 (Tex. 2002).
[43] *Lopez v. State*, 253 S.W.3d 680, 684 (Tex. Crim. App. 2008).
[44] *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied).
[45] See Volkswagen of America, Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2004).

risks the appellate court construing the objection itself, and doing so in a way that is disadvantageous to the appellant.[46] In *A.D.K.*, the Department asked the caseworker about the children telling her that Father directed them to fight.[47] Father's timely objection was overruled.[48] The caseworker answered in the affirmative, then testified that the children told her about fights between Father and Mother.[49] The trial court, in response, *sua sponte* granted Father a vague running objection.[50] On appeal, Father argued that the trial court erred in allowing the caseworker and the CASA volunteer to testify about where the children wanted to live.[51] Due to the context of the objection and the timing of the running objection, the court of appeals construed the running objection to concern violence between the parents and violence between the children, meaning that Father failed to preserve his error on appeal on the children's desires.[52]

The objecting party must obtain a ruling.[53] An unrecorded bench conference, followed up by the trial court stating, "All right. Anything else?" was not an adverse ruling that preserved error.[54]

It is not enough for the evidence to be inadmissible. To obtain reversal of a judgment based on a trial court's error in admitting or excluding evidence, the complaining party must show that (1) the trial court committed an error, and (2) the error was reasonably calculated to cause, and probably did cause, rendition of an improper

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[46] *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).
[47] *Id.*, 2019 Tex. App. LEXIS 5295, at *17.
[48] *Id.*, 2019 Tex. App. LEXIS 5295, at *17-*18.
[49] *Id.*, 2019 Tex. App. LEXIS 5295, at *18.
[50] *Id.*
[51] *Id.*, 2019 Tex. App. LEXIS 5295, at *17.
[52] *Id.* at *20-*21.
[53] Tex. R. App. P. 33.1(a)(2)(A).
[54] *Darty v. State*, 709 S.W. 652, 654-55 (Tex. Crim. App. 1986).

judgment.[55] If a party permits the same or similar evidence to be introduced without objection, the error in the admission of testimony is generally harmless and waived.[56] In one case, any error in admitting a caseworker's affidavit was found to be waived or harmless because the same information was contained in services plans to which the parents did not object.[57]

There is no reversible error on the admission of drug test results when: (1) the parent admitted to living in a "dope house" with some of the children; (2) the parent admitted to using drugs while pregnant with the youngest child; (3) the parent indicated she had no doubt the children were exposed to and had methamphetamine in their bodies; and (4) the other parent took responsibility for the children's exposure to drugs.[58] This potentially makes things difficult to the party seeking exclusion of the evidence, because an attempt to address the issue at trial may render any appellate error harmless.

d. Preserving claim evidence was erroneously excluded

In order to preserve a claim that the trial court erred in excluding evidence, the substance of the evidence must be made known.[59] The primary purpose of this is to enable an appellate court to determine whether the exclusion was erroneous and harmful.[60] To preserve an objection to the exclusion of evidence, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception.[61]

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[55] *In re J.M.*, No. 12-11-00319-CV, 2013 Tex. App. LEXIS 12816, at *5, 2013 WL 5657422, at *2 (Tex. App.—Tyler Oct. 16, 2013, pet. denied) (mem. op.); Tex. R. App. P. 44.1(a)(1).
[56] *In re A.C.*, 394 S.W.3d 633, 645 (Tex. App.—Houston [14th Dist.] 2012, no pet.).
[57] *In re A.J.E.M.-B.*, 2014 Tex. App. LEXIS 12129, at * 18.
[58] *In re A.H.J.*, No. 05-15-00501-CV, 2015 WL 5866256, at *5 (Tex. App.—Dallas Oct. 8, 2015, pet. denied) (mem. op.).
[59] Tex. R. Evid. 103(a)(2).
[60] *Ludlow v. Berry*, 959 S.W.2d 265, Tex. App.—Houston [14th Dist.] 1997, no writ).
[61] *Fitzgerald v. Water Rock Outdoors, LLC*, 536 S.W.3d 112, 121 (Tex. App.—Amarillo 2017, pet. denied).

i. Offer of Proof

Where the court sustains an objection or grants a motion to exclude evidence, the offering party, as soon as practicable but before the court's charge is read to the jury, must be allowed to make, in the absence of the jury, its offer of proof.[62]

The offer of proof may be made by counsel, who should reasonably and specifically summarize the evidence offered and state its relevance unless already apparent.[63] Formal proof is not mandated—only a short, factual recitation of what the evidence would have shown is sufficient—but must be specific enough to allow the reviewing court to determine its admissibility.[64] Upon request, the trial court must direct that an offer of proof be made in a question-and-answer form.[65] 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 not denied the opportunity for a bill of exception.[66]

For example, in *E.J.*, the trial court imposed time limits on the parties.[67] Once Mother reached her limit, she failed to request additional time to cross-examine witnesses and put on her case, maintaining an objection to any time limit whatsoever.[68] Mother also failed to make an offer of proof.[69] On appeal Mother asserted that the trial court abused its discretion by disallowing her offers of proof.[70] The court of appeals held that

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[62] Tex. R. Evid. 103(c)
[63] *PNS Stores, Inc. v. Munguia*, 484 S.W.3d 503 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
[64] *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied.).
[65] Tex. R. Evid. 103(c).
[66] *Chance v. Chance*, 911 S.W.2d 40, 51 (Tex. App.—Beaumont 1995, writ denied*); E.J. v. Tex. Dep't of Family & Protective Servs.*, No. 03-18-00473-CV, 2018 Tex. App. LEXIS 10458, at *15-*16 (Tex. App.—Austin Dec. 18, 2018, pet. denied) (mem. op.).
[67] *E.J. v. Tex. Dep't of Family & Protective Servs.*, No. 03-18-00473-CV, 2018 WL 6627720, at *4 (Tex. App.—Austin Dec. 18, 2018, pet. denied) (mem. op.).
[68] *Id.*, 2018 WL 6627720, at *5.
[69] *Id.*, 2018 WL 6627720, at *6.
[70] *Id.*

even if that were true, she failed to preserve this error because she failed to make a formal bill of exception.[71]

ii. Bill of Exception

To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.[72] A bill of exception, as a method of error preservation, is primarily used when the appellant complains on appeal about the trial court's erroneous exclusion of evidence, evidence that, because it was not admitted, would not otherwise be part of the appellate record.[73] It can also be used for appellate review of misconduct of the trial judge,[74] the bailiff,[75] or the jury.[76]

A bill of exception does not require a particular form of words, but the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint.[77]

The process for creating a bill of exception begins with the complaining party first presenting it to the trial court.[78] If the parties agree on the contents of the bill of exception, the judge must sign it and file it with the court clerk.[79] If the parties don't agree, then at a duly noticed hearing the judge may:

> (A) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct;
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> (B) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings

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[71] *Id.*
[72] Tex. R. App. P. 33.2.
[73] *Sturdivant v. State*, 445 S.W.3d 435, 440 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).
[74] *Layne Glass Co. v. Parker*, 340 S.W.2d 363 (Tex. Civ. App.—Fort Worth 1960, no writ).
[75] *Hayes v. Home Indemn. Co.*, 354 S.W.2d 300 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.).
[76] *Green v. Rudsenske*, 320 S.W.2d 1959 (Tex. Civ. App.—San Antonio, 1959, no writ).
[77] Tex. R. App. P. 33.2(a).
[78] Tex. R. App. P. 33.2(c)(1).
[79] Tex. R. App. P. 33.2(c)(2).

in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or

(C) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.[80]

If the complaining party is dissatisfied with the bill of exception filed by the judge under (2)(C), *supra*, the party may file with the trial court clerk the bill that was rejected by the judge.[81] That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed.[82] The affidavits must attest to the correctness of the bill as presented by the party.[83] The matters contained in that bill of exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill.[84] The truth of the bill of exception will be determined by the appellate court.[85] A formal bill of exception not approved by the trial court or opposing counsel, and is not a bystanders bill, is inadequate to preserve a complaint on appeal.[86]

If a formal bill of exception conflicts with the reporter's record, the bill controls.[87]

The deadline to file a formal bill of exception is no later than thirty days after the filing of the party's notice of appeal.[88]

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[80] Tex. R. App. P. 33.2(c)(2).
[81] Tex. R. App. P. 33.2(c)(3).
[82] Tex. R. App. P. 33.2(c)(3).
[83] Tex. R. App. P. 33.2(c)(3).
[84] Tex. R. App. P. 33.2(c)(3).
[85] Tex. R. App. P. 33.2(c)(3).
[86] *Cont'l Coffee Prods. Co. v. Cazarez*, 903 S.W.2d 70, 80 (Tex. App.–Houston [14th Dist.] 1995), *aff'd in part and rev'd in part on other grounds*, 937 S.W.2d 444 (Tex.1996).
[87] Tex. R. App. P. 33.2(d).
[88] Tex. R. App. P. 33.2(e)(1).

e. Preserving Legal and Factual Sufficiency Challenges: Jury Trials

Certain preservation requirements must be met to challenge the legal and factual sufficiency of jury findings in a parental termination case. To preserve a challenge to the legal sufficiency of the evidence supporting a jury finding, a party must either: (1) file a motion for instructed verdict; (2) object to the submission of a jury question; (3) file a motion for judgment notwithstanding the verdict (JNOV); (4) move to disregard the jury's answer to a vital fact question; or (5) file a timely motion for new trial.[89] Similarly, to preserve a party's right to challenge the factual sufficiency of the evidence underlying a jury finding, the party must file a motion for new trial raising such a point.[90] A party waives their factual and legal sufficiency challenges by failing to preserve them for review.[91]

A motion for new trial filed by one parent does not preserve factual sufficiency review for the other parent.[92]

i. Texas Family Code Subsections 161.001(b)(1)(D) and (E)

In *N.G.*, the Texas Supreme Court held that due process requires a heightened standard of review of a trial court's finding under subsections 161.001(b)(1)(D)[93] and

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[89] TEX. R. CIV. P. 324(b)(3); *Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991); *In re A.L.*, 486 S.W.3d 129, 130 (Tex. App.–Texarkana 2016, no pet.); *In re J.B.*, No. 09-16-00442-CV, 2017 WL 2180682, at *7 (Tex. App.–Beaumont May 18, 2017, no pet.) (mem. op.); *In re G.H.*, No. 02-14-00261-CV, 2015 WL 3827703, at *5 (Tex. App.–Fort Worth June 18, 2015, no pet.) (mem. op., en banc).

[90] *Id.*; TEX. R. CIV. P. 324(b)(2).

[91] *See, e.g.*, *In re J.M.S.*, 43 S.W.3d 60, 62 (Tex. App.–Houston [1st Dist.] 2001, no pet.) (concluding both parents waived their factual and legal sufficiency challenges by failing to preserve them for review); *In re E.M.*, 494 S.W.3d 209, 225 (Tex. App.–Waco 2015, pet. denied) (concluding father waived legal sufficiency challenge to best interest finding).

[92] *In re J.R.*, 501 S.W.3d 738, 750 (Tex. App.—Waco 2016, pet. denied) (mem. op.).

[93] Family Code subsection 161.001(b)(1)(D) permits termination if the parent knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endangered the child's physical or emotional well-being. TEX. FAM. CODE § 161.001.

(E)[94] of the Family Code, even when another ground is sufficient to uphold the termination judgment, because of the potential consequences to another child pursuant to subsection (M).[95] The Court further decided that due process and due course of law requirements mandate that an appellate court detail its analysis for an appeal of termination of parental rights under subsections (D) and (E).[96]

In *B.S. v. the Texas Department of Family and Protective Services*, the Third Court of Appeals examined *N.G.'s* holding in the context of an appeal from a jury trial in which neither parent preserved their sufficiency challenges.[97] Relying on *N.G.*, 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.[98] He contended that to allow these endangerment grounds to remain unchallenged would violate their due process rights.[99] The court of appeals 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.[100] As such, the Supreme Court did not address preservation nor exclude predicate statutory grounds from that requirement.[101] Thus, the appellate court reasoned, "[a]t most, the ruling in *In re N.G.* 'presupposes that the appellant has preserved the

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[94] Family Code subsection 161.001(b)(1)(E) allows for termination if the parent has engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the child's physical or emotional well-being. TEX. FAM. CODE § 161.001.
[95] *In re N.G.*, 577 S.W.3d 230, 235-37 (Tex. 2019). A fact finder may termination parental rights under subsection (M) if a parent had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state and the subsequent petition concerning this child was filed within a year of the prior termination. TEX. FAM. CODE 161.001(b)(1)(M), (d-1).
[96] *N.G.*, 577 S.W.3d at 237.
[97] *B.S. v. the Texas Department of Family and Protective Services*, No. 03-22-00279-CV, 2022 WL 16842084, at *2-3 (Tex. App.–Austin Nov. 10, 2022, no pet.) (mem. op.).
[98] *Id.*
[99] *Id.* at *3.
[100] *Id.*
[101] *Id.*

issues for appeal in the first instance.'"[102] Accordingly, the court of appeals "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."[103]

f. Notable Challenges Requiring Preservation

i. Affirmative Defense to Texas Family Code Subsection 161.001(b)(1)(O)

The Family Code provides an affirmative defense for parents who fail to comply with provisions of a court order, which states that termination may not be ordered if the parent proves by a preponderance of the evidence that she was unable to comply with specific provisions and made a good faith effort and the failure to comply is not attributable to the fault of the parent.[104] At least two courts of appeals have concluded that this affirmative defense is waived if not pled or otherwise raised in the trial court.[105]

In *N.B.*, the mother argued that she substantially complied with her service plan and that her failure to comply was outside of her control.[106] Citing Rule 94 of the Texas Rule of Civil Procedure, which provides that a party shall affirmatively plead any "matter constituting an avoidance or affirmative defense", the court of appeals observed that

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[102] *Id.*, *quoting 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).
[103] *Id.* Other appellate courts have reached that same conclusion. *D.T.*, 593 S.W.3d at 439 n. 3; *In re A.R.S.*, No. 05-21-00655-CV, 2022 WL 224812, at *2 n. 1 (Tex. App.–Dallas Jan. 26, 2022, no. pet.) (mem. op.); *In re M.X.R.*, No. 04-20-00042-CV, 2020 WL 2736465, at *2-3 (Tex. App.–San Antonio May 27, 2020, no pet.) (mem. op.); *In re S.C.*, No. 02-18-00422-CV (Tex. App.–Fort Worth June 13, 2019, pets denied) (mem. op.).

[104] TEX. FAM. CODE § 161.001(d); *In re N.B. and P.B.*, No. 12-22-00236-CV, 2022 WL 16843243, at *3 (Tex. App.—Tyler Nov. 9, 2022, pet. filed) (mem. op.).
[105] *See N.B.*, 2022 WL 16843243, at *3; *In re A.M.*, No. 14-23-00415-CV, 2023 WL 7206735, at *7 (Tex. App.—Houston [14th Dist.] Nov. 2, 2023, pet. denied) (mem. op.) (holding father waived Section 161.001(d)'s affirmative defense "because he did not assert the defense in his pleadings or during trial and provided no evidence to support it").
[106] *N.B.*, 2022 WL 16843243, at *2.

Mother did not plead or invoke this affirmative defense in the trial court and does not cite to this subsection on appeal.[107] Recognizing the failure to plead an affirmative defense will result in waiver, the Court held Mother waived this affirmative defense.[108]

ii. The Trial Court's Findings Under Texas Family Code Section 263.401(b)

Texas Family Code Section 263.401(b) provides in relevant part:

> 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. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a).[109]

In *G.X.H.*, the Texas Supreme Court considered when the failure to adhere to the requirements of Section 263.401 is jurisdictional.[110] The Court noted, "if the trial court neither commences trial by the dismissal date nor extends it in accordance with section 263.401(b)", automatic dismissal is statutorily mandated and jurisdiction terminated.[111] The 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."[112]

The Texas Supreme Court revisited Section 263.401 in *J.S.*[113] In *J.S.*, the trial court rendered an oral order on the record extending the dismissal date and finding that the

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[107] *Id.* at *3; TEX. R. CIV. P. 94.
[108] *N.B.*, 2022 WL 16843243, at *3.
[109] TEX. FAM. CODE § 263.401.
[110] *In re G.X.H.*, 627 S.W.3d 288, 292 (Tex. 2021).
[111] *Id.*
[112] *Id.* at 301.
[113] *In re J.S.*, 670 S.W.3d 591 (Tex. 2023).

extension was in the child's best interest under Section 263.401(b).[114] Notably, the trial court failed to make express findings regarding extraordinary circumstances, but no party objected.[115] Several weeks after the dismissal deadline passed, the trial court entered a written extension order which made both the best interest and extraordinary circumstances findings required by Section 263.401(b).[116]

On appeal, the Fifth Court of Appeals *sua sponte* determined that the trial court erred by failing to make the extraordinary circumstances finding required by Section 263.401(b) and therefore held that the final judgment was void.[117] The Department filed a petition for review with the Texas Supreme Court, arguing *inter alia* that while failure to enter an extension order on or before the dismissal deadline deprives a court of subject-matter jurisdiction, the two findings required by Section 263.401(b) do not implicate the trial court's subject-matter jurisdiction.[118]

The Texas Supreme Court agreed with the Department, explaining that courts should always start with the presumption that a statutory requirement is not jurisdictional "absent clear contrary legislative intent."[119] 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.[120] The Court further observed, "Holding that the express finding requirements of 263.401(b) are jurisdictional would permit relitigation of parental rights terminations years after judgments are signed and

[114] *Id.* at 594-95.
[115] *Id.*
[116] *Id.* at 595.
[117] *Id.* at 596.
[118] *Id.*
[119] *Id.* at 603.
[120] *Id.* at 603-05.

children are permanently placed elsewhere, or even adopted.... Such uncertainty harms children and parents alike."[121]

Accordingly, the Texas Supreme Court declared that any challenge to a trial court's findings under Section 263.401 are not challenges to the trial court's jurisdiction, and therefore such challenges must be made in accordance with the usual error preservation rules.[122]

g. Judicial Notice

A trial court is presumed to judicially know what has previously taken place in the case.[123] However, during a sufficiency review, appellate courts are only permitted to consider factual statements or allegations that were admitted during the final hearing.[124] The Texas Rules of Evidence permit a trial court to take judicial notice of a fact that is not subject to reasonable dispute.[125] 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.[126] However, while a trial court may take judicial notice of a document that has been filed in the case, it may not take judicial notice of the *truth* of allegations in the pleadings, affidavits, or other documents in the court's file.[127] Further, 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

[121] *Id.* at 605.
[122] *Id.* at 605-06.
[123] *In re J.C.C.*, 302 S.W.3d 436, 446 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).
[124] *In re F.M.E.A.F.*, 572 S.W.3d 716, 723 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).
[125] Tex. R. Evid. 201.
[126] *In re K.F.*, 402 S.W.3d 497, 504 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).
[127] *In re Shifflett*, 462 S.W.3d 528, 539 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding).

the associate judge at a de novo hearing.[128] However, any error in taking judicial notice generally must be preserved in the trial court to raise the issue on appeal.[129]

An appellate court may take judicial notice of its records.[130] In *P.R.M.*, the court of appeals used the reporter's record from a termination appeal to aid in supporting the finding at the trial court level that the grandparent lost standing because they had waited more than 90 days to file suit after the trial court had terminated parental rights.[131]

[128] *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.).
[129] *Id.*; *but see In re J.B*., 2023 WL 3213089, at *4 (Tex. App.—Eastland May 3, 2023, no pet.) (mem. op.) (holding, despite no objection from any party, that trial court abused its discretion in relying on prior testimony merely on the stipulation of the parties; the prior testimony needed to have been offered and admitted as evidence in the case).
[130] *P.R.M. v. Tex. Dep't of Family and Protective Servs.*, No. 03-16-00065-CV, 2016 WL 4506301, at *3 (Tex. App.—Austin Aug. 26, 2016, no pet.) (mem. op.).
[131] *Id.* at *2.