Termination Case Law Update

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I. PRE-TRIAL ISSUES

A. ALLEGATIONS RULED OUT

This case originated when a hospital reported concerns to the Department regarding Mother and her unborn twins, which resulted in an investigation for neglectful supervision and the removal of the children. Mother's parental rights were ultimately terminated pursuant to TFC §§ 161.001(b)(1)(D) and (E). On appeal, Mother argued that the Department's subsequent issuance of a disposition letter indicating that the allegations of neglectful supervision during Mother's hospitalization had been "ruled out" meant that the Department constructively abandoned its claims for termination under TFC §§ 161.001(b)(1)(D) and (E).

The disposition letter indicated that "based on the available information, it was reasonable to conclude that the alleged abuse or neglect did not occur." However, the Court of Appeals stated that "[r]uling out a claim for neglectful supervision during the mother's hospitalization did not preclude additional action by the Department upon further review of the circumstances of Mother's subsequent actions or prior history." The Court noted the letter itself also cautioned that it only applied to the closure of the investigation and did not preclude further involvement by the Department, including for termination of parental rights.

Accordingly, the Court of Appeals rejected Mother's argument and held that the Department was not precluded from pursuing its case for termination of parental rights. *In re Baby Girl H.*, No. 05-23-00487-CV (Tex. App.—Dallas Nov. 13, 2023, no pet.) (mem. op.).

B. TFC § 263.401 EXTENSION AND TRAUMA TO THE CHILDREN

Following termination of her parental rights, Mother appealed, alleging, *inter alia*, that the trial court erred in denying her motion to extend the court's jurisdiction under TFC § 263.401(b).

TFC § 263.401(a) provides that trial must commence no later than the first Monday after the first anniversary of the date the court rendered a temporary order appointing the Department as temporary managing conservator. TFC § 263.401(b) provides that if a trial on the merits has not commenced within the deadline set by § 263.401(a), the trial court may extend the dismissal deadline if the movant shows 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."

Mother's motion for extension was heard the week before trial. As grounds for her motion, Mother argued she needed more time to complete the court-ordered service plan requirement that she attend in-person counseling. Mother stated that she had been attending online sessions, but her current facility did not offer in-person sessions, and the Department failed to provide other options. The Court of Appeals pointed out, however, that there were other services Mother had failed to complete. Mother explained she delayed starting services because she was

traumatized by the children's removal. She admitted, however, that she was not taking her medication and had refused to drug test for months because she was using marijuana.

The caseworker also testified at the hearing, explaining the effect extending the case would have on the children. She explained that "in a child's mind, a six-month timeframe feels like years, and children who have answers do better than children who are waiting." She went on to state it is difficult for children to conceptualize the timeframe because it feels like a very long time to them. She stated that this "can create anxiety and confusion", which "commonly cause increased behavior problems." She testified that six months would be "very difficult" for the children.

The Court of Appeals pointed out that the statute provides a clear preference for commencing the case within a year, and the focus should remain on the needs of the child. The Court ultimately ruled that based both on Mother's unnecessary delays in starting her services, as well as the testimony that prolonging the case could have a detrimental effect on the children, "in focusing on the needs of the children, the trial court could have reasonably concluded that Mother had failed to prove that extraordinary circumstances justified an extension and that an extension would have been in the children's best interest." *In re H.S., B.S., and M.S.*, No. 02-23-00367-CV (Tex. App.—Fort Worth Mar. 21, 2024, no pet.) (mem. op.).

C. TFC § 263.402

Mother appealed the termination of her parental rights arguing, *inter alia,* that the trial court erred by granting an extension of the case because the extension was based on an agreement of the parties, contravening TFC § 263.402.

TFC § 263.402 provides that "[t]he parties to a suit under this chapter may not extend the deadlines by the court under this subchapter by agreement or otherwise."

On the first day of trial on May 4, 2023, the Department, the parents' attorneys, and the children's attorney ad litem expressed an agreement to extend the court's jurisdiction to conduct mediation. The court announced the final hearing would be reset to allow the parties time to attend mediation and accordingly reset the dismissal deadline to October 30, 2023. These dates were recorded on the court's docket sheet, but no other findings were made on the record or the docket sheet. Mother agreed to the extension at the hearing and did not object to the new trial date. The final hearing occurred on June 15, 2023, as reset; Mother did not object to or raise the issue of lack of mandatory findings.

On appeal, Mother argued the trial court lost jurisdiction, reasoning that the announcement of the parties' agreement rendered the extension void, as it runs contrary to TFC § 263.402. However, the Court of Appeals, disagreed that the trial court lost jurisdiction, pointing out that the court orally extended the deadlines on the record and entered the new dates in the docket which reflected the court's decision to grant the extension. The Court concluded, "the trial court, not the parties, extended the relevant deadlines, and the Department and the parties agreed with the decision to extend the deadlines." *In re J.J.S., Jr., K.W., and R.G.*, No. 10-23-00204-CV

(Tex. App.—Waco Nov. 30, 2023, pet. denied) (mem. op.).

D. COMMENCEMENT

On appeal, both parents challenged the trial court's order terminating their parental rights to the child. They argued that the trial commenced after the statutory dismissal deadline had passed, and therefore, the judgment was void. The parents asserted that Mother timely requested a jury trial but that a jury was not impaneled by the jurisdictional deadline, and commencement of a jury trial requires an impaneled jury.

The Court of Appeals noted that the original dismissal deadline for the Department suit was July 4, 2022. However, on April 20, 2022, the trial court issued an order extending the statutory dismissal deadline to December 31, 2022. Trial was originally set for April 19, 2022, then reset to August 16, 2022, and later to October 7, 2022. On October 7, 2022, all parties appeared and announced "ready," the trial court swore in witnesses, and the Department identified a medical expert as its first witness. Before the Department could begin examination of this witness, attorneys for both parents objected to the witness based on inadequate discovery, and the trial court stopped the proceedings and ordered the Department to complete the discovery process by October 14, 2022. The court continued the trial to December 2, 2022. On November 1, 2022, Mother requested a jury trial, and the trial court granted this request and set the jury trial for December 12, 2022.

The trial court called the case on December 12, 2022, and then went directly into pretrial matters, which included ruling on motions *in limine*, discussing preemptory strikes, addressing the Department's untimely disclosure of its medical witness, and hearing a motion to prohibit using evidence from a prior case. At the end of the day, the trial court made a finding that trial had commenced and reset the proceedings for February 21, 2023. On that date, Mother filed a plea to the jurisdiction, arguing that the trial court had lost jurisdiction on December 31, 2022, the automatic dismissal date. The trial court denied Mother's plea to the jurisdiction because the parties announced ready and witnesses were sworn on October 7, 2022, and the court had ruled on motions *in limine* on December 12, 2022. On February 21, 2023, the parties selected a jury and proceeded with trial, which ended on March 2, 2023.

The Court of Appeals pointed out that the parents incorrectly relied on criminal case law in arguing that the trial did not commence until the jury was impaneled, explaining that these criminal cases do not apply to parental termination proceedings. Rather, in Department suits, commencement means, at a minimum, that parties have been asked to make announcements, and the trial court has determined if any preliminary matters need to be addressed. Thus, the Court concluded that trial commenced on October 7, 2022, when the parties announced ready, the court informed the parties that trial would go forth, witnesses were identified and sworn, and the rule was invoked. The Court further reasoned that Mother's request for a jury trial, and the trial court's granting of that request, did not affect the trial court's jurisdiction under TFC § 263.401 because trial had already commenced. Accordingly, the Court overruled their jurisdictional challenge. *In re A.N.C.*, 679 S.W.3d 311 (Tex. App—San Antonio 2023, no

pet.) *See also In re E.A.R., E.A.R., E.A.R., and E.A.R.*, 672 S.W.3d 716 (Tex. App—San Antonio 2023, pet. denied) (rejecting the argument that calling the caseworker to provide brief testimony was done solely for the purpose of avoiding the mandatory dismissal deadline, holding that the only issue under TFC § 263.401 is whether the trial commenced before the deadline); *see also In re R.R. and R.R.*, 676 S.W.3d 808 (Tex. App.—Corpus Christi-Edinburg 2023, pet. denied) (holding trial commenced for purposes of TFC § 263.401 where court heard preliminary motions, parties announced ready, and the Department called the caseworker to testify and sought admission of an exhibit regardless of whether court and parties "feigned" commencement).

E. UCCJEA

The Department filed its original petition regarding the child in March 2022. The Department attached an affidavit of emergency removal, which averred neglectful supervision of the then two-week-old child by Mother and Father, who lived in Beaumont, Texas. The affidavit noted that Mother's and Father's parental rights to the child's older sibling had been terminated earlier that month, and during the pendency of the prior suit, Mother tested positive for methamphetamine while pregnant with the subject child. After the child was born, Mother and Father hid the child from the Department, causing the Department concern for the child's safety.

The trial court issued an emergency order of protection of the child, which stated it had jurisdiction under Family Code § 262.002 and named the Department temporary sole managing conservator of the child. The Department then filed a petition for writ of habeas corpus, stating Mother and Father were illegally restraining the child in Jefferson, County, Texas, and attempting to hide the child. The trial court issued a writ of attachment, ordering the delivery of the child into the possession of the Department.

In April 2022, the 27th Judicial District Court of Louisiana ("the Louisiana Court") issued an instanter order for removal and provisional custody to the Louisiana Department of Children and Family Services. In its order, the Louisiana Court found that 1) based on the information provided by the Texas trial court, it was necessary for the State of Louisiana to obtain emergency custody of the child, as he was located in Father's custody in Louisiana; and 2) in accordance with the documentation provided by the Texas trial court, including its writ of attachment, the child was located in Louisiana after being removed from Texas. After the child was placed in Louisiana's provisional custody, the Louisiana Court vacated its instanter order for removal and returned the child to the care of the Department by order of the Texas trial court.

In June 2022, Mother and Father filed pleas to the jurisdiction, arguing the Texas trial court lack subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") because Texas was not the child's home state.

The UCCJEA, adopted by the State of Texas and codified under Chapter 152 of the Texas Family Code, establishes the applicable procedures for child custody proceedings in which a child has moved from one state to another. Mother and Father alleged that the child was born and resided in Louisiana, and

the Department failed to show that Louisiana declined jurisdiction and the Texas trial court did not have jurisdiction to determine child custody under Family Code § 152.201.

In August 2022, the Texas trial court conducted a hearing on the pleas to the jurisdiction and found it had initial child custody jurisdiction under Family Code § 152.201, and Texas was the child's home state when the action was filed.

Mother and Father raised the same issue on appeal. The Court of Appeals concluded that the trial court correctly denied the parents' pleas to the jurisdiction pursuant to Family Code § 152.204(b) because Texas became the child's home state when the Department filed its original petition, which sought to protect the child from threatened mistreatment and abuse under its temporary emergency jurisdiction. The Court noted that the record demonstrated the Louisiana Court returned the child to the Department and did not dispute the authority of the Texas trial court's emergency jurisdiction, and the Louisiana Court's dismissal of its instanter order showed it declined to exercise jurisdiction and deferred to Texas, pursuant to Family Code § 152.201.

The Court concluded that since a child custody proceeding had not commenced in a court of another state having jurisdiction under Family Code §§ 152.201 through 152.203, the Texas trial court's child custody determination pursuant to Family Code § 152.204 under its temporary emergency jurisdiction became a final determination, making Texas the child's home state. The Court, therefore, held the Texas trial court had jurisdiction to make an initial custody determination under Family Code § 152.201, and Mother's and Father's pleas to the jurisdiction were properly denied. *In re T.K., Jr.*, No. 09-23-00103-CV (Tex. App.—Beaumont Aug. 3, 2023, no pet.) (mem. op.).

II. TRIAL ISSUES

A. ABANDONMENT OF PLEADINGS

Mother and Father argued that the trial court erred by terminating their parental rights because, at the close of trial, the Department abandoned the grounds for termination alleged in its live pleading. According to Mother and Father, the pleadings did not support the judgment.

In its original and amended petitions, the Department requested that if reunification of the child with Mother and Father was not possible, the trial court name a relative of the child, another suitable person, or the Department itself as the child's sole managing conservator. In the alternative, the Department sought termination of Mother's and Father's parental rights to the child under several statutory predicate grounds. There were no pleadings by any other party requesting affirmative relief.

At the first trial setting, the Department requested that the trial court first consider its motion for monitored return. The Department's counsel and the caseworker explained that a "transition plan" was formulated to reunite the child with Mother and Father. Mother and Father joined the Department's request for a monitored return; however, the child's attorney *ad litem* and child advocate were in opposition. The trial court denied the motion and considered the testimony in support of the monitored return as

testimony relevant to the trial on termination grounds. The proceedings were recessed.

When the trial recommenced two months later, the trial court denied the request by the Department, Mother, and Father for the court to reconsider its ruling on the request for monitored return, and the trial continued. The caseworker testified the Department had no safety concerns with allowing the child in the home, and Mother and Father had "completed their services and maintained sobriety." The caseworker informed the trial court that the Department's goal for the child was "family reunification," and the Department "would like to monitor the child in the home." Further, the caseworker agreed with Father's counsel that the Department was not seeking termination of Mother's and Father's parental rights. At the beginning of closing arguments, the Department announced it was "abandoning our termination grounds" and "reurging the motion for a monitored return." Alternatively, the Department's counsel stated that the Department was asking for permanent managing conservatorship to the current caregivers with Mother and Father named as possessory conservators.

The trial court later signed a written judgment terminating Mother's and Father's parental rights to the child and appointing the Department as the child's sole managing conservator.

The Court of Appeals concluded that the Department, through the caseworker's testimony and the Department's counsel's statements on the record during closing argument, "unequivocally" abandoned the portion of its pleadings seeking termination of Mother's and Father's parental rights. Accordingly, the Appellate Court determined there were no pleadings before the trial court requesting termination of Mother's and Father's parental rights to the child, and the trial court's judgment was not supported by a pleading and, therefore, erroneous. It reversed the judgment terminating Mother's and Father's parental rights and remanded the case for further proceedings. *In re A.B.A. A/K/A/ A.B.S.*, No. 01-23-00548-CV (Tex. App.—Houston [1st Dist.] Dec. 21, 2023, no pet.) (mem. op.).

B. Admissibility of Hearsay – TFC § 104.006

On appeal, Father argued that the trial court erroneously admitted the children's hearsay statements that he physically and sexually abused them, and therefore these statements should be disregarded in an analysis of the legal and factual sufficiency of the evidence.

TFC § 104.006 permits the introduction of otherwise inadmissible hearsay statements of a child twelve years of age or younger that describes alleged abuse against the child if the trial court finds that the statements are reliable based on the time, content, and circumstances of the statement, and: (1) the child testifies or is available to testify; or (2) admitting the statement in lieu of the child's testimony is necessary to protect the child's welfare. The term abuse, as defined by TFC § 261.001, includes "sexual conduct harmful to a child's mental, emotional, or physical welfare," including conduct that constitutes the offense of continuous sexual abuse of a young child or disabled individual, indecency with a child, a sexual assault, or aggravated sexual assault.

The Court of Appeals noted that other courts of appeals have recognized that TFC § 104.006 is the civil equivalent of Article 38.072 of the Code of Criminal Procedure, and the same or a similar analysis should be applied to determine reliability. The Court observed that under Article 38.072, a trial court may consider the following indicia of reliability: (1) the child victim testifies at trial and admits making the out-of-court statement; (2) the child understands the need to tell the truth and has the ability to observe, recollect, and narrate; (3) other evidence corroborates the statement; (4) the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults; (5) the child's statement is clear and unambiguous and rises to the needed level of certainty; (6) the statement is consistent with other evidence; (7) the statement describes an event that a child of the victim's age could not be expected to fabricate; (8) the child behaves abnormally after the contact; (9) the child has a motive to fabricate the statement; (10) the child expects punishment because of reporting the conduct; and (11) the accused had the opportunity to commit the offense. Further, the reliability of an outcry statement is determined on a case-by-case basis and dependent upon the circumstances of the outcry rather than the stated abuse.

In his argument, Father did not dispute the children's ages or their availability to testify. Rather, Father asserted the statement from Child1, then age seven, that, "my dad touched my penis," and Child2's statement, age five, that Father "would touch her down there" failed to specifically describe acts of sexual abuse. The foster parents testified that while they were discussing appropriate and inappropriate touching with the children, Child1 unambiguously stated that Father touched his penis, was "upset", and subsequently stated that Father "should be in jail for what he did." Child1 described sitting on the couch when it happened, and that "he didn't understand what was happening, and he was just, like, there." When questioned whether this could have just been normal parental functions, such as changing Child1's diaper, the foster parent testified that Child1 stated Father would not change his diaper. In the same period, the foster parents saw Child2 masturbating in the living room and told them that Father "would touch her down there." When they explained "the appropriateness of masturbating and touching yourself," Child2 became upset and "confused about why it was inappropriate for her father to touch her." Further, Child2 said nothing about a diaper change and described that Father "touched her private parts with his hand in her bedroom at night."

The Court of Appeals concluded that based on the "time, content, and circumstances" of the children's statements, the trial court did not abuse its discretion in admitting them. The Court explained it was undisputed that Father had the opportunity to sexually abuse his children, there was no indication that the children had a motive to fabricate the statements, and the children's therapists and the foster parents determined their statements were truthful based on their demeanor and behavior and the context in which they made the statements. Further, the children made their outcries spontaneously and with no evidence to support Father's unsubstantiated claims that they were manipulated. Thus, the Court decided that the trial court could have reasonably determined that the incidents rose to the level of abuse.

Concerning the specificity of the outcries, the Court concluded that a child victim cannot be expected to testify with the same clarity as a mature adult and that similar statements had been found to constitute legally sufficient evidence to support convictions for child sexual abuse. Accordingly, based on this evidence of sexual abuse, the Court found the evidence legally and factually sufficient to support the trial court's endangerment findings. *In re A.D., I.D., and A.D.*, No. 11-23-00202-CV (Tex. App.—Eastland Jan. 11, 2024, pet. denied) (mem. op.).

C. Trial in Absentia

On the day of trial, the trial court recessed and ordered the parties to return at 1:00 p.m. Mother did not appear at 1:00 p.m. after the recess. Before any testimony was given, the trial court was informed that Mother had fallen in the courthouse and was being treated by medical personnel. After taking a brief recess to gather information, the trial court determined the trial would continue in Mother's absence. At the conclusion of trial, Mother's parental rights to the child were terminated.

On appeal, Mother argued that the trial court reversibly erred by proceeding with trial in her absence "following a medical emergency" as she did "not voluntarily absent herself from the proceedings."

The Court of Appeals considered that after taking a recess to gather information about Mother's condition, the trial court stated on the record that it was concerned Mother was attempting to delay trial and found the following:

> So at the risk of – at the risk of being corrected on review, I'm going to find that [Mother] is intentionally setting up circumstances to delay this case, that she is not injured and that this is simply an attempt to further delay proceedings in this case following on the heels of requests that her counsel – by her counsel to be removed from the case and following on the heels of her representation that she was going to be ready to go to trial in thirty minutes pro se and that she was going to get some documents that she wanted to get for trial.
>
> I just feel like basically that the court's being victimized and that the interest of the – of justice in the interest of the children are not served by further delay in this case. And so we're going to proceed, and you may call your witness.

Accordingly, the Court of Appeals concluded, "the record reflects that the trial court, being the most familiar with the history of the parties in this case, found Mother to have voluntarily absented herself from the proceedings after the determination that she would proceed pro se in trial" and held that the trial court did not err in proceeding with trial in Mother's absence. *In re R.R. and R.R.*, 676 S.W.3d 808 (Tex. App.—Corpus Christi–Edinburg 2023, pet. denied).

D. RIGHT TO CONFRONTATION

The Court of Appeals considered whether Mother's Sixth Amendment right to confrontation was violated when the trial court admitted drug test results by business record affidavit without a sponsoring expert witness.

The Appellate Court recognized that the Sixth Amendment to the United States Constitution provides, in relevant part: "*In all criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against [her] . . ." U.S. CONST. amend VI (emphasis added). In addition, citing *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2002), the Court observed that the Texas Supreme Court has held that parental termination cases are civil in nature because "[i]n securing what is in the best interest of the child, the State is not pursuing a retributive or punitive aim, but a 'purely remedial function: the protection of minors.'" As such, the Court rejected Mother's argument and concluded that "[b]ecause parental termination cases lack the purpose to punish and are designed to protect the best interest of the child, parental termination proceedings are, by their nature, civil, not criminal." *In re T.W.*, No. 07-23-00386-CV (Tex. App.—Amarillo April 2, 2024, no pet.) (mem. op.).

E. INMATE PRESENCE AT TRIAL

Mother asserted that the trial court abused its discretion when it denied her the right to be present at trial in violation of her due process rights. At the time of trial, Mother had recently been incarcerated. The trial court allowed a brief recess for Mother's counsel to attempt to secure her virtual presence but ultimately proceeded to trial without her.

The Appellate Court cited to case law, which states that while a parent cannot be denied access to the court simply because she is incarcerated, inmates do not have an absolute right to appear in person at every court proceeding. Instead, an incarcerated parent's right of access to the court must be weighed against the protection of the correctional system's integrity. The Court noted several factors in assessing whether an inmate has satisfied her burden to show why her interest in appearing outweighs the impact on the correctional system, including: the cost and inconvenience of transporting the inmate to the courtroom; the security risk the inmate presents to the court and public; whether the inmate's claims are substantial; whether the matter's resolution can reasonably be delayed until the inmate's release; whether the inmate can and will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone, or some other means; whether the inmate's presence is important in judging her demeanor and credibility; whether the trial is to the court or a jury; and the inmate's probability of success on the merits.

The Court held that because Mother did not introduce any evidence under any of these factors or otherwise satisfy her burden of justifying the need for her presence, it cannot be said that the trial court abused its discretion when it proceeded to trial in her absence. Accordingly, Mother's argument was overruled. *In re A.A.D.*, No. 14-23-00499-CV (Tex. App.—Houston [14th Dist.] Apr. 9, 2024, pet. denied) (mem. op.).

III. TERMINATION GROUNDS

A. TFC § 161.001(b)(1)(D) and (E)

1. Texas Supreme Court disapproves of "causal connection" theory

The Department conducted an investigation from January to March 2020, during which time Father and the children were homeless for two months, and Father tested positive for methamphetamine. Following the children's removal, Father again tested positive for methamphetamine in April. In May, Father was ordered to comply with a drug assessment, follow the recommendations, and submit to drug testing; he was warned that a failure to submit would be considered a positive result. Father tested positive for methamphetamine on a hair follicle drug test in June. Thereafter, Father complied with his service plan, provided a series of negative drug tests, and completed outpatient drug treatment in August. The children were then placed with the paternal grandmother, and Father was allowed supervised visitation. In October, Father tested positive for marijuana. He completed a second drug assessment, which recommended additional outpatient treatment. At that point, Father stopped complying with his service plan, refused treatment, and failed to submit to every subsequent court-ordered drug test.

The paternal grandmother subsequently left the children unsupervised in Father's care in violation of the trial court's orders. When Father's sister notified the Department, Father, in the presence of the children, threatened to kill himself. When police arrived, they located a female guest of Father's hiding in a closet; her purse contained methamphetamine and drug paraphernalia. Father was then admitted to a psychiatric hospital. Between Father's February hospitalization and the September 2021 trial, Father only had contact with his caseworker twice, did not respond to communications about visitation, never asked about the children, and did not attend any parent-child visits.

At trial, both Father and his caseworker testified that Father had never physically harmed the children. Father admitted he stopped communicating with the Department and provided no proof of stable housing. He further admitted that because he failed to submit to drug testing from October 2020 to September 2021, the court had no way of knowing whether he was drug-free. The trial court subsequently terminated Father's parental rights pursuant to TFC §§ 161.001(b)(1)(D), (E), and (P), which allow the trial court to order termination if it finds by clear and convincing evidence that the parent: (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; (E) 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; and (P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and failed to complete a court-ordered substance abuse treatment program or, after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance.

On appeal, Father challenged the trial court's predicate ground findings. The Fourteenth

Court reversed Father's termination and held that the evidence, as presented, was legally insufficient to support Father's termination under all three grounds. Citing its opinion in *In re L.C.L.*, 599 S.W.3d 79 (Tex. App.—Houston [14th Dist.] 2020, no pet.), the Fourteenth Court held that drug use alone could not result in termination under (D) or (E), which require proof of a direct causal link between a parent's drug use and harm to the child. The Fourteenth Court determined that none of the facts by themselves supported a finding of endangerment because there was no proof Father placed the children in an endangering environment, and the evidence of Father's course of conduct was insufficient and undeveloped. The Fourteenth Court applied the same reasoning to its analysis of the evidence supporting Subsection (P) and held similarly.

The Texas Supreme Court considered the Department's petition for review. Citing to *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531 (Tex. 1987) (a parent's endangering conduct need not "be directed at the child or that the child actually suffers injury") and *In re J.O.A.*, 283 S.W.3d 336 (Tex. 2009) (endangerment does not require a parent's drug use directly harm the child; a pattern of behavior that presents a substantial risk of harm is sufficient), the Supreme Court held that "the court of appeals erred in requiring direct evidence that Father's drug use resulted in physical injury to his children." Instead, the Supreme Court stated that precedent interpreting the term "endangerment" permits "a factfinder to infer a risk of harm from parental conduct that, while not directed toward the child, presents a substantial risk to the child's health and safety." The Court went on to state:

> While illegal drug use alone may not be sufficient to show endangerment, a pattern of drug use accompanied by circumstances that indicate related dangers to the child can establish a substantial risk of harm. A reviewing court should not evaluate drug-use evidence in isolation; rather, it should consider additional evidence that a factfinder could reasonably credit that demonstrates that illegal drug use presents a risk to the parent's 'ability to parent.'

The Supreme Court stated that the Fourteenth Court "should not have ignored the aggregate weight of Father's ongoing drug use, homelessness, employment instability, and near-complete abandonment of his children for the six months preceding trial." The Supreme Court expressly disapproved of the Fourteenth Court's direct-harm holding in *L.C.L.*, as well as those cases in which that holding has been cited with approval, and agreed with the courts that have held that "endangerment may be inferred from a course of parental conduct that creates a serious risk to a child's physical or emotional well-being." *In re R.R.A., H.G.A., and H.B.A.*, 687 S.W.3d 269 (Tex. 2024); *see also M. Y. v. Tex. Dep't of Family & Protective Servs.*, No. 03-22-00780-CV (Tex. App.—Austin May 31, 2023, no pet.) (mem. op.) (Although no direct evidence as to the length or frequency of Mother's methamphetamine use, Mother lacked appropriate living arrangements, neglected some of the child's basic needs, and admitted her drug use prevented her from properly caring for the child. The trial court could have reasonably

inferred that Mother's methamphetamine use was not an isolated event but an ongoing course of conduct.); *see also A. B. v. Tex. Dep't of Family & Protective Servs.*, No. 03-22-00759-CV (Tex. App.—Austin May 4, 2023, no pet.) (mem. op.) (While a finding of endangerment based on drug use alone is not automatic, there is no requirement that direct evidence show a causal link between drug use and endangerment.).

2. Knowledge of paternity

Father argued that the evidence was legally and factually insufficient to support the trial court's finding under subsection (E). The Court of Appeals related that the finding under this subsection was supported by Father's illegal drug use, subjecting the child to instability due to incarceration and failure to participate in the service plan. Father argued that he had never been served and did not know he was the father until September 2022, after the child was removed, so he could not have endangered the child. The Court of Appeals cited to several cases to overrule his argument, as it is a "long-time feature of the law of endangerment" that it is "not necessary that the conduct be directed at the child or that the child actually suffers injury" or that the parent's endangering conduct happen in the child's presence. The Court concluded that "Father's illegal-drug use and repeated conduct leading to incarceration still exposed Child to jeopardy and loss even if Father did not do those things while around Child. And . . . knowledge of paternity is not a prerequisite to a showing of Paragraph (E) endangerment." The Court ultimately held "a father's conduct before the establishment of paternity can be considered as evidence of an endangering course of conduct under Paragraph (E)." *A.S. v. Tex. Dep't of Family and Protective Servs.*, No. 03-23-00658-CV (Tex. App.—Austin Apr. 12, 2024, no pet. h.) (mem. op.).

3. Refusal to acknowledge substance abuse

Termination of Mother's parental rights sustained under TFC § 161.001(b)(1)(E) based in part on Mother's lengthy history of abusing prescription medication, including during her previous Department case and at the time of the subject child's birth, "refusal to completely disengage from prescription drug use", and general dishonesty about her substance abuse issues. *In re R.H.*, No. 02-23-00371-CV, __ S.W.3d __ (Tex. App.—Fort Worth Mar. 21, 2024, no pet. h.).

4. Conviction not required

At the time of the trial, Father had a pending charge from 2021 for the offense of aggravated assault of a family member. Father's indictment alleged that, on or about April 3, 2021, Father "unlawfully, intentionally[,] and knowingly threaten[ed] [Mother], ... a person with whom [Father] had a dating relationship, with imminent bodily injury by using and exhibiting a deadly weapon, namely a motor vehicle." According to testimony, Father hit Mother's car in "a head-on collision" with his car when she was five months pregnant with Child, and he then pulled a man, who was in Mother's car, out of her car and "assaulted him." In overruling Father's challenge to the trial court's TFC 161.001(b)(1)(E) finding, the Court of Appeals considered, in part, Father's indictment related to the 2021 felony offense of aggravated assault of a family member. The Appellate Court recognized that "courts have routinely considered evidence of parent-on-

parent physical abuse in termination cases without requiring evidence that the conduct resulted in a criminal conviction." Affirmed. *In re D.J.G.*, No. 01-22-00870-CV (Tex. App.—Houston [1st Dist.] May 18, 2023, no pet.) (mem. op.).

5. Sex trafficking

Father challenged the sufficiency of the evidence supporting termination of his parental rights pursuant to TFC § 161.001(b)(1)(E).

Evidence at trial showed that Mother first became pregnant with Father's child when she was thirteen years old and he was fifteen years old. She became pregnant with their second child less than two years later. At times, Mother indicated that she had been kidnapped by Father and his mother and that they had induced her to have babies by promising her a home. At other times, Mother denied that she had been coerced to have children and said that living with Father's mother was the safest place for her to be, despite running away multiple times.

The Court of Appeals noted that the record further showed that Father was arrested for a probation violation at the outset of the case and taken to jail, leaving the children with his mother, who was later arrested for harboring another child runaway, other than Mother. The Court noted that although Father argued "that he and Mother 'supported and trusted each other' and 'were still engaged in a relationship,' this [did] not negate the fact that Father had a reason-to-believe disposition for sexually abusing Mother by impregnating her when she was thirteen years old and again when she was fifteen years old."

Father contended that the Department's case was largely based on the "speculative belief that paternal grandmother was overly involved in the case and controlling over Father and Mother [] yet still failed to [show] how this endangered the children's physical or emotional well-being." However, the Court pointed out that the record established the children were subject to food insecurity under Father's mother care, in addition to paternal grandmother's multiple reason-to-believe dispositions including sexual abuse, physical abuse, and neglectful supervision of Mother, as well as medical neglect and neglectful supervision of Father.

The Court noted that paternal grandmother, along with Father, had lured Mother into having babies and that paternal grandmother had played a role in sex trafficking Mother. The Court, therefore, concluded that "[e]ven though Father had been a direct target of his mom's abuse and neglect, he exposed the children to her, continued living with her, and wanted to raise the children in her home. Because a factfinder may infer from past endangering conduct that similar conduct will recur, there was every indication that Father's mom would continue to be a danger to Father and Mother, as well as the children."

The Court accordingly held that the factfinder could have formed a firm belief or conviction that Father's course of conduct endangered the children's well-being. *In re K.J. and CW.*, No. 02-23-00198-CV (Tex. App.—Fort Worth Oct. 5, 2023, pet. denied) (mem. op.).

6. Stress associated with caring for the children

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

The evidence showed that Mother had a significant history of methamphetamine abuse that continued during the Department case. She began using methamphetamine at the age of seventeen, more than twenty years earlier. Mother relapsed when the child was initially removed, and then relapsed due to stress shortly after the child was returned to her in a monitored return. Thus, these relapses resulted in both the child's removal and re-removal. Mother admitted she continued to use drugs for a short period after the child was removed for the second time. She also placed drugs in the home where the child lived to test her adult daughter, who she suspected of abusing drugs.

The Court of Appeals recognized that Mother had taken steps toward achieving a drug-free lifestyle, such as voluntarily admitting herself to an inpatient program after the child's removal, followed by her participation in outpatient treatment and drug court. Mother also testified to her commitment to sobriety and long-term recovery. Yet, the Court noted that a parent's recent improvement does not erase a long history of substance abuse and endangering conduct.

The Court pointed out that Mother had completed outpatient treatment multiple times, including classes and treatment in a prior case, even before the inpatient treatment in this case. Nevertheless, she continued to relapse even despite these interventions. The Court also noted that Mother testified that stress contributed to her relapses and that this stress seemed to increase when she had children in her care. The Department caseworker testified about Mother's pattern of decline:

> The concern is that [Mother] tends to do well, complies with services while her children are out of her care. When her children are returned to her care, that is when she starts falling off on doing what she needs to do to maintain stability and she eventually relapses while the children are in her care.

Thus, the Court of Appeals concluded that while Mother's recent improvement was significant, it did not eradicate the prior course of conduct which endangered the child's physical and emotional well-being. *In re A.H.*, 679 S.W.3d 817 (Tex. App—El Paso 2023, pet. denied).

7. Failure to understand special medical needs

Mother and Father challenge their termination under TFC §§ 161.001(b)(1)(D) and (E), which allow for termination if the trial court finds by clear and convincing evidence that the parent knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child, or 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. Mother also challenged her termination under TFC § 161.001(b)(1)(P), which allows for termination if the trial court finds by clear and convincing evidence that the parent used a

controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and failed to complete a court-ordered substance abuse treatment program or, after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance.

The child was born prematurely, with a low birthweight and tested positive for methamphetamine and amphetamines at birth. Mother refused to speak to the investigator, and Father's home contained no items needed to care for the child. Mother and Father failed to comply with drug testing and no family members were willing to take the child. The child was subsequently removed.

In addition to other conduct which was found to be endangering, the Court of Appeals pointed to evidence that Mother and Father "refused to acknowledge, much less address, [the child's] special needs." The record reflected that the child required a special feeding protocol to prevent her from aspirating; however, Mother and Father failed to properly feed her during supervised visits. The caseworker testified that Mother and Father adamantly denied there was anything wrong with the child, denied she required special feeding, and claimed they knew how to feed her and could care for her. Father did not refute the caseworker's testimony and stated only that his mother worked at a hospital so he would "have access to get [the child's special needs] taken care of." Father claimed Mother demonstrated an ability to care for a special-needs child by addressing her older child's "G-button" but admitted Mother was not allowed any unsupervised contact with that child and had never parented her alone.

The Court of Appeals concluded that "[e]vidence that the Parents denied and even refused to address [the child's] special needs further supports the trial court's endangerment findings." Accordingly, the Court of Appeals affirmed the trial court's endangerment findings for Mother and Father. *In re H.C.*, No. 02-23-00477-CV (Tex. App.—Fort Worth Apr. 11, 2024, no pet. h.) (mem. op.); *see also In re C.D.M., J.L.M., and H.N.P.*, No. 05-23-00582-CV (Tex. App.—Dallas Oct. 31, 2023, no pet.) (mem. op.) (considering parents' failure to adequately address and treat the child's severe eczema in support of termination under Subsections (D) and (E)).

8. Unexplained injuries

The Department began an investigation after the child, a seven-week-old infant, was hospitalized with a fractured skull, a brain bleed, and retinal hemorrhaging. The pediatric nurse practitioner who treated the child in the emergency room indicated that the injury to his skull required significant force—such as that experienced in a major car accident or throwing an infant against a wall. As no car accident or similar event had occurred, the child's hospital care team determined his injuries were intentional.

Investigators were initially concerned that Father had physically abused the child, but as the investigation progressed, they concluded that it was likely Mother who had done so. Ultimately, the Department sought termination of Mother's parental rights and withdrew the termination ground alleged against Father.

The jury terminated Mother's parental rights under TFC §§ 161.001(b)(1)(D), (E), and (O) and TFC § 161.003. Mother appealed, and the Court of Appeals reversed. The Court of Appeals determined "the record show[ed] inconsistencies in the facts as to what symptoms developed, when they developed, and how they were reported," and it concluded that "[f]or these reasons, the evidence [was] legally insufficient to find that Mother—or any other specific person—caused [the child's] injuries." The Department and Father filed petitions for review in the Texas Supreme Court.

The Supreme Court noted that the court of appeals reversed the jury's termination of Mother's rights under the endangerment paragraphs because it concluded there was insufficient evidence that Mother endangered the child either "by directly causing his injuries or due to her mental health." The Court disagreed and reiterated that "although paragraphs (D) and (E) require conduct that places the child in danger or knowledge that conditions or other persons place the child in danger, these paragraphs do not require that endangering "conduct be directed at the child" or that the child "actually suffer[ ] injury.'"

The Court held the circumstantial evidence the jury could have credited was legally sufficient to support the inference that Mother was the person whose conduct endangered the child. First, the nurse practitioner believed the child's injuries occurred on February 24, the day before the child was taken to the emergency room. The symptoms of the child's head trauma included seizures, vomiting, abnormal eating patterns, crying out in pain, irritability, and abnormal fussiness. The nurse practitioner "testified that if the onset of symptoms was the child's fussiness, noted by parents on the evening of February 24, then that was likely when the injury occurred."

Second, Mother kept a detailed feeding log, which included documentation of the child's feeding and bowel movements and notations of where Mother nursed the child and for how long. According to this log, the only time the child was not in Mother's care before his hospitalization was when the maternal grandfather cared for the child for approximately an hour on February 24 and when Father cared for the child during the night of February 24 while Mother slept.

Third, the Supreme Court stated that neither Mother nor Father provided a plausible explanation for the child's injuries, which supported an inference that at least one of them knew the cause. It considered that Mother's and Father's stories about what happened on the evening of February 24 differed, and it was Father's story that remained most consistent.

Fourth, the child's injuries were severe and very likely intentional. He was hospitalized for eleven days. His retinas were actively hemorrhaging, his brain bleeding was so severe that he was placed in the pediatric critical care unit, and it was unclear if he would survive or live a normal life if he recovered.

Fifth, Mother made inconsistent statements throughout the Department's investigation.

Sixth, Department caseworkers and other investigators expressed concerns regarding Mother's behavior during the investigation and around the child. In addition, there was testimony that the child exhibited a strong and persistent "fear response" during Mother's

visits. Once the child became mobile, he would run or crawl away to hide in a corner and beat his head against the wall.

Finally, Mother had a history of mental health issues that the jury could have viewed as relevant to the child's injuries. Mother had been voluntarily hospitalized in the past, and she commented to her psychiatrist on the morning of February 24 that she felt she was "going into crisis."

Accordingly, the Supreme Court concluded that the evidence, "taken together," was legally sufficient to support the jury's finding that Mother engaged in conduct that endangered the child's physical or emotional well-being. The Court granted the Department's and Father's petitions for review, reversed the court of appeals' judgment, and remanded the case for further proceedings. *In re C.E.*, 687 S.W.3d 304 (Tex. 2024), reh'g denied (May 3, 2024).

B. TFC § 161.001(b)(1)(O)

1. Substantial compliance sometimes adequate to defeat termination

The Department took possession of Mother's three children after she failed to pick up the older two from daycare before it closed at midnight and then lied to the police about the reason for her delay. The Department prepared a family plan of service and ultimately sought termination of Mother's parental rights based solely on TFC § 161.001(b)(1)(O). Subsection (O) permits termination if the court finds by clear and convincing evidence that the 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 for not less than nine months as a result of the child's removal from the parent for abuse or neglect. The trial court terminated Mother's parental rights, and the Fourth Court of Appeals affirmed. The Texas Supreme Court granted Mother's petition for review.

Mother challenged the sufficiency of the evidence supporting subsection (O). The Texas Supreme Court explained that the text of subsection (O) "contemplates direct, specifically required actions." *citing In re A.L.R.*, 646 S.W.3d 833, 837 (Tex. 2022). They went on to state, "We eschew vague plan requirements and have emphasized that the court's order describing the parents' necessary actions 'must be sufficiently specific to warrant termination of parental rights for failure to comply with it.'" *citing In re N.G.*, 577 S.W.3d 230, 238 (Tex. 2019). The Court then pointed out that termination of parental rights is not automatic simply because the Department proves a parent failed to complete one element of the service plan, citing to the permissive language (i.e., "The court *may* order termination of the parent-child relationship if the court finds by clear and convincing evidence . . . that the parent has . . . failed to comply . . .") in subsection (O). The Court recited that the trial court bears the ultimate responsibility for determining whether making findings under subsection (O) actually warrants termination of parental rights. The Court then stated, "Thus, if the noncompliance is trivial or immaterial in light of the plan's requirements overall, termination under (O) is not appropriate."

On appeal, Mother argued she substantially complied with the plan's requirements. The

Supreme Court then considered each relevant element of the service plan in turn.

The Department first argued that Mother failed to comply with the plan's requirement for individual counseling because Mother was "unsuccessfully discharged" from her sessions with Counselor Browne. The Court pointed out, however, that the "plan nowhere requires that Mother achieve any particular benchmark, such as participating in a specified number of individual sessions or passing a test of any sort." Instead, the plan merely stated Mother had been referred to begin services with Counselor Browne, and she would "undergo individual counseling in order to address her needs". The plan also described topics to be addressed, such as the reasons for removal and coping mechanisms, coping mechanisms for her mood changes and how to provide the children with a safe and stable environment, and to find a "healthier way[]" to raise the children and "work with their family structure."

The Supreme Court noted that it was undisputed Mother began sessions with Counselor Browne, she attended a number of sessions, and at least at one point, the Department considered her participation to be successful. Moreover, Mother attended additional counseling through Grupo Amor. The Supreme Court pointed out the Department did not provide evidence Mother failed to at least "address" the issues of concern. The Court accordingly held, "Because the plan contains no specific requirement that Mother attain a particular benchmark in her individual counseling services with Browne, the fact that she was discharged by him (apparently at the Department's prompting . . .) after a year of successful sessions is no evidence that she failed to comply with the plan's 'specifically established' requirements regarding individual counseling . . . [Termination under (O)] is not warranted when a parent participates as the plan requires and the Department waits until trial to reveal that it was measuring performance against a previously undisclosed requirement."

The Court then turned to the plan's requirement that Mother "attend, participate and successfully complete parenting classes," "submit to substance abuse classes at S.C.A.N.," and provide the Department with certificates of completion. After Mother told the Department she could not contact S.C.A.N. during the pandemic, the Department agreed Mother could take this course through her counseling with Browne. It is undisputed she did so during her year of counseling with Browne and then continued when she started her counseling at Grupo Amor. However, Mother was to provide a certificate of completion for those classes. The Department argued Mother failed to complete this requirement before being discharged by Browne. Mother recounted that she completed the classes with Grupo Amor. The caseworker agreed Mother completed at least some classes at Grupo Amor, but as to the certificate, she testified only that she did not receive one. In its analysis, the Court stated that termination for failure to comply with court-ordered services requires a "nuanced assessment of the parent's conduct and progress toward plan completion in light of the totality of the plan's requirements and overall goal. In determining whether the Department has established grounds for termination under (O), the trial court should consider the nature and degree of the parent's alleged noncompliance and the

materiality of the disputed plan requirement in achieving the plan's stated goal." The Court concluded that even if the factfinder believed the evidence conclusively showed Mother's noncompliance with that element of the plan by clear and convincing evidence, the trial court is afforded discretion under (O) to determine whether the noncompliance was "too trivial to warrant judgment of termination". The Court held that failure to provide a certificate of completion was too trivial in light of the degree of compliance Mother demonstrated with respect to the material components of the service plan.

The Supreme Court rejected the Department's argument that courts across the state had ruled that complete compliance is the only way to avoid termination under (O), stating that the question in the cases cited by the Department was whether termination under (O) can be avoided merely by showing compliance with other requirements when the parent has failed to comply with one or more material requirements. The Court confirmed that a parent cannot overcome the complete failure to comply with a material requirement by arguing that performing other requirements constitutes substantial compliance with the plan overall, and that there were some requirements for which nothing but strict compliance would suffice. However, "other requirements—particularly those that are bureaucratic or technical—may be too trivial, in the larger context of the plan and the parent's overall performance, to have their breach give rise to termination." The Court went on to hold, "[w]here, as here, the plan requires a parent to attend classes with a specified service provider and the parent goes elsewhere (with the Department's approval), the parents' technical noncompliance with that requirement would not support termination under (O)."

The Court accordingly determined that the trial court and the court of appeals erroneously concluded that Mother's failure to strictly comply with all requirements of her service plan required termination of her parental rights." The Court stated that a proper application of (O) is "less mechanical. In evaluating whether termination is warranted, the trial court must ensure that any asserted noncompliance is of a requirement that is neither unwritten nor vague but rather 'specifically established' in a court-ordered plan. Additionally, to justify termination, the noncompliance must not be trivial or immaterial in light of the nature and degree of the parent's noncompliance and the totality of the plan's requirements." The Court reversed the judgment terminating Mother's parental rights pursuant to TFC § 161.001(b)(1)(O). *In re R.J.G., R.J.G., D.G.M.*, 681 S.W.3d 370 (Tex. 2023); *but see In re B.J.F.*, No. 01-23-00522-CV (Tex. App.—Houston [1st Dist.] Jan. 11, 2024, pet. denied) (mem. op.) (concluding the aspects of Mother's service plan with which she did not comply were not "trivial or immaterial" requirements for reunification and therefore sufficient to support termination under (O)).

2. No service plan in record

The trial court terminated Mother's parental rights based on TFC § 161.001(b)(1)(O). Mother appealed, arguing that the evidence was legally and factually insufficient to support the trial court's finding because there was neither an order nor a service plan in the record that "specifically established the actions necessary for [her] to

obtain the return of the children[ren].” Further, she argued that because there was no testimony as to the details of the service plan, the Department did not prove that she failed to comply with the service plan.

Mother’s service plan was neither filed nor introduced into evidence at the trial. The Department responded by contending that the terms of the service plan were established in a May 2023 permanency report under the heading “Services and Orders Needed.” However, the Court of Appeals ascertained that there was no indication in the report that the services and orders listed were included in Mother’s service plan and no trial testimony that the list was composed of Mother’s service plan. In addition, the Court found that there was no order establishing that Mother was ordered to obtain the services listed in the report or that the list in the report was approved as is required by a service plan.

The Court of Appeals sustained Mother’s challenge to the trial court’s subsection (O) finding. It concluded that because “the service plan was not filed in the trial court’s record and was not introduced into evidence at trial, the trial court could not have considered whether it was sufficiently specific for Mother to comply with it.” Accordingly, the Court held that it could not uphold the termination of Mother’s parental rights based on her alleged failure to comply with the service plan. Therefore, the trial court’s TFC § 161.001(b)(1)(O) finding was not supported by legally sufficient evidence. The Court of Appeals reversed the trial court’s order, in part, and rendered judgment vacating those portions of the trial court’s order relating to the termination of Mother’s parental rights. *In re L.D.W., K.A.W., and K.L.C.*, No. 06-23-00097-CV (Tex. App.—Texarkana April 19, 2024, no pet.) (mem. op.).

C. TFC § 161.001(b)(1)(P)

On appeal, Father challenged the legal and factual sufficiency of the evidence supporting the trial court's order terminating his rights pursuant to TFC § 161.001(b)(1)(P). Under subsection (P), a trial court may terminate the parent-child relationship if it finds by clear and convincing evidence that the parent has “used a controlled substance ... in a manner that endangered the health or safety of the child, and: (i) failed to complete a court-ordered substance abuse treatment program; or (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance.”

The record reflected that Father had a long and recent history of substance abuse, which included cocaine and methamphetamine abuse. Based on this history, Father was ordered to complete a substance abuse program, and he complied. Father tested positive twice, however, after completing the program, including at least once for methamphetamine. He claimed he failed a drug test after drinking and “black[s] out sometimes” when he drinks. After his failed drug tests, the caseworker told Father to engage in a substance abuse treatment program to address his relapse and helped him schedule appointments, but Father failed to appear for three separate drug assessments.

On appeal, Father did not dispute the evidence of his relapse or missed assessments. Instead, he argued that the evidence was insufficient to support termination pursuant to subsection (P) because the child was placed in foster care

when he failed his drug tests, and therefore, he could not have endangered the child. The Court of Appeals rejected this argument, explaining that even though the child was not physically present during Father's drug use, the trial court could have considered Father's conduct in determining whether his substance abuse after completing court-ordered treatment endangered the child's health or safety. The trial court could have considered Father's criminal history and his pending criminal charge for possession of a controlled substance. Accordingly, the Court determined the evidence was legally and factually sufficient to support termination of Father's parental rights under subsection (P). *In re G.T.*, No. 04-23-00821-CV (Tex. App—San Antonio Feb. 7, 2024, no pet.) (mem. op.).

D. TFC § 161.002

"The rights of an alleged father may be terminated if ... after being served with citation, he does not respond by timely filing an admission of paternity or a counterclaim for paternity under Chapter 160." TFC § 161.002(b)(1).

The Appellate Court recognized that "Section 161.002 prescribes the filing of an admission of paternity, but there is no reference in the statute to any formalities that must be observed when 'filing' such an admission."

Here, out of four children involved in the case, Father was the presumed father of all but Child3. On appeal, Father challenged the sufficiency of the trial court's finding that he "did not respond by timely filing an admission of paternity or by filing a counterclaim for paternity or for voluntary paternity to be adjudicated" as Child's father pursuant to TFC § 161.002(b)(1). Father argued that he admitted paternity of Child3 when he appeared at the trial, opposed termination of his parental rights, and asked for more time to complete services "and take custody of my kids." He further argued that nothing was offered to suggest he was not including Child3 in his request for custody.

In this case, Father appeared at the trial, opposed the termination of his parental rights, and asked for more time to complete his services "and take custody of my kids." However, the Court of Appeals discerned that while "informal methods have been accepted, not all conduct or actions of an alleged parent during the pendency of a parental rights case qualifies as an informal admission of paternity." In rejecting Father's argument, the Appellate Court considered that Father had four children who were the subject of the trial, and he was the acknowledged father of three of those children. Accordingly, it concluded that Father's reference to "my kids" was too vague to constitute an unequivocal admission that he was the father to Child3. Affirmed. *In re N.L.S., E.D.S., A.C.S., and I.S.*, No. 04-23-00251-CV (Tex. App.—San Antonio July 5, 2023, no pet.) (mem. op.).

IV. BEST INTEREST

A. GENERAL

1. Old convictions

In affirming the trial court's best interest finding and the "stability" factor under *Holley*, the Court of Appeals considered Mother's admitted criminal history and "being in and out of jail all her life" as evidence of her ongoing instability.

The Court noted Mother's "long history of periodic incarceration both before and after her children were born", including a jail stay in 2003, an eleven-month jail stay in 2015, another in 2019 for what Mother described as "robbery charges", and a January 2020 jail stay for a "warrant violation", for which she was released less than a month before she gave birth to one of the children. In addition, Mother had three convictions for prostitution between 2008 and 2009 and was jailed during the pendency of the Department case between November 2021 and October 2022.

The Court pointed out that Mother did not "use her time out of jail to establish the stabilizing environment her children needed", as she failed to establish stable housing, employment, or plans for the children. Accordingly, the Court of Appeals held that "Mother's instability weighed in favor of the trial court's findings that termination was in the children's best interest." *In re A.B. and A.R.*, No. 02-23-00124-CV (Tex. App.—Fort Worth Aug. 31, 2023, pet. denied) (mem. op.).

2. *Indifference to child's medical needs*

Following termination of her parental rights, Mother appealed the sufficiency of the evidence supporting the trial court's best interest finding. The Court of Appeals was particularly concerned about Mother's "wholesale denial" of her substance abuse issues and their impact on the child. The Court of Appeals pointed out Mother was "indifferent" when asked about the child's positive drug test, and she proceeded to tell the trial court the child had no developmental delays. However, the evidence plainly showed that the child had "endured several months of therapy to hold his head up, stand, and walk." The child was also born with gastrointestinal problems, an extra digit on each hand, and torticollis. Mother's continued denial of these extreme medical needs and indifference to her potential role in the child's developmental delays weighed in favor of the trial court's best interest determination. Affirmed. *In re Z.S.*, No. 11-23-00184-CV (Tex. App.—Eastland Dec. 21, 2023, no pet.) (mem. op.); *See also In re E.J.M.*, 673 S.W.3d 310 (Tex. App.—San Antonio 2023, no pet.); *In re H.J.E.Z.*, No. 14-23-00946-CV (Tex. App.—Houston [14th Dist.] Apr. 11, 2024, pet. denied).

3. *Father never cared for child without supervision*

Following a jury trial, Father's parental rights were terminated pursuant to subsections (D), (E), and (P) and a finding that termination is in the child's best interest. In considering the evidence supporting the best interest determination, the Appellate Court pointed out, *inter alia*¸ that although the supervised visits between Father and the child had gone smoothly, "the record is also clear that Mother was responsible for Daughter prior to removal, and that other than in supervised settings, Father has not cared for Daughter by himself." *A.B. v. Tex. Dep't of Family and Protective Servs.*, No. 03-22-00759-CV (Tex. App.—Austin May 4, 2023, no pet.) (mem. op.).

4. *Drug-related conduct*

In affirming its best interest finding, the Court of Appeals considered the "dispositive issue" of "whether [M]other's substance-abuse problem [was] severe enough for a factfinder to reasonably find by clear and convincing

evidence that the termination of her parental rights [was] in her child's best interest."

The Court noted "several circumstances from which the trial court may have reasonably found the mother's drug use was particularly serious", including evidence that: (1) Mother used cocaine while pregnant with the child; (2) Mother's drug use involved "hard drugs – cocaine and methamphetamine in particular – rather than less destructive ones"; (3) Mother repeatedly relapsed in her drug use despite attending substance abuse rehabilitation multiple times between 2016 and 2022; (4) "[M]other repeatedly tested positive for cocaine, and later methamphetamine, during the pendency of this case even though her drug use was what led to the removal of the child from her custody and despite being told that his return to her custody was contingent upon her being drug-free"; (5) Mother continued to use illegal drugs despite being charged with possession of cocaine in 2018; and (6) Mother repeatedly lied about her ongoing drug use "in an effort minimize it or conceal it."

The Court acknowledged that the evidence concerning issues other than Mother's drug use was largely not adverse to her, such as evidence that she visited and was bonded with the child, was employed, and had stable housing. The Court concluded, "[u]ltimately, however, this undisputed evidence does not tilt the balance in [M]other's favor because the evidence as a whole shows that her sincere desire to be the parent of her very young child is compromised by her illegal drug use." The Court further concluded that a factfinder "could reasonably find on this record that the mother lacks the willingness or ability to overcome her illegal drug problem and therefore also lacks the ability to realize her sincere aspiration to be an effective parent to her child." *In re E.D.*, 682 S.W.3d 595 (Tex. App.—Houston [1st Dist.] 2023, pet. denied).

B. DESIRES

1. "Unbonding"

The Department became involved after Mother tested positive for methamphetamine during a prenatal visit. While Mother and the child tested negative at the child's birth, the Department was aware of Mother's significant history of drug use. Mother agreed to let the child live with Grandmother. Eight months later, Mother was ordered to complete services through the Department. Mother refused to participate in services for the duration of her year-long case. Mother indicated she wanted Grandmother to become the child's legal guardian; however, Grandmother's home study was denied. The child was subsequently removed.

During the conservatorship case, Mother's compliance with the visitation schedule was sporadic, and she sometimes appeared for visits after having used methamphetamine. Once visits were changed from in-person to virtual, Mother missed some visits and appeared under the influence during at least one visit.

In its analysis of the first *Holley* factor, i.e. the desires of the child, the Court of Appeals considered that, while there was no direct evidence of the two-year-old child's desires, the caseworker testified that although the child initially responded to the visits with Mother, "because the visits were so sporadic, the bond was slowly unbonding." The Court of Appeals affirmed the trial court's best interest finding.

In re J.S., 675 S.W.3d 120 (Tex. App.—Dallas 2023, no pet.).

C. PHYSICAL AND EMOTIONAL NEEDS/PHYSICAL AND EMOTIONAL DANGER

1. Department not required to show alternatives

The second and third *Holley* factors consider the emotional and physical needs of the child and the emotional and physical danger to the child, now and in the future. On appeal, Mother argued that her objective was to be awarded possessory conservatorship to allow her additional time to address her addiction. The Court of Appeals noted the record reflected that Mother continued to use illegal drugs after the child came into care and during the pendency of the case. Further, Mother disregarded the trial court's order that she not receive unsupervised visitation with the children and was charged with injury to a child concerning an older child during the trial proceedings. The Court concluded that "[a]lthough the right to parent is one of constitutional dimension, the Department is not required to show that other alternatives, short of termination, such as possessory conservatorship, were not available to protect the children." *In re A.M.*, No. 14-23-00415-CV (Tex. App—Houston [14th] Nov. 2, 2023, pet. denied) (mem. op.).

2. *No understanding of child's needs*

The Court of Appeals considered the child's significant medical needs under the second *Holley* factor, the emotional and physical needs of the child now and in the future. The child was born with a congenital heart defect and received a heart transplant at the age of four. As a result, she required medications to suppress her immune system because it would otherwise reject the donated organ. The child's caregiver and the caregiver's mother, characterized as Father's "godsister" and "godmother" respectively, received training for the child's medical needs. Because of his incarceration, Father had not received the same training and was unfamiliar with the child's medical team.

The evidence further showed that Father failed to comprehend the seriousness of the child's medical needs. In phone calls, Father pleaded with the caregiver's mother not to assist the Department in terminating his parental rights. Instead, Father preferred that the caregiver return the child to foster care so that he might be able to exercise his parental rights once he was released from prison. Yet, testimonial evidence from medical professionals established that should the child be in foster care—as Father desired—and need a new heart, she might not receive priority on the transplant list because of her unstable housing situation. The Court concluded that the trial court could have reasonably factored this consideration in its best interest finding. *In re K.M.H.*, No. 14-23-00377-CV (Tex. App—Houston [14th] Oct. 12, 2023, pet. denied) (mem. op.)..

D. PARENTING ABILITIES

1. Late placement suggestion

In its best interest analysis, the Court of Appeals considered the parenting ability of Father, who appealed the judgment terminating his parental rights to the children. The Department's home studies indicated

placement with Father's relatives was not possible. At trial, Father testified that the children could be placed with an out-of-state cousin, who, according to Father, said she would take care of the children. However, the Court noted that Father provided the cousin's name "just a few weeks before trial," preventing adequate time for an ICPC-approved home study. Considering, in part, that the trial court expressed concern that Father knew about the potential for his cousin to take the children but did not give the Department sufficient time to investigate, the Court of Appeals concluded this evidence was relevant to the parental-abilities factor and supported the trial court's best interest finding. Affirmed. *In re J.W. and V.W.*, No. 05-23-01049-CV (Tex. App.—Dallas March 29, 2024, no pet. h.) (mem. op.).

2. No remorse

In affirming the trial court's best interest finding and the "parenting abilities" factor under *Holley*, the Court of Appeals considered that although Mother and Father completed parenting classes, refrained from criminal activity, participated in drug and alcohol testing, a psychosocial assessment, and individual counseling, interacted appropriately during visitation with the children, and "presumably demonstrated an increased understanding of appropriate parenting techniques", there was "also evidence that [the child] identified [Mother and Father] as persons who physically abused her and that neither [Mother nor Father] demonstrated any remorse for their actions or otherwise acknowledged the outcries made by [the children]."

The Court further noted the contrasting evidence that the children had shown significant improvement in the care of their foster parents, to whom they were bonded, and their foster parents facilitated visits between the siblings. The trial court's best interest determination was therefore affirmed.
In re A.C. and S.M. No. 14-23-00577-CV (Tex. App.—Houston [14th Dist.] Feb. 6, 2024, no pet.) (mem. op.); *In re A.R. and N.R.*, No. 14-23-0062-CV (Tex. App.—Houston [14th] Feb. 6, 2024, no pet.) (mem. op.).

3. Lack of evidence

The children were removed following allegations of neglectful supervision, domestic violence, and substance abuse. At trial, the court cited its recollection of prior hearings and information not presented at trial and subsequently terminated Mother's parental rights, finding that termination was in the children's best interest. However, the Court of Appeals stated that because the transcripts of those prior hearings were not introduced as evidence at trial, it was error for the trial court to consider such information. The Court stated that its review on appeal was similarly "limited to the testimony presented at trial and the application of that evidence to the *Holley* factors".

The Court of Appeals found much of the evidence presented at trial to be conclusory. Under the fourth *Holley* factor, the parental abilities of the individuals seeking custody, the Court noted that, aside from concerns for Mother's financial and housing stability, the Department presented no evidence "negating Mother's ability to parent her children." The Court noted that Mother completed parenting classes and attended all her virtual visits

despite living in Florida. Mother's current caseworker confirmed her visits were appropriate, the Department had no concerns for her interactions with the children, and the children were very bonded to her. While Mother's previous caseworker testified Mother had to be redirected during visits because she would make "broken promises to the children or she would ask questions over and over again about their health until she got the answer that she wants," the caseworker failed to elaborate. The Court pointed out: "The Department failed to develop this testimony and no further evidence was presented on Mother's actions during the visits." The evidence further reflected that Mother maintained contact with her caseworker, asked how the children were doing and for updates regarding their health following medical and dental appointments, and received updates on the children's therapies.

Citing the "minimal and conclusory evidence regarding Mother's inability to parent," the Court of Appeals held that the evidence adduced at trial weighed against termination under this and seven other *Holley* factors. The Court reversed the trial court's termination of Mother's parental rights and rendered judgment denying termination. *In re E.J.C., M.J.J.C., V.P., A.N.B., and D.A.P.*, No. 04-23-00519-CV (Tex. App.—San Antonio Nov. 8, 2023, no pet.) (mem. op.).

E. Acts or Omissions

1. Transient lifestyle

In analyzing the eighth *Holley* factor, acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one, the Court of Appeals noted that Mother's continued methamphetamine use and dangerous romantic relationship constituted "acts", and going off her medications and failing to complete her court-ordered service plan served as "omissions", which indicated that the parent-child relationship was improper. In addition, the Court considered evidence that Mother showed little concern for the child, had very little contact with him prior to his removal, used drugs while the child was in her care, and repeatedly chose her paramour over the child. The Court pointed out that, months after the child's removal, "knowing that he had been placed in foster care and understanding that she needed to work on and complete her services to be reunited with him, Mother moved to Washington with [her paramour]." The Court stated: "In essence, Mother chose a transient life with her abusive paramour over trying to provide a stable home for her very young son." Based on this evidence, the Court concluded that the "Acts or Omissions" *Holley* factor weighed in favor of termination. *In re G.M.*, No. 02-23-00061-CV (Tex. App.—Fort Worth June 29, 2023, pet. denied) (mem. op.).

V. Conservatorship

A. Lack of Evidence Against Mother

In the final order in a Department-initiated suit, the trial court appointed the child's aunt as the child's sole managing conservator and gave Mother no possessory rights or access. On appeal, Mother argued that the trial court abused its discretion by not appointing her the child's conservator or granting her access to him. The Department argued that the trial court's ruling was necessary to protect the child's emotional and physical well-being.

TFC § 161.205 provides that if termination is not ordered, the court shall render any order in the best interest of the child. To overcome the parental presumption under TFC § 153.131, a nonparent must prove by a preponderance of the evidence that appointment of a parent would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development. Citing Family Code sections 153.131(a) and 161.205, the Court of Appeals noted that a nonparent must first overcome the presumption that the child's best interest is served by appointing a parent as managing conservator before the trial court may even consider the issue of possessory conservatorship and access. Thus, because the parental presumption was implicated, the Department was required to present rebuttal evidence of Mother's current *specific actions or omissions* that demonstrated an award of custody to her would result in physical or emotional harm to the child.

It was undisputed that Mother succeeded in her service plan during the Department case, and the Department agreed that Mother had made one of the most notable improvements the agency had seen. At trial, Mother testified she had been clean and sober for ten months, was enrolled in a job training program that would result in a part-time custodial job, and had rented a two-bedroom home in the hope that the child would be returned to her. However, the Department did not pursue termination of Mother's parental rights and instead asked that Aunt be awarded permanent conservatorship because the child was not emotionally ready to return to Mother.

The evidence reflected that Mother had struggled with drug addiction in the past, and she and the child had been homeless as a result. Fourteen years old at trial, the child resented Mother because of his past neglect and refused to see her. The child also expressed suicidal feelings concerning reunification. Two specialists who worked with the child and aunt testified about his negative feelings toward Mother, and the child's counselor specifically recommended that visitation with Mother not occur unless recommended later by a therapist. She also opined that the child's depressive feelings may increase if he was returned to Mother.

The Court of Appeals understood that the trial court gave considerable weight to the child's desire to stay with his aunt, given his strong feelings against reunification and the concern that he would harm himself if he was returned to Mother. The Court concluded, however, that the final order "failed to account for the dearth of evidence 'of specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child'" as was required to support this order. (internal cites omitted). Concerning Mother, the Department only presented evidence that she completed her service plan, showed significant progress, and had a safe and appropriate home for the child. Therefore, there was no evidence to show Mother was presently unsuitable to be awarded custody. Accordingly, the Court of Appeals reversed the decision of the trial court. *In re R.P.*, No. 04-23-00828-CV, __ S.W.3d __ (Tex. App—San Antonio 2024, no pet.).

B. THREAT OF DEPORTATION

Father challenged the appointment of the Department as the children's permanent

managing conservator and limitation of his possession and access to the children.

There was evidence at trial that Father loved the children and completed all tasks on his service plan. Department representatives testified he had addressed the concerns and reasons for removal, and he would be able to meet the children's physical and emotional needs. Moreover, the fourteen-year-old child testified he loved Father and wanted to live with him.

The Court of Appeals also noted evidence weighing against Father, including an outstanding indictment for domestic violence against Mother and testimony that the oldest child was "parentified" when he came into care because he was the one who took care of his two younger brothers. The jury also heard evidence that because Father is a citizen of Germany, a conviction of domestic violence could result in deportation back to Germany. The oldest child expressed concern as to what would happen if Father was incarcerated or deported. The child stated he wished to remain in his current foster home until Father's criminal charges were resolved, as he did not want to end up in a different placement. The evidence showed the other children harbored the same fear about ending up in a different placement and wished to remain in their current placement until Father's criminal charges were resolved. Accordingly, the Court of Appeals found that the jury could have rationally concluded that appointing Father as the children's sole managing conservator while the criminal charges were still pending would significantly impair the children's physical health or emotional development. *In re A.G.B., G.A.B., and J.M.B.*, No. 04-22-00879-CV (Tex. App.—San Antonio June 14, 2023, pet. denied) (mem. op.).

VI. POST-TRIAL – DE NOVO

A. SPECIFICITY OF MOTION

The Family Code permits a judge to refer suits affecting the parent-child relationship to an associate judge for a ruling. TFC § 201.005(a). Upon ruling on the matter, the associate judge must issue a proposed order containing the associate judge's findings, conclusions, or recommendations. Any party may then request a *de novo* hearing before the referring court by filing a written request within three days of receiving notice of the associate judge's order or judgment. TFC § 201.015(a). Pursuant to TFC § 201.015(b), the request "must specify the issues that will be presented to the referring court." The *de novo* hearing is mandatory if properly requested.

Following termination of her parental rights, Mother appealed, arguing, *inter alia*, that the trial court abused its discretion by denying her request for a *de novo* hearing. The trial court denied Mother's timely filed *de novo* request after it agreed with the Department's contention that Mother's *de novo* request was insufficiently specific pursuant to TFC 201.015(b).

The Court of Appeals reversed the trial court's decision. Mother's timely-filed *de novo* request stated: "Pursuant to Texas Family Code § 201.015, Respondent [Mother] requests a hearing before the Referring Court on the following issues: A. Associate Judge's ruling to terminate [Mother's] parental rights." The Appellate Court pointed out that a judgment terminating parental rights requires

findings on one or more predicate grounds as well as a best interest finding. The Court held "Mother's request for review of the associate judge's ruling terminating the parental rights necessarily challenged the sufficiency of the evidence challenging those findings."

The Court rejected the Department's argument that to hold Mother's request sufficiently specific would "invalidate" the specificity requirement. The Court cited to *In re A.L.M.-F.*, 593 S.W.3d, 277 to point out that the Supreme Court had already explained a *de novo* hearing is not a trial *de novo*, which is a "new and independent action". Rather, a *de novo* hearing is "mandatory when invoked but expedited in time frame and limited in scope." "The purpose of the specificity requirement is to preclude the party seeking review from raising other issues during the hearing." The Court accordingly held, "Mother's request, which implicitly requested *de novo* review of the sufficiency of the findings of two statutory predicates and best interest, fulfills this purpose." The Court determined that a *de novo* hearing in this context "remains an extension of the original trial on the merits", as the referring court is permitted to consult the transcript from the trial before the associate judge, and furthermore, the associate judge's order remains in full force and effect pending the hearing before the referring judge. The Court, therefore, determined Mother's *de novo* request was sufficiently specific, and the trial court abused its discretion in ruling otherwise. *D.V. v. Tex. Dep't of Family and Protective Servs.*, No. 03-23-00098-CV (Tex. App.—Austin July 13, 2023, no pet.) (mem. op.).

B. NEW EVIDENCE

Mother's parental rights were terminated in final hearing before an associate judge. Mother timely requested a de novo hearing of the associate judge's findings. On the date of the scheduled *de novo* hearing, the referring court briefly questioned the attorneys and a witness regarding the evidence they intended to present and whether any of the evidence was new. The court then stated that a de novo hearing "is for newly discovered evidence" and noted that Mother had the right to directly appeal. The court also stated,"if something had cropped up in between that you had no idea about and couldn't have put on had you wanted to, that's the purpose of de novo." For these reasons, the court refused to conduct Mother's requested de novo hearing and affirmed the associate judge's ruling.

On appeal, Mother argued the trial court erred by denying her request for a de novo hearing. The Court of Appeals agreed with Mother, pointing out that the record reflects Mother timely requested a de novo hearing before the referring court, and the record did not reflect an objection from any party that Mother's written request was defective or noncompliant with the relevant statutes, including Family Code sec. 201.015(b), which requires that a request for a de novo hearing "specify the issues that will be presented to the referring court."

The Court went on to say that "[w]e do not find any legal authority supporting the trial court's imposition of a rule that a party must present 'newly discovered evidence' before the court will conduct the requested de novo hearing." The Court, therefore, concluded that the trial court abused its discretion in refusing to hold a de novo hearing pursuant to Mother's request

and that such error was harmful "because it likely resulted in the rendition of an improper judgment, and further denied Mother the ability to present her case to the referring court." *In re A.C., R.G., P.G., and B.G.*, No. 12-23-00232-CV (Tex. App.—Tyler Nov. 15, 2023, no pet.).

VII. ICWA

A. ICWA vs TFC Findings

The Department sought termination of Father's parental rights. Pursuant to the Indian Child Welfare Act ("ICWA"), the Miami Tribe of Oklahoma intervened. Following a bench trial, Father's parental rights were terminated. Father appealed, arguing, *inter alia*, that the trial court erred when it made findings under both TFC § 161.001 and 25 U.S.C. 1912(f). Pursuant to 25 U.S.C. 1912(f), "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." In *In re W.D.H.*, 43 S.W.3d 30, 33-38 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), the Fourteenth Court of Appeals ruled that ICWA preempts the Family Code, and trial courts should not make both TFC § 161.001 and ICWA findings. Instead, the trial court should make only the required findings under 25 U.S.C. 1912(f).

The Court of Appeals noted a split in Texas Courts of Appeals as to whether a trial court should make both TFC and ICWA findings and acknowledged the Fourteenth Court of Appeals was alone in ruling the trial court should not make TFC findings. Despite that, the Court found it was bound by *W.D.H.* under the doctrine of horizontal *stare decisis*, and therefore, it was error for the trial court to make both TFC and ICWA findings.

The Court next turned to whether the trial court's error was reversible. The Court recited Tex. R. App. P. 44.1(a), which provides that a judgment may not be reversed on appeal based on an error of law unless the court of appeals determines the complained-of error (1) probably caused the rendition of an improper judgment or (2) probably prevented the appellant from properly presenting the case to the court of appeals. The Court stated Father failed to challenge the sufficiency of the evidence to support the trial court's TFC findings and did not explain how he was harmed by those findings. The Court of Appeals accordingly determined there was no reversible error because the error (1) did not probably cause the rendition of an improper judgment and (2) did not probably prevent Father from properly presenting the case to the court.

Father's issue was overruled, and the judgment ultimately affirmed. *In re C.J.B. and T.A.B.*, 681 S.W.3d 778 (Tex. App.—Houston [14th Dist., Sept. 14, 2023, no pet. h.) (reh'g denied); *but see In re R.H.*, No. 02-23-00371-CV (Tex. App.—Fort Worth 2023, no pet. h.).

VIII. Abuse of Discretion in Orders Against Department

A. Sanctions

The Department sought mandamus review of a December 2023 and a January 2024 order

through which the trial court, *inter alia*, imposed sanctions on the Department. The subject child of the underlying suit is J.D., a seventeen-year-old who has been in the Department's permanent managing conservatorship since June 29, 2021, and for whom the trial court has held periodic permanency review hearings pursuant to Family Code § 263.501, which requires the trial court to conduct permanency review hearings for children in the Department's permanent managing conservatorship at least once every six months.

The challenged provision in the December order stated the following:

> A one hundred dollar ($100) fine will be ordered for each day of school that [J.D.] misses without a showing that the inability to take [J.D.] to school was unavoidable.

The challenged provision in the January order stated the following:

> 2.4 The Department will set up a savings account for the child by January 1, 2024 at 5:00 p.m. The attorneys representing the child will verify the account is set up. Beginning January 11, 2024, the Department will deposit $500.000 (Five Hundred Dollars) into the child's savings account every 24 hours that the child is not in [a] licensed placement.

The Court of Appeals pointed out that the record did not reflect that the trial court ordered the economic consequences contained in the orders based on a rule or statute authorizing sanctions. The Court therefore determined, "the only basis to order these consequences would be the trial court's inherent authority to sanction." The Court noted recent authority from the Texas Supreme Court, which reaffirmed that "sanctions issued pursuant to a court's inherent powers are permissible … to deter, alleviate, and counteract *bad-faith abuse of the judicial process*." (internal citations omitted). The Court further noted that "the inherent authority to sanction 'is not boundless' and 'is limited by due process.'" (internal citation omitted).

The Court noted that the December sanctions would be invoked if the Department's inaction was "avoidable", and the January sanctions would be invoked as a result of the trial court's finding that the lack of a licensed placement for the child is a result of the Department's "neglect." The Court concluded, however, that findings that inaction was "avoidable" or resulting from "neglect" do not demonstrate bad faith. The Court went on to say that "these provisions are not authorized under the court's inherent power to sanction because they purport to address the Department's performance as managing conservator rather than any "bad-faith abuse of the judicial process." Accordingly, the Court held that the sanctions provisions in both the December and January orders were void. *In re Tex. Dep't of Family and Protective Services*, No. 04-24-00016-CV, __ S.W.3d __ (Tex. App.—San Antonio Apr. 24, 2024, orig. proceeding).

B. KINSHIP FUNDS

In this case, the Department is the permanent managing conservator of four children. In September 2020, the Department placed the children with their maternal great-aunt, who

has been their caregiver ever since. In January 2023, a permanency hearing was held in the underlying case before an associate judge, who ordered the Department to do the following:

"[T]he Department must continue paying kinship funds to the children's placement and those payments will continue to new relative placements if the children are moved to a new family placement. Payments are to continue until licensing of the placement occurs. The Department is to take funds from other sources if federal kinship funds are exhausted."

The Department sought *de novo* review before the referring court, and a hearing was conducted on March 10, 2023. The referring court signed an order on March 27, 2023, which included the following provisions: (1) the Department is ordered to continue to pay the equivalent of monthly "kinship funds" to any and all caregivers/placements for the four children in its care so that the Department shall meet the needs of all four children in its care as required by law; (2) any and all funds in arrears that have not been paid to the caregiver shall be tendered no later than March 15, 2023 at 5:00 p.m.; (3) the Court finds the equivalent of "kinship funds" to be a monthly financial assistance of $1520.00.

The Department filed an original petition for writ of mandamus arguing that the trial court's order violated the Separation of Powers Clause because the order usurps the Department's authority to set and regulate the relative caregiver program. It also argued that it could not legally comply with the trial court's order.

40 TEX. ADMIN CODE §§ 700.1007(b),(b-1), and (c) state that a caregiver's monthly cash payment is distributed in the same manner as foster care reimbursement payments, and the payment to the caregiver may not exceed fifty percent of the Department's daily Basic Foster Care Rate. Further, TFC § 264.755 limits the monthly cash payments to twelve months; however, the Department can extend the payments for an additional six months for "good cause." Hence, the Court of Appeals determined that the legislature has authorized the Department to determine the monthly cash assistance a caregiver receives, but it limited the monthly payments to twelve months unless the Department determines good cause exists.

Here, the children's maternal great-aunt became the children's caregiver in September 2020 and began receiving $1,500 a month in cash assistance under the program in November 2020. Her final payment under the program was in November 2021, but the Department granted a six-month extension after finding good cause. The maternal great-aunt received additional assistance under the program, including a computer and printer to assist her in completing a foster home screening. The Department also referred the maternal great-aunt to four licensed child-placing agencies to complete the verification process. Two agencies could not assist the maternal great-aunt because of staffing issues, and the remaining two agencies could not complete the foster home screening because the maternal great-aunt refused to agree to background checks on individuals who frequented her home.

The Appellate Court concluded that the maternal great-aunt was no longer eligible to receive assistance, and her home was not a verified foster home when the trial court ordered the Department to pay her $1,520 per month and to pay arrears to cover the period

after the maternal great-aunt became statutorily ineligible to receive cash payments under the program. Assuming the maternal great-aunt was still eligible, the Appellate Court noted that "the legislature has vested the authority to set the amount for the monthly cash payment in the Department."

Accordingly, the Court of Appeals held that "the trial court lacked the authority—constitutional, statutory, inherent, or otherwise—to (1) order the Department to continue to pay the equivalent of monthly kinship funds beyond the statutory timeframe, (2) order the Department to pay kinship arrears for any funds that are beyond the statutory timeframe, or (3) make any findings regarding the monthly financial equivalent of kinship fund assistance." *In re Texas Dep't of Fam. and Protective Servs.*, 679 S.W.3d 266 (Tex. App.—San Antonio 2023, orig. proceeding).

IX. DEPARTMENT'S CONSENT TO ADOPT

Mother gave birth to the child in August 2020 when she was incarcerated, and the Department removed him two days later. Mother had three other children (Siblings) already in the Department's custody due to her drug use. Siblings were originally placed with the Kents, and then moved to the Hamiltons, where they were when the child was born. Mother wanted the child placed with the Kents, who the Department considered fictive kin due to their "supportive relationship and mentoring role" with Mother. The Department agreed to the placement. The Hamiltons adopted Siblings when the child was four months old. In April 2021, when the child was eight months old, the Hamiltons intervened in the Department suit and filed a petition for adoption of the child in a separate proceeding.

In June 2022, the Department moved to dismiss the Hamiltons as intervening parties in the Department suit and to dismiss their adoption petition on the basis that the Department had not consented to their adoption of the child. A child's managing conservator must give written consent for an adoption if the person seeking to adopt is not the child's managing conservator. TFC § 162.010. However, the managing conservator's consent is not required if the trial court finds that consent is being refused without good cause. *Id*. In the Hamiltons' intervention petition, they asked the trial court to waive the consent requirement and filed a motion to waive the consent requirement in the adoption proceeding.

The trial court held a hearing in August 2022. The Hamiltons called four witnesses—the Department caseworker, the director of a child placing agency, a psychologist, and Mrs. Hamilton. Most of the testimony concerned (1) the Hamiltons' parenting ability and readiness to adopt, (2) federal and state policy regarding sibling placements in foster care, and (3) the fact that the child was not placed with the Hamiltons despite Siblings being in their care. Testimonial highlights included the psychologist's testimony that a child attaches at a young age, but the child would probably still do well with the Hamiltons. He had not observed the child with the Kents. The Department caseworker testified the child was bonded and doing well with the Kents and it would be traumatic and detrimental to move him, and her testimony was not contradicted. Mrs. Hamilton admitted that she did not mention to the caseworker that they wanted the child until he was over five months old. The Department caseworker, who had only been on

the case for four months, stated she could not recall any documentation of efforts to place the siblings together. She also testified that the Kents, as fictive kin and the family that Mother requested for placement, were also a prioritized placement for the child.

The trial court signed an order which, in relevant part, (1) found that the Hamiltons had not proven that the Department lacked good cause to withhold consent, and (2) denied the Hamiltons' motion to waive the consent.

In multiple issues on appeal, the Hamiltons challenged the trial court's decision concerning the consent issue—e.g., the trial court erred by denying their request to waive the Department's consent and that they established as a matter of law that the Department was without good cause to refuse consent to their adoption of the child. The Court of Appeals noted that as the party seeking waiver of the consent requirement, the Hamiltons had the burden of proving the Department's lack of good cause. The only factual basis on which the Hamiltons argued a lack of good cause was the fact that they had adopted the child's siblings, asserting that federal and state law and Department policy all prioritize placing a child with the child's siblings when possible.

The Court of Appeals reviewed the federal and state law and Department policy upon which the Hamiltons relied. Included among that authority was the Adoption Assistance and Child Welfare Act, which "provid[es] for the appropriation of money to be paid by the federal government to the states for certain children who are placed outside their homes, in foster homes or elsewhere." As amended by Fostering Connections to Success and Increasing Adoptions Act, one section provides that to be eligible for payments, states must have a plan that "provides that reasonable efforts shall be made" to place siblings in the same placement unless the state "documents that such a joint placement would be contrary to the safety or well-being of any of the siblings." 42 U.S.C.A. § 671(a)(31). For siblings not placed together, the plan must "provide for frequent visitation or other ongoing interaction". However, the statute does not compel states to place siblings together and "[s]tates receive funding if they comply on a systemwide basis—even if not in some individual case." (Internal citations omitted).

The Court noted that, like federal law, Texas law prioritizes placing siblings together. TFC § 262.114(d) provides that the Department "shall give [placement] preference to persons in the following order: (1) a person related to the child by blood, marriage, or adoption; (2) a person with whom the child has a long-standing and significant relationship; (3) a foster home; and (4) a general residential operation." TFC § 262.114; *see also* TFC § 263.008(b)(6) (foster child bill of rights: providing that it is the state's policy that a child in foster care be informed of the child's rights relating to placement with the child's siblings and contact with the child's family members). The Court also noted the Department's policy handbook provides that a family who has adopted a child's siblings must be considered for placement of the child and given preference. Based on this authority, the Court of Appeals concluded that federal and state law, as well as Department guidance, reflect a policy that the Department should make efforts to keep siblings together when possible. However, the Court reasoned that while federal

legislation encourages—and Department policy requires—the Department to make reasonable efforts to place siblings together, none of the cited laws or policies require keeping siblings together in all circumstances.

The Court of Appeals pointed out that the dispute in this case was not over whether the Department was fair to the Hamiltons in making its placement decision. Rather, the issue was whether the Hamiltons proved that the Department did not have good cause to refuse consent of their adoption. The Court noted that the Hamiltons introduced no evidence that the child was not already doing well with the Kents, and the evidence presented showed the child was bonded to the Kents and doing well in their care. Accordingly, "[o]n this record, even if the Department should have but did not offer the Hamiltons placement of [the child], and even if they would have accepted placement if offered, their having adopted the siblings is not enough to show as a matter of law that the Department had no good-faith reason to believe that refusing consent was in [the child's] best interest."

Therefore, the Court affirmed the trial court's order. The Court declined to hold, however, that the Department always has good cause to deny adoption of a young child when the child has been in someone else's care for most of their life. Instead, the Court recognized that a child's attachment to their current placement and maintaining stability are matters that the Department may consider in deciding whether to consent to adoption. *In re J.W.*, Nos. 02-23-00047-CV, 02-23-00048-CV (Tex. App.—Fort Worth Jan. 11, 2024, no pet.) (mem. op.).