

# Child Welfare Legislative and Case Law Update

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KELLIE PRICE, SPECIAL PROJECTS ATTORNEY, DFPS

REBECCA SAFAVI, APPELLATE ATTORNEY, DFPS

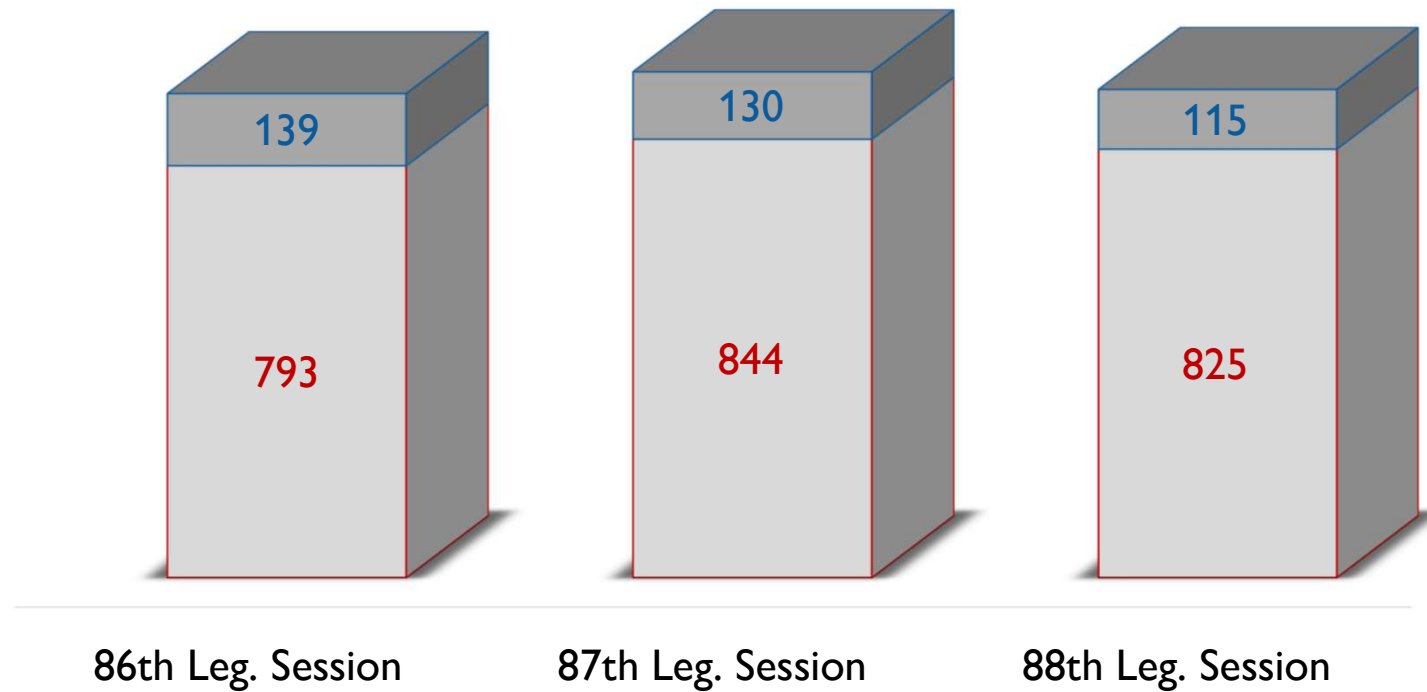
JANUARY 12, 2024



**Selected Bills**  
**88th Regular Legislative**  
**Session Update**

## Bills Tracked by DFPS

■ Bills Tracked ■ Bills Passed into Law



# HB 730

## Rep. Frank

### Family Code § 261.303(b), (c), Amended; (f), (g), (h), New Language

- The court may order admission by DFPS to the home, school, or other place where the child may be for an interview, examination, and investigation if the court has good cause to believe the child is in imminent danger of aggravated circumstances or has probable cause to believe the admission is necessary to protect the child from abuse or neglect.
- To order the release of records by the parent or to order a medical, psychological, or psychiatric examination of the child, the court must have probable cause to believe the order is necessary to protect the child from abuse or neglect.

# HB 730

## Family Code § 261.303(b), (c), Amended; (f), (g), (h), New Language, cont.

- A hearing for an order may not be ex parte unless the court has probable cause to believe there is no time consistent with the health and safety of the child for a full hearing.
- The order must include the court's findings regarding the sufficiency of the evidence, and the court must provide a copy of the order to a party upon request.

*Applies only to an order rendered on or after the effective date.*

# HB 730

## Family Code § 261.307, Amended

- Requires a DFPS investigator upon first contact to provide a parent or alleged perpetrator with a written summary that must now include an explanation that any statement or admission made by the person to anyone may be used against the person in a criminal case, as a basis to remove the child, or as a basis to terminate the person's relationship with the child.

# HB 730

The summary must also include known allegations under investigation and verbally notify the person of their right to:

- not speak with any agent of DFPS without legal counsel present;
- receive assistance from an attorney;
- have a court-appointed attorney if the person is indigent, they are the parent of the child, and DFPS seeks a court order under Family Code Chapter 262 or 264;
- record any interaction or interview subject to the understanding that the recording may be disclosed to DFPS, law enforcement, or another party under a court order;
- refuse to allow the investigator to enter the home or interview the children without a court order;
- have legal counsel present before allowing the investigator to enter the home or interview the child;
- withhold consent to the release of any medical or mental health records;
- withhold consent to any medical or psychological examination of the child; refuse to submit to a drug test; and
- consult with legal counsel prior to agreeing to any proposed voluntary safety plan.

# HB 730

## Family Code § 261.307, Amended, cont.

- DFPS must document that verbal notice was provided to the person and DFPS must adopt a form to document that the person received the written and oral summary and provide a signed copy to the person's attorney, if represented.
- If the person does not receive the verbal notification and written summary, any information obtained from the person, and any other information that would not have been discovered without that information, is not admissible for use against the person in any civil proceeding.

*Applies only to the investigation of a report of abuse of neglect that is made on or after the effective date.*



# HB 730

## Family Code § 262.206, Amended

- Ex parte hearings under Family Code Chapter 262 must be recorded by either audio or video or a court reporter transcription. The court must provide a copy of the recording to a party upon request, and DFPS must provide notice of the hearing to the parent's attorney, if represented.

*Applies only to an ex parte hearing held on or after the effective date.*

# HB 730

## Family Code § 264.203(e), (n), Amended

- Courts may not issue a temporary restraining order under Family Code § 105.001 that places the child outside the child's home or in the conservatorship of DFPS.

# HB 730

## Family Code § 264.902 (a), Amended; (e)-(j), New Language

- Before a parent may enter into a Parental Child Safety Placement (PCSP), DFPS must notify the parent of their right to counsel and give them a reasonable amount of time to consult an attorney. PCSPs automatically terminate after 30 days and DFPS may enter into not more than two 30-day extensions.
- Upon entering a PCSP agreement, DFPS must inform the parent of their right to refuse to enter into the agreement and to be represented by an attorney or a court-appointed attorney, if indigent and if DFPS seeks a subsequent court order.
- DFPS may not place a child in a PCSP for longer than 90 days unless both the parent and their attorney sign the agreement or a court renders an order under Family Code Chapter 262. Written notice of certain provisions must be placed in the PCSP.

*Applies only to a PCSP executed on or after the effective date.*

# HB 793 Rep. Noble

## Effective Date September 1, 2023

### Family Code § 263.1021, New Language

- Allows a parent to obtain services in their service plan by a qualified or licensed provider selected by the parent. The services must be designed to achieve the goals of the service plan and may be provided remotely. The provider must certify whether the parent has satisfactorily completed the service. DFPS must reimburse the service provider at the same rate as DFPS' contracted providers in the region.

*Applies only to a suit filed by DFPS on or after the effective date.*



# HB 968

## Rep. Gates

### Family Code § 262.101, Amended

- Adds to the requirements of emergency removal affidavits that the child could not be protected by a kick-out order of the perpetrator or by placement with a relative or designated caregiver under a PCSP because it was refused, was not possible, or that placement would pose an immediate danger to the child.
- The affidavit must describe all reasonable efforts that were made to prevent or eliminate the need for the removal of the child.

# HB 968

## Family Code § 262.1016, New Language

- Authorizes an agreed order to remove a perpetrator. The order may not be used against an alleged perpetrator as an admission of child abuse or neglect and is enforceable civilly or criminally but is not enforceable as a contract.
- The person affected by an agreed order may request that the court terminate the order and the court must terminate the agreed order upon a finding that the order is no longer needed and that terminating the order is in the best interest of the child.

# HB 1087

## Rep. Hull

### Family Code § 161.001(f), (g), New Language

- Prevents the court from ordering termination of parental rights in a suit by DFPS unless the court finds by clear and convincing evidence that DFPS made reasonable efforts to return the child to the parent before commencement of a trial on the merits, and despite those reasonable efforts, a continuing danger remains in the home that prevents the return of the child to the parent.
- The court does not have to make a finding regarding reasonable efforts if a service plan for the parent was waived due to aggravated circumstances.
- The court must include in a separate section of its order written findings describing with specificity the reasonable efforts DFPS made to return the child to the child's home.

# HB 1087

## Family Code § 262.201(g-2), New Language

- Requires adversary hearing orders to describe with specificity in a separate section all reasonable efforts made to prevent or eliminate removal or return the child home and to place the child with a non-custodial parent.

*Applies only to a Suit Affecting the Parent-Child Relationship filed on or after the effective date.*



# HB 2850 Rep. Smith

## Effective Date September 1, 2023

- Amends the Family Code by creating Title 6, entitled “Civil Procedure,” and adding Chapter 301, Discovery Procedures for Civil Actions.

### **Family Code § 301.001, New Language**

- Clarifies that Family Code Chapter 301 applies only to civil actions brought under the Texas Family Code.

### **Family Code § 301.002, New Language**

- Notwithstanding Government Code § 22.004, Family Code Chapter 301 may not be modified or repealed by a rule adopted by the Supreme Court of Texas.



# HB 5010 Rep. Schofield

## Effective Date September 1, 2023

### Government Code § 81.073(a)(1)(B), (a)(2)(B), New Language

- Requires grievances against an attorney to be classified as a complaint if submitted by the following persons in the proceeding that is the subject of the grievance:
  - a family member of a ward in a guardianship proceeding;
  - a family member of a decedent in a probate matter;
  - a trustee of a trust or an executor of an estate;
  - the judge, prosecuting attorney, defense attorney, court staff member, or juror in the legal matter;
  - a trustee in a bankruptcy; or
  - any other person who has a cognizable individual interest in or connection to the legal matter or facts alleged in the grievance.



# SB 718 Sen. Paxton

## Effective Date September 1, 2023

### Family Code § 157.168, Amended

- Requires a court to order additional periods of possession and access when court-ordered access has been denied due to a DFPS investigation that did not result in a finding of Reason to Believe (RTB), unless the party denying access shows good cause as to why more access should not be granted. Does not create a cause of action against DFPS or waive sovereign immunity.

*Applies only to a Suit Affecting the Parent-Child Relationship pending before a trial court on or after the effective date.*



# SB 1930

## Sen. Kolkhorst

### Family Code § 107.004(f), New Language

- If the child is considered for placement in an RTC, QRTP, or similar setting, an attorney ad litem must review any available information regarding the child's needs including the Child and Adolescent Needs and Strengths (CANS) assessment, psychological evaluations, discharge notes, incident reports and counseling notes and determine if the placement is appropriate to meet the child's needs.
- The attorney ad litem must meet with the child to elicit the child's opinion regarding the child's current or proposed placement.
- The attorney ad litem must advise the child regarding DFPS' request for placement and the likelihood of the request being granted.
- The attorney ad litem must advocate to the court for the child's specific desires regarding the requested placement.
- The attorney ad litem may request a placement conference and participate in any placement conferences conducted by DFPS regarding an RTC, QRTP, or similar placement.

# SB 1930

## **Family Code § 107.0131(a), Amended**

- An attorney appointed to represent a parent may participate in a case staffing related to a placement in an RTC or QRTP.

## **Family Code § 263.001(a)(3-c), New Language**

- Defines an RTC per Human Resources Code Chapter 42.

# SB 1930

## Family Code § 264.018(a)(5), Amended

- Adds placement of a child in an RTC or placement conferences to determine the appropriateness of an RTC placement to the definition of a significant event requiring notice to the parent, attorney ad litem, and guardian ad litem.

# Questions about Legislative Updates?



# Case Law Update



# Appointment of Counsel

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TFC 107.013

# Lawyer to Client: “Don’t do that”



# TFC 107.013 – Mandatory Appointment of Attorney ad Litem for Parent

(a) In a suit filed by a governmental entity under Subtitle E in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of:

- (1) an **indigent parent** of the child who **responds in opposition** to the termination or appointment;
- (2) a parent served by citation by publication;
- (3) an alleged father who failed to register with the registry under Chapter 160 and whose identity or location is unknown; and
- (4) an alleged father who registered with the paternity registry under Chapter 160, but the petitioner's attempt to personally serve citation at the address provided to the registry and at any other address for the alleged father known by the petitioner has been unsuccessful.

(a-1) In a suit described by Subsection (a), if a parent is not represented by an attorney at the parent's first appearance in court, the **court shall inform the parent** of:

- (1) the right to be represented by an attorney; and
- (2) if the parent is indigent and appears in opposition to the suit, the right to an attorney ad litem appointed by the court.



## TFC 107.013, cont.

(d) The court **shall require a parent who claims indigence under Subsection (a) to file an affidavit of indigence** in accordance with Rule 145(b) of the Texas Rules of Civil Procedure **before the court may conduct a hearing to determine the parent's indigence under this section.** The court may consider additional evidence at that hearing, including evidence relating to the parent's income, source of income, assets, property ownership, benefits paid in accordance with a federal, state, or local public assistance program, outstanding obligations, and necessary expenses and the number and ages of the parent's dependents. If the court determines the parent is indigent, the court shall appoint an attorney ad litem to represent the parent.

(e) A parent who the court has determined is indigent for purposes of this section is **presumed to remain indigent for the duration of the suit and any subsequent appeal unless the court,** after reconsideration on the motion of the parent, the attorney ad litem for the parent, or the attorney representing the governmental entity, **determines that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances.**



## *In re B.C.*, 592 S.W.3d 133 (Tex. 2019)

- Filing affidavit of indigence is a necessary prerequisite to determination that parent is indigent in termination of parental rights case

BUT

- trial court's failure to admonish unrepresented Mother pursuant to (a-1) in this case of her right to court-appointed attorney at *every* permanency hearing was reversible error.



*In re I.C.*, No. 02-21-00045-CV (Tex. App.—Fort Worth Aug. 19, 2021, no pet.) (mem. op.)

- TFC 107.016(2)(C) – appointed attorney continues to serve until the attorney is relieved of duty after a finding of good cause.
- TFC 107.013(e) – parent remains indigent for duration of the suit AND the appeal, unless upon reconsideration, the court finds the parent no longer indigent due to a material and substantial change in the parent’s financial circumstances.



*In re I.C.*, No. 02-21-00045-CV (Tex. App.—Fort Worth Aug. 19, 2021, no pet.) (mem. op.), cont.

- Trial court erred in dismissing Mother's court appointed attorney
- Order dismissing the attorney was deficient
- Record did not support a finding of material and substantial change
- Evidence did not support the conclusion that Mother was no longer indigent



# Additional Considerations

- TFC 107.0132 / 107.0131

- Rights and duties of appointed attorney for alleged father are different than for an attorney appointed to a parent.
- *In re W.H.*, No. 14-23-00287-CV (Tex. App.—Houston [14th Dist.] Oct. 19, 2023, no pet.) (mem. op.) – Father denied due process where about nine months elapsed from time he was named in petition until he was appointed counsel.
- “Once the Department named Father as an alleged father in the amended petition (filed March 25, 2022), the trial court should have appointed an ad litem attorney to represent Father.”
- “the trial court, understanding the important legislative safeguards and the interests at work in a parental termination case, should have appointed counsel for Father at some point after Father was named in the Third Amended Petition and prior to the April 2022 permanency hearing.”





# Additional Considerations, cont.

- TFC 161.003(b)

- o Immediately after the filing of a suit under this section, the court shall appoint an attorney ad litem to represent the interests of the parent against whom the suit is brought.



# Additional Considerations, cont.

- TFC 107.016 – Continued representation; Duration of appointment
  - o In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested:
    - o **(2) an attorney appointed under this subchapter to serve as an attorney ad litem for a parent or an alleged father continues to serve in that capacity until the earliest of:**
      - o (A) the date the suit affecting the parent-child relationship is dismissed;
      - o **(B) the date all appeals in relation to any final order terminating parental rights are exhausted or waived; or**
      - o (C) the date the attorney is relieved of the attorney's duties or replaced by another attorney after a finding of good cause is rendered by the court on the record.
- *In re P.M.*, 520 S.W.3d 24 (Tex. 2016)



# Dismissal Deadline

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TFC 263.401

TFC 263.403

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**CONFUSION**

# TFC 263.401 – Dismissal and Extensions

(a) Unless the court has commenced the trial on the merits or granted an extension under Subsection (b) or (b-1), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court's jurisdiction over the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child is terminated and the suit is automatically dismissed without a court order. Not later than the 60th day before the day the suit is automatically dismissed, the court shall notify all parties to the suit of the automatic dismissal date.

(b) Unless the court has commenced the trial on the merits, the court may not retain the suit on the court's docket after the time described by Subsection (a) unless the court finds that **extraordinary circumstances** necessitate the child remaining in the temporary managing conservatorship of the department **and that continuing the appointment of the department as temporary managing conservator is in the best interest of the child**. If the court makes those findings, the court may retain the suit on the court's docket for a period **not to exceed 180 days** after the time described by Subsection (a). If the court retains the suit on the court's docket, **the court shall render an order** in which the court:

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



## TFC 263.401, cont.

(b-2) When considering under Subsection (b) whether to find that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department for a case in which **the court orders a parent to complete a substance abuse treatment program, the court shall consider whether the parent made a good faith effort to successfully complete the program.**

(b-3) A court shall find under Subsection (b) that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department if:

- (1) a parent of a child has made a good faith effort to successfully complete the service plan but needs additional time; and
- (2) on completion of the service plan the court intends to order the child returned to the parent.

(c) If the court grants an extension under Subsection (b) or (b-1) but does not commence the trial on the merits before the dismissal date, the court's jurisdiction over the suit is terminated and the suit is automatically dismissed without a court order. The court may not grant an additional extension that extends the suit beyond the required date for dismissal under Subsection (b) or (b-1), as applicable.



# TFC 263.401(b-2)

*In re C.P.C. and D.L.C.*, No. 05-21-00764-CV (Tex. App.—Dallas Jan. 25, 2022, no pet.) (mem. op.)

- Mother requested continuance and extension, claiming she was almost done with her court-ordered services
- Evidence at trial showed . . .
- Trial court ruled Mother was not even remotely close to done with services, denies Mother's motion
- Mother appeals, alleging abuse of discretion under (b-2)
  - Mother argued that because the evidence showed she made a good faith effort to complete the program, the trial court was required to find extraordinary circumstances and grant the extension
- Court of Appeals disagrees, stating the statute provides it is a consideration, not that if the good faith effort exists the trial court is required to grant the extension.
  - “Nothing in the record suggests the trial court did not appropriately consider mother's participation in her substance abuse treatment program. On the contrary, the trial court specifically referenced Mother's attendance in her treatment counseling sessions and weighed it alongside evidence showing that Mother made little or no effort to complete other aspects of her service plan.”
  - Adds that the evidence didn't even support Mother's contention she made a good faith effort at all



# TFC 263.403 – Monitored Return

(a) **Notwithstanding Section 263.401**, the court may retain jurisdiction and not dismiss the suit or render a final order as required by that section if the court renders a temporary order that:

- (1) finds that retaining jurisdiction under this section is in the best interest of the child;
- (2) orders the department to:
  - (A) return the child to the child's parent; or
  - (B) transition the child, according to a schedule determined by the department or court, from substitute care to the parent while the parent completes the remaining requirements imposed under a service plan and specified in the temporary order that are necessary for the child's return;
- (3) orders the department to continue to serve as temporary managing conservator of the child; and
- (4) orders the department to monitor the child's placement to ensure that the child is in a safe environment.





## TFC 263.403, cont.

**(a-1) Unless the court has granted an extension under Section 263.401(b), the department or the parent may request the court to retain jurisdiction for an additional six months as necessary for a parent to complete the remaining requirements under a service plan in a transition monitored return under Subsection (a)(2)(B).**

(b) If the court renders an order under this section, the court shall:

- (1) include in the order specific findings regarding the grounds for the order; and
- (2) schedule a new date, not later than the 180th day after the date the temporary order is rendered, for dismissal of the suit unless a trial on the merits has commenced.



## TFC 263.403, cont.

(c) If before the dismissal of the suit or the commencement of the trial on the merits a child placed with a parent under this section must be moved from that home by the department or the court **renders a temporary order terminating the transition order issued under Subsection (a)(2)(B), the court shall, at the time of the move or order, schedule a new date for dismissal of the suit. The new dismissal date may not be later than the original dismissal date established under Section 263.401 or the 180th day after the date the child is moved** or the order is rendered under this subsection, whichever date is later.

(d) If the court renders an order under this section, the court must include in the order specific findings regarding the grounds for the order.



# How do TFC 263.401 and TFC 263.403 work together?

- “Section 263.403 allows the trial court to retain jurisdiction and enter an order for the monitored return of the child beyond the provisions of section 263.401.”

- *In re K.R.*, No. 07-20-00149-CV (Tex. App.—Amarillo Oct. 23, 2020, pet. denied) (mem. op.)
  - Suit started March 7, 2018, making the dismissal date March 11, 2019
  - March 5, 2019 – dismissal date extended to September 7, 2019 under TFC 263.403(b)
  - December 2, 2019 – child returned to the Department because Mother no longer able to provide the child a safe environment
    - New dismissal date set for May 30, 2020 pursuant to TFC 263.403(c)
  - Final hearing commenced May 28, 2020; Mother’s parental rights terminated



# Extra Thoughts

- Do you have to use TFC 263.403 if you want to do a monitored return?
- What if you use TFC 263.403 before doing a TFC 263.401 extension?



# De Novo Hearing

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TFC 201.015

# TFC 201.015

(a) A party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request **not later than the third working day** after the date the party **receives notice** of:

(1) **the substance of the associate judge's report** as provided by Section 201.011; or

(2) the rendering of the temporary order, if the request concerns a temporary order rendered by an associate judge under Section 201.007(a)(14)(C).

(b) A request for a de novo hearing under this section **must specify the issues that will be presented to the referring court**.

(c) In the de novo hearing before the referring court, the parties may present witnesses on the issues specified in the request for hearing. The referring court may also consider the record from the hearing before the associate judge, including the charge to and verdict returned by a jury.

(f) The referring court, after notice to the parties, shall hold a de novo hearing not later than the 30th day after the date on which the initial request for a de novo hearing was filed with the clerk of the referring court.

(i) A party may not demand a second jury in a de novo hearing before the referring court if the associate judge's proposed order or judgment resulted from a jury trial.



# Highlights to Remember...

TFC 201.015(a)(1) – notice of substance of the order may be as simple as an oral statement in open court.

- *In re B.C. and A.B.*, No. 07-19-00290-CV (Tex. App.—Amarillo Sept. 26, 2019) – email
- What doesn't work – a simple docket notation with no indication the substance of the order was announced in court.

TFC 201.015(b) – specify the issues

- *D.V. v. Tex. Dep't of Family & Protective Servs.*, No. 03-23-00098-CV (Tex. App.—Austin July 13, 2023, no pet.) (mem. op.)
  - Purpose of (b) is to prevent raising issues not specifically raised in the motion
  - Mother's de novo request was sufficiently specific where it simply requested de novo review on the “associate judge's ruling to terminate [Mother's] parental rights”



# Notice of Appeal

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TFC 263.405

TRAP 26.1



# TFC and TRAP

- TFC 263.405 – appeal of a final order in a termination case is an accelerated appeal
- TRAP 26.1(b) – in an accelerated appeal, the notice of appeal must be filed within **20 days** after the judgment or order is signed



# Note!

- Filing a motion for new trial or other post-judgment motions does NOT extend the deadline for filing a notice of appeal
  - o Filing a notice of appeal does not mean you cannot also file a motion for new trial, however -
- Don't forget our lesson from earlier: TFC 107.016 – you're on the hook for representation until you're let off
- Consider filing the notice of appeal even if you're asking the trial court to appoint a different attorney for the appeal



# TFC 161.001(b)(1)(O)

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IN RE R.J.G., R.J.G., AND D.G.M., NO.22-0451 (TEX. 2023)

# December 15, 2023 Decision on (O) Ground

- Department sought termination solely on Tex. Fam. Code Section 161.001(b)(1)(O)
- Mother conceded she did not “comply in the precise way the Department hoped she would” but argued she “complied with the plan’s terms.”
- Mother completed a long list of services
- Caseworker testified she failed to comply in the way the Department wanted
- Trial court concluded it could not consider “substantial compliance” and strict compliance was required



# Supreme Court of Texas rejects “strict compliance”

- (O) requires a parent fail to comply with “specifically established” court-ordered service plan
- Even if it is specifically established in a written plan, “that requirement may be so trivial and immaterial, considering the totality of what the plan requires, that the parent’s noncompliance does not justify termination . . . The trial court should consider whether the nature and degree of the asserted noncompliance justifies termination under the totality of the circumstances.”



# Supreme Court of Texas rejects “strict compliance,” cont.

- Mother made sustained efforts to complete the plan and to demonstrate her desire to parent, but caseworker testified...

Q: Would it be fair to say she has complied; she just hasn't complied when the State needed her to comply or in the way she was ordered to comply? Is that a fair statement?

A: Yes.

- Supreme Court of Texas reasoned that based on the permissive language of 161.001(b)(1)(O), “if the noncompliance is trivial or immaterial in light of the plan’s requirements overall, termination under (O) is not appropriate.” “We granted review in this case to clarify that strict compliance with every detail of a service plan is not always required to avoid termination under (O).”



# Supreme Court of Texas rejects “strict compliance,” cont.

- Mother failed to provide a physical completion certificate:
  - o “the particular act of noncompliance in question—the failure of Mother to provide the Department a certificate demonstrating what the caseworker concedes she knew—is too trivial and immaterial, in light of the degree of Mother’s compliance with the plan’s material requirements, to support termination under (O).”
- Requirements that are bureaucratic or technical may be too trivial, so strict compliance is not required.



me doing legal research to find support but ending up back at the same case I first found



Questions?



# Contact information

Kellie Price – Special Projects Attorney

[kellie.price@dfps.Texas.gov](mailto:kellie.price@dfps.Texas.gov)

Rebecca Safavi – DFPS Appellate Unit

[rebecca.safavi@dfps.texas.gov](mailto:rebecca.safavi@dfps.texas.gov)

