Recent (and some not so recent) Appellate Issues: A Cautionary Tale

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GOAL OF PAPER AND PRESENTATION

Serving in the Department's appellate unit provides us with the unique opportunity to handle the Department's appellate issues on a statewide level. This, of course, means that we consult on a variety of trial and appellate issues and matters faced by attorneys across the state. In preparing this paper and presentation, we have endeavored to select and cover troublesome issues that Department attorneys commonly encounter, as well as some "hot topics." Our hope is that at the end of our presentation you will:

1. understand and identify various issues and concerns in the prosecution of cases for DFPS through an analysis of case law; and
2. learn and develop strategies for avoiding and addressing such issues.

As always, we appreciate the opportunity to come before you.

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I. GETTING TO TRIAL: LEAVING THE STARTING BLOCKS WITHOUT TRIPPING.

A. Service

1. Service of Process Invalid

Mother's four children were removed, and the Department was named their temporary managing conservator. Several months later, the Department sought termination of mother's parental rights. After an unsuccessful attempt at personal service, the Department sought to serve mother by publication. The caseworker had communicated with mother by phone, but had no permanent address at which to serve her. Despite not having an address, the caseworker was able to notify mother of two court hearings which she attended. Mother had also visited the children a month prior to the trial at the Department's office. The caseworker checked IMPACT and numerous other diligent search websites for locating information on mother. The worker outlined these efforts in the requisite affidavit before citing mother by publication.

Mother did not appear at trial. The court heard evidence that the children were physically abused, the mother tested positive for methamphetamine during the birth of her youngest child, and the children had been living and were doing well in their adoptive home for six months. Mother's "publication attorney" stated that mother was served by publication and the publication was "ripe". The publication attorney never had contact with mother and learned for the first time at the final hearing that mother had visited the children at the Department's office. Mother filed a motion for new trial within two years of the judgment pursuant to TRCP 329(a)—(authorizing trial court to grant motion for new trial within two years of judgment if judgment rendered on service by publication and defendant did not appear in person or by attorney of her own selection). In her motion, mother claimed that citation by publication was obtained by fraud and was invalid because she was in contact with the caseworker and visited the children while Department was attempting to serve her. Mother also claimed that she informed the caseworker that her address was the same as her mother's address, which the caseworker already had. The caseworker admitted that she met mother in her office for a prescheduled meeting. The court denied mother's motion, and she appealed, claiming her due process rights had been violated.

On appeal, the Department argued that the six-month bar to collateral attack under TFC 161.211 precluded mother's collateral attack on the judgment. A divided court of appeals agreed, holding that TFC 161.211's six-month deadline was dispositive, because it clearly states that there can be no collateral or direct attack on a judgment of termination of parental rights, including a motion for new trial, more than 6 months after the termination order is signed. The appellate court also held that because mother had not raised her constitutional challenge at the trial court level, it was not preserved for appellate review.

The Supreme Court granted mother's petition for review. In discussing the requirements for service by publication in a parental-termination case, the Supreme Court noted that under TFC §161.107(b), "If a parent of a child has not been personally served in a suit in which the Department of Family and Protective Services seeks termination, the department must make a diligent effort to locate the parent." The Court wrote that, "A lack of diligence makes service by publication ineffective."

The Court elaborated that "diligence is measured not by the quantity of the search but by its quality." In analyzing the basis for citation by publication in this case, the Court held that, "Here, it was both possible and practicable to more adequately warn [mother] of the impending termination of her parental rights, and citation by publication was therefore constitutionally inadequate." The Court held that service on mother by publication deprived her of due process.

The Supreme Court next decided the question of whether the six-month bar under TFC §161.211 precluded mother's collateral attack given the constitutional infirmity of the citation by publication. The Court held that, "[TFC §161.211] cannot place a temporal limit on a challenge to a void judgment filed by a defendant who did not receive the type to notice to which she was constitutionally entitled. Despite the Legislature's intent to expedite termination proceedings, it cannot do so at the expense of a parent's constitutional right to notice."

The Court also found that while actual notice of the proceedings cannot substitute for proper service, a parent's right to challenge a termination must have bounds. The Court elaborated that "when a child's welfare hangs in the balance, the reliance interest created by a termination order need not yield to when a parent learns of the order and unreasonably fails to act." "If, after learning of the termination, a parent unreasonably stands mute, and granting of relief would impair another party's substantial reliance interest, the trial court has discretion to deny relief." The Supreme Court reversed the appeals court's judgment and remanded the case to the trial court with instructions that "[Mother] is entitled to a new trial unless [the trial court determines] she unreasonably delayed in seeking relief after learning of the judgment against her, and granting relief would impair another party's substantial reliance of the judgment." *In re E.R., J.B., E.G., and C.L.*, 385 S.W.3d 552 (Tex. 2012).

2. Citation by Publication: No Due Diligence

TFC § 161.208 requires the Department to show that it exercised diligence in locating a missing parent and a relative of that parent before it can be named as the permanent managing conservator of a child. On appeal, mother argued that the appellate record did not demonstrate the Department's due diligence "in its efforts to locate her." Citing *In re E.R., J.B., E.G., and C.L.*, 385 S.W.3d 552 (Tex. 2012), the appellate court reiterated: "A lack of diligence makes service by publication ineffective." The Department conceded there was no affidavit demonstrating the Department's due diligence in the record. Accordingly, mother's issue was sustained and the termination of her parental rights was reversed and remanded for a new trial. *In re A.M.C., J.M.C. III, C.D.C. and H.D.C.*, No. 09-12-00314-CV (Tex. App.—Beaumont Dec. 6, 2012, no pet.) (mem. op.).

3. Service by Posting Held Invalid

On June 21, 2011, the Department sought the removal of child from mother. The Department's petition asserted that the location of child's father was unknown and sought determination of parentage and termination. Pursuant to TFC § 102.010 and TRCP 109a, the trial court signed an order authorizing citation of father by posting a copy of the citation on the courthouse door. The appellate record did not contain a motion for substitute service on father or a return of service.

In July 2011, the trial court held an adversary hearing during which counsel for the Department indicated that the Department had recently learned that father had a different name than that identified in the original petition. The Department then completed a search of the bureau of vital statistics paternity registry and did not locate anyone claiming paternity of child.

During an August 2011 status conference, the Department caseworker indicated that she had learned from child's mother that father had been deported to Mexico and that the Department had contacted the Mexican Consulate in an effort to locate father. In December 2011, the caseworker reported that father had been located in Mexico and that his service plan had been sent to him through the Consulate. The caseworker related that father had been in contact with her and was "somewhat engaged" in his service plan as evidenced by his participation in therapy, his providing proof of housing and employment, and a negative drug screen. Father had not completed parenting classes and, due to his residency, had not visited with child.

In April 2012, the Department filed its final pretrial permanency plan and progress report identifying father as child's father and stating that father had been maintaining contact with the Department through the Consulate. At that time, father had continued engaging in therapy and had completed parenting classes and a domestic violence class. He had also submitted to a psychological evaluation which recommended further services which father had not completed at that time. The caseworker recommended termination based on father's "not favorable" psychological evaluation and his lack of bond with child due to his not having visited with child during the case.

On April 16, 2012, trial took place; neither father nor his ad litem attorney attended. During trial, a Department caseworker testified that search results from the paternity registry had been filed and that father had failed to register with the paternity registry. The caseworker said "yes" when asked if father constructively abandoned child and that termination was in child's best interest. The trial court signed an order of

termination erroneously stating that father appeared for trial and announced ready through his counsel of record. The trial court's order found that: (1) father was served with citation or waived service; (2) did not respond by filing an admission of paternity, a counterclaim for paternity, or a request for voluntary paternity to be adjudicated; and (3) constructively abandoned child.

On appeal, father argued that the termination order should be reversed because he was not properly served. The appellate court remarked that despite having learned father's correct name and location four months before trial, the Department "failed to serve him by any means, even though he had not waived service or appeared." In accordance with well-established precedent, the court found that service by publication on father using an incorrect name did not constitute valid service.

The Department argued on appeal that valid service was not material because the TFC authorizes termination of an alleged father in some circumstances without service of citation. The appellate court acknowledged that TFC §160.404 authorizes termination, without notice, of the parental rights of a father who did not timely file with the bureau of vital statistics and that TFC § 161.002(b)(2), read in conjunction with TFC § 161.002(c-1), authorizes the trial court to terminate an alleged father's rights without service of citation if: (1) the child was over one year of age when the petition was filed; (2) the father had not registered with the paternity registry; and (3) the father's identity and location are unknown. The appellate court held that because the Department was aware of father's location and identity, and was in contact with him for more than four months before trial, TFC 161.002(b)(2) did not apply and father's rights could not be terminated without valid service or waiver of service. The court also held that the evidence was factually insufficient to support termination under (N) and best interest and reversed the trial court's judgment, remanding the case for a new trial. *In re J.M.*, 387 S.W.3d 865 (Tex. App—San Antonio 2012, no pet.).

B. Removal

1. Risk of Harm Insufficient

Mother and father brought a mandamus proceeding to compel the return of their daughter after the trial court entered its adversary hearing order appointing the Department as the child's temporary managing conservator. In previous proceedings, mother's and father's parental rights had been terminated to other children. On the day of the subject child's birth, the Department removed her because of mother's and father's history.

The court analyzed section 262.201, noting that aggravated circumstances existed in the case because mother's and father's parental rights had been terminated as to other children. As such, the trial court was not required to consider whether the Department had exercised reasonable efforts to avoid the removal. The court further noted that a trial court has flexibility and discretion in determining what efforts were reasonable in preventing or eliminating the need for removal.

But the court granted mandamus, returning the child to mother and father. The court concluded that the trial court's finding that there was a danger to the physical health or safety of the child caused by the act of the parents was not supported by the record. The court noted that the events leading to termination of mother's and father's parental rights to their other children had occurred fourteen months before the subject child's birth. The court wrote: "[i]n the absence of any *current* conditions or actions that would constitute a danger to [the child's] health or safety, the trial court could not have reasonably based its findings on the prior terminations alone." The court noted that aside from a skin rash and a few skin pustules, the subject child was in good health. The fact that the child was delivered at home and had not been to the doctor in the five days since her birth had not posed any known danger. Additionally, the child was scheduled for a visit with the doctor a few days after her removal. The court concisely stated: "[though] from their past record as to their other children, [mother and father] may pose a risk to [the child], we hold that risk is not a sufficient statutory basis, and the proof in this case does not meet the high statutory requirements, to allow the Department to deny [mother and father] present possession of

[the child.]" *In re Cochran*, 151 S.W.3d 275 (Tex. App.—Texarkana 2004, orig. proceeding).

2. No Proof of Urgent Need for Protection

The Department investigator testified at the adversary hearing that the Department received a referral that mother was unwilling to take care of her child, the child constantly screams, and mother "acts" as if she is going to shake him. When the investigator visited the home, she found mother on the porch with her three roommates. At the investigator's request, mother showed her the bedroom where mother and the child slept. The investigator observed that the child's bed was a play pen with a "boppy" (a crescent shaped pillow used for breast feeding), had two blankets on either side, and a very large coat was hanging over the railing. The investigator was concerned that the child could be smothered by these things in the crib. It was also observed that there was a bottle that had very thick rice cereal in it that was grainy and building up on the sides. The investigator testified that it was very easy for a child to choke on the cereal, especially if the child was not supervised. Finally, the investigator related that she had been a conservatorship worker in a 2009 case with mother involving an older child and was concerned because some of the allegations in the current case mirrored those in the 2009 case. In the 2009 case, mother was diagnosed with bipolar disorder, had an inability to control her anger, and lacked parenting skills.

The Texarkana Court found that 262.201(b)(3) "affords the trial court discretion to determine what efforts are 'reasonable' to enable the child to return home. However, there was no evidence presented at trial that the Department undertook any efforts to return the child home. This requirement may be waived 'if the court finds that the parent has subjected the child to aggravated circumstances.'" The Texarkana Court further found that the record was devoid of any proof that there was an urgent need for protection that required immediate removal of the child. Finally, evidence regarding danger to the physical health or safety of the child was "virtually non-existent." The appeals court granted conditional mandamus, requiring the trial court to vacate its temporary orders. *In re Tonya Allen*, 359 S.W.3d 284 (Tex. App.—Texarkana 2012, orig. proceeding).

C. Appointment of Attorney for Parent

1. No Appointment: Case Reversed

On January 11, 2010, while mother was in jail, the Department filed a petition seeking the termination of mother's parental rights to daughter and son. Mother was still in jail at the time of the adversary hearing on January 25th, when she agreed to an order appointing the Department temporary managing conservator of son. Because mother had agreed to the temporary order, the trial court deferred a finding regarding the appointment of counsel. Mother was later released from jail and participated in review conferences from March 1, 2010 through October 4, 2010. After that, she stopped attending conferences or hearings. Through most of the case prior to the final hearing, the Department's stated goal was reunification. Mother was arrested again on March 9, 2011, released on May 2, 2011, and re-confined on May 25, 2011, after being adjudicated guilty and sentenced to serve six years in TDCJ.

At the time of the June 14, 2011 final hearing, mother was in jail, waiting to be transferred to prison. The only issue considered at the final hearing was mother's parental rights to son, because mother had earlier agreed that the Department should be named permanent managing conservator of daughter. Mother replied "yes" when asked if she was ready for trial. She confirmed that she agreed that the Department be permanent managing conservator of the daughter and that she understood that the trial would only concern son. The court made no further inquiries of mother. Mother participated in the trial, trying to object to some exhibits and conducting cross-examination. One exhibit introduced by the Department was a "Judgment Adjudicating Guilt" against mother. Attached to the judgment was a "Bill of Costs" from the district clerk, listing court-appointed attorney's fees of $1600.00. The court terminated mother's parental rights to son and appointed an attorney ad litem to represent mother on appeal.

On appeal, mother complained that the trial court erred in terminating her parental rights without appointing trial counsel under TFC 107.013(a)(1) (providing for the appointment of counsel to "an indigent parent . . . who responds in opposition to the termination"). The Amarillo Court of Appeals noted that the evidence at trial of the $1600 in attorney's fees in the criminal case led to a logical deduction that mother was found indigent for the purposes of the criminal case shortly before the final termination trial. It then framed the issue before it as: "[D]oes a trial court err in failing to appoint an attorney ad litem to represent a parent when the parent at issue has made no formal request?"

The Department argued on appeal that absent a formal request for counsel, the trial court had no duty to appoint counsel. It also argued that mother's failure to present an affidavit of indigency supported the trial court's actions. Mother argued that the trial court's failure to inquire whether she desired counsel was an error of constitutional magnitude.

The Amarillo Court of Appeals reasoned that requiring a formal request for counsel would mean that the trial court would not have a duty to inquire about mother's indigency status, even if she had filed a written answer to the suit. It distinguished the cases relied upon by the Department, and queried, "What is the duty of the trial court when the parent appears in person to contest the termination but does not affirmatively request appointment of counsel? Does the failure to file a written answer mean that the parent is not responding in opposition to the termination?"

The court of appeals rejected the Department's argument that mother "did not appear in opposition," noting that her responses on the day of trial—concurring that she had reached an agreement regarding daughter and that the issue remaining to be tried involved her son—made it "apparent" that she was responding in opposition to the termination. It held that no "magic words" were required to be "in opposition" to a request for termination, and it noted that the trial court was aware of the appointment of counsel issue as evidenced by the trial court's order deferring a finding regarding the appointment of counsel. The court of appeals commented that mother's position at trial had changed since the time of the adversary hearing, stating: "We see her position in opposition from both the lack of a voluntary relinquishment and [mother's] efforts on the day of the hearing."

The appellate court also rejected the Department's argument that mother's announcement of ready for trial, without making a request for counsel, meant there was no error in not appointing counsel. The appellate court held that such a contention placed an additional requirement on a parent that does not exist in TFC 107.013(a)—to both appear in opposition *and* to request an attorney.

The court of appeals noted that the record affirmatively undermined the Department's position because: (1) mother was brought to the courthouse from the jail for the hearing; (2) she had been adjudicated guilty and sentenced to six years in prison; (3) an exhibit introduced by the Department contained a bill of costs in the criminal case indicating that mother had an appointed attorney; and (4) when the children were removed, mother was receiving state benefits in the form of a Lone Star Card. The court of appeals specifically referenced the Department's petition, noting that it contained a request that the trial court inquire about the indigency of any parent who appeared in opposition to the termination without an attorney—which the appellate court remarked was "the exact scenario we find in this record."

The court of appeals finally rejected the Department's contention that mother's failure to request the appointment of counsel at or before the final hearing meant that she had voluntarily waived her right to appointed counsel. It noted that the record was devoid of any indication that mother knew of her right to claim indigency and request counsel. It also observed that in criminal cases, by analogy, a waiver of the right to counsel must be made voluntarily and intelligently and with knowledge of the dangers and disadvantages of proceeding to trial without counsel.

The court of appeals concluded: "In consideration of the recognized constitutional dimensions of the parent-child relationship, we see no reason why the trial court should not make an inquiry into whether [mother] desired to proceed without benefit of counsel." The appellate court sustained mother's issue and reversed and remanded the case for a new trial. *In re J.M.*, 361 S.W.3d 734 (Tex. App.—Amarillo 2012, no pet.); *but see In re A.M. and J.E.M.*, No. 13-11-00304-CV (Tex. App.—Corpus Christi Nov. 22, 2011, no pet.) (mem. op.) ("In a termination proceeding, a trial court has discretion not to appoint counsel until after a parent has requested appointment.").

2. Later Appointment Not Reversed

The Department filed an "Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship" on December 10, 2009. The adversary hearing was held on January 21, 2010. The temporary orders from that hearing indicated that mother appeared at the hearing and announced ready and that the trial court was "deferring its finding regarding an attorney ad litem for [mother] because she 'has not appeared in opposition to this suit or has not established indigency.'" The service plan dated February 16, 2010, indicated that the permanency goal for all of the children was "family reunification." The Department's permanency progress report filed September 23, 2010, changed the permanency goal to "termination of parental rights." The next permanency hearing was held October 8, 2010, and the court's docket sheet entry "reflects that the court noted that the Department's goal was 'now termination,' and that both parents were advised of their right to an attorney; the court appointed an attorney to represent [mother]." A new trial date was set for December 16, 2010, but mother's counsel requested a continuance, which was granted to February 3, 2011. After a bench trial, the court terminated mother's parental rights.

On appeal, mother argued that "the trial court should have appointed counsel to represent her soon after the Department filed its petition because it was obvious she was indigent and opposed the termination of her parental rights." She "contend[ed] the trial court had notice of her indigency as early as December 16, 2009 by virtue of the caseworker's affidavit attached to the Department's original petition, which stated she was currently receiving food stamps." She "also argue[d] her appearances at all of the hearings showed she was 'opposed to' any termination of her parental rights from the beginning of the proceedings; therefore, the trial court erred in not appointing her an attorney ad litem right away."

Although the appellate record did not include an affidavit of indigence filed by mother as required by TFC 107.013(d), the October 8th order appointing trial counsel for mother indicated that she had filed an affidavit of indigency. However, the record did not contain any instance in which mother "ever made an earlier request for appointment of an attorney, either orally or in writing, or filed an answer or testified in opposition to removal of the children prior to October 8, 2010."

The San Antonio Court of Appeals reiterated that "the complete failure to appoint counsel for an indigent parent is reversible error, but the trial court has discretion in the timing of appointment of counsel based on the open-ended language of section 107.013 and the omission of any set time-frame in the statute for appointment of counsel." The court then reasoned: "[Mother] neither appeared in opposition to removal of her children nor filed an affidavit of indigence as required by section 107.013 at any time prior to the appointment of counsel on October 8, 2010. Moreover, the Department's stated permanency goal for the children was family reunification until the September 23, 2010 progress report, when it was changed to parental termination; [mother] was appointed counsel at the next hearing held two weeks later. [Mother's] appointed counsel had four months to prepare for trial and [mother] does not assert that her counsel was unprepared or otherwise rendered ineffective assistance due to the timing of the appointment." The court held "the trial court did not abuse its discretion under TFC 107.013(a) by appointing an attorney ad litem for [mother] on October 8, 2010, ten months after the Department's petition was filed." *In re C.Y.S., et al.*, No. 04-11-00308-CV (Tex. App.—San Antonio Nov. 30, 2011, no pet.) (mem.

op.); *see also In re A.M. and J.E.M.*, No. 13-11-00304-CV (Tex. App.—Corpus Christi Nov. 22, 2011, no pet.) (mem. op.).

3. No Right to Appointed Counsel of Choice

Immediately before trial began, court-appointed counsel for father and mother informed the court that his clients wished for him to be discharged from representing them and desired that a specifically-named attorney be appointed in his place. The trial court noted that it did not have a motion to substitute before it and that the specifically-named attorney was not present in court. The trial court also commented on the fact that the mandatory dismissal date was in a few days. The trial court denied the request, the case proceeded to trial, and father's and mother's parental rights were terminated.

On appeal, father and mother complained that they were forced to go to trial "without counsel of their own choosing." The Austin Court of Appeals wrote that there were no cases dealing with this issue in the parental-rights context, but noted that the Texas Supreme Court has looked to well-established criminal jurisprudence as a guide when deciding questions that arise frequently in the criminal context, but only recently became part of parental-rights jurisprudence. The court of appeals stated that it is well-established that an indigent criminal defendant does not have a right to court-appointed counsel of his or her own choosing. The appellate court then rejected father's and mother's complaint, holding that "the conclusion that an indigent criminal defendant has no right to appointed counsel of his or her choosing applies equally in the parental-rights context." *Elder v. Tex. Dep't of Family and Protective Servs.*, No. 03-10-00876-CV (Tex. App.—Austin Sept. 20, 2011, no pet.) (mem. op.).

D. Standing

After mother's and father's parental rights had been terminated, the child's foster parents and paternal grandparents both filed separate petitions to adopt child. Foster parents filed a motion to dismiss grandparents' petition for lack of standing under TFC § 102.005. The trial court found that although grandparents had not established sufficient substantial past contact to bring their suit under 102.005(5), they still had standing to bring their suit under TFC § 102.006(c) and denied foster parent's motion.

On appeal, foster parents argued that standing to file a petition for adoption must be established pursuant to TFC 102.005 and that 102.006 does not confer standing in-and-of-itself, but merely establishes limitations on those who would otherwise qualify for standing under 102.005.

TFC 102.005 confers standing to bring an "original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption" by: (1) a stepparent of the child; (2) an adult who, as a result of a placement for adoption, has had actual possession and control of the child for any time during the 30-day period preceding the filing of the petition; (3) an adult who has had actual possession of the child for not less than two months during the three-month period preceding the filing of the petition; (4) an adult who had adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or (5) another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so. TFC § 102.006 "Limitations on Standing" provides, in relevant part, that if the parent-child relationship has been terminated, an original suit may not be filed by a family member of either terminated parent. The limitations of § 102.006 do not apply to a grandparent of the child if the grandparent files an original suit or suit for modification requesting managing conservatorship of the child not later than the 90th day after the date the parent-child relationship between the child and parent is terminated in suit brought by the Department.

The appellate court agreed with foster parents, writing that a review of the plain text of TFC § 102.005 and § 102.006 shows that "in order for a party to have standing to bring an original petition for adoption, the party must first meet the standing requirements of section 102.005. Section 102.006 does not confer standing, but instead limits which parties have standing to file a petition pursuant to section 102.005." The appellate court held that the trial court erred in finding that grandparents who did not meet the requirements of TFC 102.005 had standing to bring their petition under 102.006(c), reversed the trial

court's order, and rendered judgment that the grandparent's suit be dismissed for lack of jurisdiction. *In re J.C.*, No. 04-12-00116-CV, ___ S.W.3d ___, (Tex. App.—San Antonio 2012, no pet.).

II. IT'S TRIAL TIME: MISCELLANEOUS ISSUES TO DERAIL YOUR CASE.

A. ICWA

1. Failure to Follow ICWA: Case Reversed

Preservation of Error

Mother appealed a judgment terminating her parental rights to the children. Mother's four complaints all hinged on the issue of whether the Indian Child Welfare Act's protections should have been applied to the termination case. The appellate court found that the Department knew the children were possibly Indian children and the trial court had reason to believe the children were Indian children. The appellate court ultimately abated the appeal and remanded to the trial court so that proper notice could be sent to the proper individuals, and after proper notice, for a hearing to determine whether the children were Indian children as defined in the ICWA.

The Department contended that mother waived her issue in several ways. She did not object to the failure to apply the ICWA at the trial court, nor did she object to the charge as containing improper standards of review and incorrect questions regarding the findings necessary for termination of her parental rights. Mother also did not raise the trial court's failure to apply the ICWA in her statement of points of error on appeal in accordance with then relevant 263.405. The issue was whether the ICWA preempts state law in these regards. *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

Federal Preemption

Federal law preempts state law when: (1) Congress has expressly preempted state law; (2) Congress has installed a comprehensive regulatory scheme in the area, removing the entire field from the state realm; or (3) state law directly conflicts with the force or purpose of federal law. The appellate court considered the third prong, conflict preemption. Texas state rules require preservation of error by the complaining party at the trial court to raise an issue on appeal. At that time, section 263.405 required a statement of points by the parent for the appellate court to consider an issue in a termination case when the Department was involved. Section 1912 of the ICWA places the burden of determining the issue of whether the ICWA applies on the Department and the trial court, which is in conflict with the state rules regarding preservation of error by the parent. Additionally, section 1914 of the ICWA regarding post-judgment attacks on involuntary terminations for violations of the notice requirements in ICWA are in conflict with subsections 263.405(d) and (i) requirements of bringing complaints in a statement of points. The appellate court held that the provisions of the ICWA allowing post-judgment challenges to involuntary termination proceedings preempt Texas rules and statutes regarding preservation of error. Accordingly, the protections enumerated in the ICWA are mandatory as to the trial court and the Department, they preempt state law, and the failure to follow the ICWA may be raised for the first time on appeal. *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

ICWA Guidelines

The ICWA applies to all state child custody proceedings involving an Indian child when the court knows or has reason to know an Indian child is involved. An Indian child is defined by the ICWA as an "unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." The ICWA does not define what constitutes being a "member" or "being eligible for membership." Each tribe has its own criteria for determining tribe membership. The Bureau of Indian Affairs ("BIA") Guidelines for State Courts; Indian Child Custody Proceedings, provides: "Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences." The burden is placed on the trial court to seek verification of the child's status through either the BIA or the child's tribe. Circumstances under which a state court has reason to believe a child involved in a court proceeding is an Indian include when (i) any party to the case … informs the court that the child is an Indian child; or (ii) any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is

an Indian child. *See* BIA Guidelines for State Courts; Indian Child Custody Proceedings. It is the trial court's and the petitioner's burden to make inquiry sufficient to affirmatively determine whether the child is an Indian child. *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

Notice under the ICWA

It is the duty of the trial court and the Department to send notice in an involuntary proceeding "where the court knows or has reason to know that an Indian child is involved." The notice must be sent to the "appropriate Area Director" and the Secretary of the Interior. Upon receiving the notice, the Secretary of the Interior or his designee is obliged to make reasonable, documented efforts to locate and notify the tribe within fifteen days, or to notify the trial court how much time is needed to complete the search for the child's tribe. In this case, an attorney for the Department sent a notice under the ICWA and filed a copy with the trial court. The appellate court found that the trial court had reason to believe that the children were Indian children because the Department discovered information that the children's maternal grandmother was alleged to be a member of the Chippewa Indian Nation. Once the trial court had reason to believe that the children were Indian children, the notice provisions of the ICWA were triggered and became mandatory. The Department's notice did not contain all the required information. Left out of the notice were the child's birthplace; mother's maiden name and prior addresses; and mother's place of birth. No additional notice was sent regarding a different court date than the one listed, nor notification that the cause had been transferred prior to the date listed in the notice for the next hearing. It was undisputed that notice was not sent to any person at any time regarding one of the children. It was also undisputed that there was no compliance with the other requirements of the ICWA at the trial, such as the requirements of experts in Indian cultural issues or a finding beyond a reasonable doubt at the termination hearing 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 re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

The Remedy

A violation of the ICWA notice provisions may be a cause for invalidating the termination proceedings at some future point in time. The appellate court sustained mother's first issue, holding that the trial court erred in failing to properly notify the tribe as required by the ICWA. The court determined the proper remedy in this situation is to remand the case so that proper notice can be provided. The court conditionally affirmed the termination judgment in the event it was determined that the children were not Indian children. The trial court was required to ensure that proper notice that complied with the statutory notice requisites was provided. The trial court was required to conduct a hearing to determine whether the children were Indian children under the ICWA. If, after proper notice and a hearing, the trial court determined that the children were not Indian children, then the appellate court would issue a judgment affirming the trial court's termination judgment. If, after notice and hearing, the trial court determined that the children were Indian children, then the appellate court would issue a judgment reversing the trial court's termination judgment, requiring the trial court to conduct a new trial applying the ICWA. *In re J.J.C. and In re A.M.C.*, 302 S.W.3d 896 (Tex. App.–Waco 2009, no pet.).

2. What Constitutes Notice under ICWA?

Appellants argued that the trial court violated the verification and notice provision of the Indian Child Welfare Act (ICWA) in failing to conduct an inquiry as to the subject children's possible Indian heritage following paternal grandmother's testimony that one of the children is "half Indian" because grandmother is "half Black Foot, and [child's] mom [is] half Cheyenne." Grandmother also claimed the child would be eligible for federal grants for college tuition because of her "Indian blood." Appellants argued on appeal that grandmother's testimony put the court on notice of possible ICWA applicability and asked that the case be remanded to the trial court for proper notice and verification and so that a hearing could be conducted to determine whether the children in this case were Indian children as defined under ICWA.

The appellate court rejected appellants' arguments, writing "[w]e disagree that the case should be remanded and abated, however, because we do not believe

that the trial court 'kn[e]w or ha[d] reason to know that an Indian child' was involved in the case." Citing § 1903(4) of ICWA, which defines an "Indian Child" as a person under eighteen who either: (a) is a member of an Indian tribe; or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, the court held that although grandmother stated that she is "half Black Foot" and child's mother is "half Cheyenne", grandmother did not state that she, the children, their father, or their respective mothers were members of an Indian tribe or that either child would be eligible for membership with an Indian tribe. *In re C.T. and K.T.*, No. 13-12-00006-CV (Tex. App.—Corpus Christi, Dec. 27, 2012, no pet.) (mem. op.); see also *B.O. and T.S. v. Tex. Dep't Family. Protective Servs.*, No 03-12-00676-CV (Tex. App.—Austin April 12, 2013, no pet. h.) (mem. op.) (holding ICWA only applies when subject child meets the definition of Indian child under Act).

B. JUDICIAL NOTICE

1. What Can Be Judicially Noticed?

Mother's parental rights were terminated under subsection 161.001(1)(O). On appeal, mother argued that the Department offered no evidence to support three of the four elements of (O). The Department contended that the trial court had the necessary evidence on the elements because it took judicial notice of its file and relied on the contents therein to find the challenged elements.

The court reversed the case, finding that the record did not affirmatively indicate that the trial court took judicial notice of its records in the case. The trial court may *sua sponte* take judicial notice of appropriate matters, however, when it does so, it must give the parties an opportunity to challenge that decision. "Here, the Department did not ask the trial court to take judicial notice of any prior orders in its file or of any other matters. The court did not announce in open court that it was taking judicial notice, nor did it recite in the termination decree that it had done so. Thus, we hold that the court did not take judicial notice." The court also noted that "while a court may judicially notice the existence of an affidavit in its file, it may not take judicial notice of the truth of the factual contents contained therein." As there was no evidence establishing the challenged elements, the case was reversed.

The court further noted that a trial court may take judicial notice of its own records, but may not consider testimony from a previous trial unless admitted into evidence. "The trial judge's own memory of what the witness may have said at the prior proceeding is insufficient to substitute for an accurate and properly authenticated record of that testimony." "A trial judge may not even judicially notice testimony that was given at a temporary hearing in a family law case at a subsequent hearing in the same cause without admitting the prior testimony into evidence." *In re C.L. and I.L.*, 304 S.W.3d 512 (Tex. App.—Waco Oct. 2009, no pet.).

2. Judicially Noticed Documents Not Evidence

In concluding that the evidence was legally insufficient to support the trial court's (D) finding as to father, the court of appeals noted: "To support some of the allegations in this case, the Department refers to documents filed in the clerk's record, which include third-party statements regarding the children's living conditions with their aunt and statements from Department employees that provide further details about [father's] sister's intellect and the prior 'CPS history' of the children's mother and [father's] sister. Although the trial court took judicial notice of its file, this is not evidence we can consider as part of a legal-sufficiency review." *Rios v. Tex. Dep't of Family and Protective Servs.*, No. 03-11-00565-CV (Tex. App.—Austin July 11, 2012, no pet.) (mem. op.).

C. TFC 161.004

1. 161.004 Elements Not Required

In 2009, the Department filed an original petition seeking to terminate mother's parental rights and those of the children's respective fathers. In October 2010, the parties entered into a mediated settlement agreement and the trial court signed a final order incorporating the agreement. The order denied the Department's request for termination, appointed the Department permanent managing conservator of the children, appointed mother possessory conservator with supervised visitation, and ordered mother to complete a number of services. In May 2011 and January 2012, the Department filed amended petitions for termination and motions to modify the final order.

Among other termination grounds, the Department alleged that mother constructively abandoned the children under TFC § 161.001(1)(N). The trial court's order terminated mother's parental rights under several grounds, including (N). The appellate court rejected mother's challenge, holding that the evidence was legally and factually sufficient to support termination for constructive abandonment under section 161.001(1)(N).

As part of mother's challenge to the constructive abandonment finding, she argued that section 161.004, not section 161.001(1), applied because the case was tried as a petition to terminate on a motion to modify after termination previously had been denied. Mother argued that under section 161.004, the relevant time period for proving a predicate ground, such as constructive abandonment, was before October 2010, the date of the order incorporating the mediated settlement agreement, and that there was no evidence showing the circumstances of the parties in October 2010 to show a change since then. The appellate court noted that to support termination under section 161.004, the Department would have to show that mother committed an act listed in section 161.001 before the order denying termination was rendered, that termination was in the children's best interest, and that circumstances have materially and substantially changed since rendition of the order to be modified. The court, however, rejected mother's argument, writing: "The Department's evidence of constructive abandonment, however, showed actions and conduct occurring after the October 2010 order. Because we have concluded that this evidence was sufficient to support termination under section 161.001, evidence to support termination under section 161.004—such as evidence of changed circumstances or constructive abandonment prior to October 2010—was not required." *J.M. v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00161-CV (Tex. App.—Austin June 26, 2012, no pet.) (mem. op.).

2. Material and Substantial Change

In 2009, children were removed from mother's and father's care, placed with paternal aunt, and the Department filed a petition to terminate mother's and father's parental rights. In 2010, the trial court signed a final decree appointing the Department as the children's sole managing conservator and mother as their possessory conservator. The trial court's order found that appointment of father as the children's possessory conservator was not in their best interest and denied him possession of, or access to, the children.

In 2011, the children were removed from aunt's care due to allegations of domestic violence in the home and were placed in foster care. Additionally, since the rendition of the final decree, father was adjudicated guilty of burglary of a habitation and was sentenced to two years in prison, mother failed three drug tests and had entered drug treatment for the fourth time, and the children were improving in foster care but were also exhibiting anxiety due to their lack of stability and permanence. Two months after the removal from aunt's home, the Department filed an original motion to modify based on the fact that there had been a material and substantial change in circumstances since the final decree, seeking to terminate mother's and father's parental rights. In 2012, the trial court found that "[t]he circumstances of the Children or Sole Managing Conservator, Possessory Conservator, or other party affected by the prior order …have materially and substantially changed since the rendition of" the prior order and entered a decree of termination.

On appeal, father argued that the trial court erred in finding that there was a material and substantial change in his circumstances because his circumstances had not materially and substantially changed and he was not named possessory conservator of the children. The appellate court rejected father's arguments, writing that under TFC § 161.004 "a material and substantial change in circumstances is not limited to Father's circumstances as he seems to suggest. Here, the trial court could also find the requisite material and substantial change in the circumstances of Mother or the children." The appellate court went on to hold that "the trial court could have formed a firm belief or conviction that there had been a material and substantial change in the circumstances of Father, Mother, and the children since the rendition of the [] 2010 decree". *In re C.A.C., S.Y.C., K.G.C., and M.E.C.*, No. 14-12-00396-CV (Tex. App.—Houston [14th Dist.] Sept. 27, 2012, no pet.) (mem. op.).

3. 161.004 Reversed

In 2010, children were removed from mother's care after they had been left at their daycare facility without an authorized person to pick them up. Mother claimed she had left the children in the care of a friend a few days before the removal and father did not live in the same town as children. While the children were in the Department's care, mother engaged in violent conduct, used drugs, and committed criminal acts. Within a few months of the removal, mother was sentenced to five years in prison. In 2011, the Department, mother, and father entered into an agreed order in which the Department was named the children's permanent managing conservator and mother and father were named their possessory conservators. After the entry of the agreed order, mother remained incarcerated and father stopped visiting the children. In 2012, the Department sought to modify the court's prior order on the basis that there had been a material and substantial change to the circumstances of the parties, children, or other individual affected by the first order denying termination and sought to terminate mother's and father's parental rights. Following a jury trial, the trial court entered the findings of the jury which terminated mother's parental rights under TFC §§ 161.001(1)(D),(E),(N),(O), and (Q) grounds, and found that termination was in the children's best interest. Father's rights were also terminated.

On appeal, mother challenged the sufficiency of the evidence to support the judgment on the basis that the evidence of events which occurred after the entry of the agreed order did not support termination. The Department argued that because the requirements of TFC 161.004 were met, including a showing that there had been a material and substantial change in circumstances, evidence of mother's conduct predating the first order could have been considered by the factfinder. The appellate court found that, absent language in the jury charge or termination order which indicated that the factfinder found that there had been a material and substantial change to the circumstance of the parties, children, or other individual affected by the first order denying termination, there was no evidence upon which the appellate court could infer that the factfinder made the requisite material and substantial change finding under 161.004. The appellate court concluded that because 161.004 did not appear to have served as a basis for the termination order, "we are unable to consider previously presented evidence of acts or omissions occurring prior to the trial court's final order denying termination; we cannot evaluate statutory elements which did not form a basis for the trial court's order of termination." The court found that based solely on a review of the evidence of events and mother's conduct which occurred after the entry of the 2011 agreed order, the evidence was legally insufficient to support termination under TFC 161.001(1). *In re D.N. and D.N.*, No. 07-12-00508-CV, ___ S.W.3d. ___, (Tex. App.—Amarillo 2013, no pet. h.).

III. THE TERMINATION GROUNDS: WHAT'S MY EVIDENCE AGAIN?

A. 161.001(1)(E)

1. Criminal Course of Conduct Insufficient

At trial, the Department relied on the following "virtually undisputed" evidence to "prove endangerment": (1) father acknowledged that he was convicted in Wisconsin of an offense involving a minor when he was younger; (2) father received probation for this offense, "long before" the children were born; (3) after mother and father separated, father tried to obtain a green card and was arrested for violating the terms of his probation; and (4) father was deported. The appellate court found this evidence supported the trial court's (E) ground finding. Father appealed to the Texas Supreme Court.

The Supreme Court acknowledged that father's conviction, probation violation, and deportation are all factors that may be considered under TFC § 161.001(1)(E); however, it found the evidence legally insufficient to support termination of father's parental rights. The Court explained: "the Department bears the burden of showing how the offense was part of a voluntary course of conduct endangering the children's well-being." Other than Department reports stating: "criminal activity involving sex with a minor", the Department "did not offer evidence concerning the Wisconsin or deportation proceedings." In a footnote, the Court stated: "While the statements are certainly very serious, given that the statements supply no details, that [father] was given a probated sentence, that the events occurred at least eight years be-

fore [father] was deported and at least thirteen years before the Department initiated these termination proceedings, and that in the long interim there is evidence [father] consistently demonstrated his desire to care and provide for his children, the brief statements in the Department's records cannot be considered clear and convincing evidence of endangerment."

The only evidence concerning the conviction came from father's own testimony wherein he admitted he "got in trouble in Wisconsin" because his "girlfriend was underage". The Court noted that "The Department asked no questions about this issue on cross-examination" and that "[t]he record does not contain the Wisconsin judgment, probation terms, or the charges brought. The Department presented no evidence concerning the date, circumstances, or offending conduct, or the girl's age." While following its own precedent "that an offense occurring before a person's children are born can be a relevant factor in establishing an endangering course of conduct", the Court held that the evidence supporting TFC § 161.001(1)(E) was legally insufficient because "the Department bears the burden of introducing evidence concerning the offense and establishing that the offense was part of a voluntary course of conduct that endangered the children's well-being", and the Department did not meet its burden. *In re E.N.C., J.A.C., S.A.L., N.A.G. and C.G.L.*, 384 S.W.3d 796 (Tex. 2012); see also *In re A.M.C., J.M.C. III, C.D.C. and H.D.C.*, No. 09-12-00314-CV (Tex. App. Beaumont Dec. 6, 2012, no pet.) (mem. op.) (In holding that the findings under TFC § 161.001(1)(D) and (E) were legally insufficient, the appellate court explained that: "The State did not fully develop the record regarding Father's alleged drug use or Father's alleged criminal history." Consequently, as relief requested by father, the court affirmed the termination on other grounds, but removed the endangerment findings from the final order and modified the trial court's judgment "to delete the [(D) and (E)] findings").

2. Criminal Conduct and Drug Use Insufficient

Following a jury trial in which the parents' rights were terminated, mother challenged the legal and factual sufficiency of the jury's finding under (E). In its analysis, the appellate court listed: (1) "Evidence in the Light Most Favorable to the Finding"; and (2) "Undisputed Facts Not Supporting the Finding."

In its evidence favorable to the finding, the court of appeals considered evidence of mother's: (1) history of methamphetamine use; (2) addiction to "both methamphetamines and marijuana"; (3) relapse after in-patient drug treatment on three different occasions; (4) criminal history related to her drug use; (5) prior Department involvement regarding older children, due to her methamphetamine use in their presence and while driving the children; (6) admission of methamphetamine use while pregnant with the child, despite having used drugs during a prior pregnancy; and (7) probation violation due to her methamphetamine use, resulting in her incarceration and giving birth to the child while incarcerated. The court also noted testimony that mother did not regularly attend Narcotics Anonymous and that the CASA Supervisor believed that two of mother's drug test results were "questionable."

The court cited the following "[u]ndisputed facts" as not supporting the jury's finding: (1) the child was born free of birth defects and did not test positive for controlled substances; (2) neither the Department nor CASA recommended termination of mother's parental rights to her older children and she obtained joint managing conservatorship of those children nine months prior to trial and had unsupervised overnight visits with those children; (3) mother tested negative on all drug tests during the case and testified that she had been sober for fourteen months at time of trial; (4) mother attended Narcotics Anonymous and had a sponsor; (5) mother's therapist, psychologist, and drug counselor each testified as to her likelihood of relapse based on her one year of sobriety; (6) mother worked full-time during the pendency of the case; (7) CASA supervisor's testimony that termination of mother's rights "was not CASA's original goal", but changed its recommendation so that the child's foster family could adopt the child, from which the court inferred that CASA's recommendation "was not based on [mother's] continuing to engage in endangering conduct"; and (8) the Department supervisor's testimony that if the child "was older, CPS would not be seeking termination of [mother's] parental rights."

The appellate court found the evidence legally insufficient to support termination of mother's parental rights under (E), holding that "[t]he evidence at trial show that [mother] had engaged in endangering conduct before [the child] was born. But the undisputed evidence shows that, once [the child] was born, [mother] did not continue to engage in a course of conduct that would endanger [the child's] well-being." The court concluded that "no reasonable trier of fact could form a firm belief or conviction that [mother] engaged in a continuous course of conduct or placed [the child] with persons who engaged in conduct that endangered [the child's] physical and emotional wellbeing." *In re H.L.F.*, No. 12-11-00243-CV (Tex. App.—Tyler Nov. 30, 2012, pet denied) (mem. op.); compare to *In re J.E.*, No. 07-12-00449-CV (Tex. App.—Amarillo Feb. 5, 2013, no pet.) (mem. op.) (Appellate court held that despite that mother had "refrained from drug use for about a year", was gainfully employed, and had an apartment, the trial court "is not required to consider conduct shortly before trial as negating evidence of a long pattern of endangering conduct.").

B. 161.001(1)(L)

1. Serious Injury Defined

Three-year-old child was removed from the home after her aunt and uncle found her in the care of mother and father with serious untreated burns on her legs. It was later determined that child had sustained the burns while being forced to stand in "boiling water." Mother admitted she and father did not take child to the hospital out of fear that child and her five other siblings would be removed from the home. Mother also admitted knowing the burns were infected. Mother later pled guilty to reckless injury to a child and was sentenced to two years in the Texas Department of Criminal Justice. Mother's parental rights were terminated under TFC § 161.001(1)(L), which provides for termination of parental rights of a parent who has been convicted for being criminally responsible for the serious injury of a child under specific sections of the Penal Code. The TFC does not define the term "serious injury". One of the Penal Code sections enumerated under (L) is PC 22.04, (involving injury to a child, elderly individual, or disabled individual) which states that a person has committed this offense if she intentionally, knowingly, recklessly, or with criminal negligence causes serious bodily injury or injury to a child.

Although mother admitted she was convicted of reckless injury to a child under PC 22.04, she argued on appeal that the evidence was insufficient under (L) because her conviction for this offense did not establish that child suffered "serious injury" resulting from the burns on her legs. Mother emphasized that her conviction under PC 22.04 required a showing of "serious bodily injury" or "bodily injury." Mother argued that the appellate court should adopt the Penal Code definitions as the standard for defining serious injury under (L) ground.

The appellate court, in rejecting mother's argument, held that "demonstrating 'serious injury' to a child under subsection (L) does not require a showing of 'serious bodily injury' as defined by the Penal Code." The appellate court cited well-established case law which holds that when a term is not defined in a statute it is given its ordinary meaning. In adopting the approach of the First Court of Appeals, the court stated "[o]ur sister court in Houston has adopted a dictionary definition of 'serious injury' to be applied in this context, which we also adopt." The court also looked to Webster's Dictionary definitions of the terms serious—"having important or dangerous possible consequences" and injury—"hurt, damage, or loss sustained", and concluded that the evidence was legally and factually sufficient to support the finding that mother committed serious injury to child as required under (L) ground. *In re A.L., M.L., and J.Y.R.*, 389 S.W.3d 896 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

2. Emotional Injury as Serious Injury

TFC § 161.001(1)(L) provides for termination of parental rights of a parent who has been convicted or placed on community supervision for the serious injury of a child under specified sections of the Texas Penal Code, including section 21.11 (indecency with a child). In 2011, pursuant to an agreement, the trial court appointed the Department permanent managing conservator and father and mother possessory conservators of the children. Four months later, father was arrested for indecency with a child for engaging in sexual contact with one of his daughters. The Department filed a petition for modification and termina-

tion of father's and mother's parental rights. Father pled guilty to indecency with a child and was placed on deferred adjudication community supervision. The trial court terminated father's parental rights under section 161.001(1)(L)(iv). Father appealed, contending the evidence was legally and factually insufficient to prove that his criminal conduct caused the serious injury of a child. The appellate court recognized that although the Texas Supreme Court has not directly addressed the issue, it commented on the issue in a per curiam statement issued in a denial of a petition for review, stating, "We . . . disavow any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury." The indictment charged father with intentionally or knowingly engaging in sexual contact with his daughter and the final judgment and conviction were admitted into evidence. The therapist of the victimized child testified that the child suffered from severe anxiety issues and from enuresis and encopresis, requires medication, and was treated in a mental hospital. The therapist also testified that the child did not want to see her father, expressed anger toward him, and feared returning to her prior home. While recognizing that "serious injury" in this context has not been defined, the appellate court held that "the injuries suffered by this child certainly support a finding that she suffered serious injury." The appellate court disagreed with father's contention that the therapist's testimony did not make a causal connection between the sexual abuse and the child's hospitalization, reasoning that although the therapist did not specifically attribute "all of [the child's] problems to the sexual abuse, she did testify that sexual abuse was a factor." The court found no authority "suggesting that sexual indecency must be the sole cause of serious injury." Thus, the appellate court held that the evidence of the child's emotional injuries was legally and factually sufficient to support the trial court's finding that the child suffered serious injury as a result of father's conduct. *R.F. v. Tex. Dep't of Family and Protective Servs*., 390 S.W.3d 63 (Tex. App.—El Paso 2012, no pet.).

C. 161.001(1)(O)

1. Lack of Order Fatal

Father's parental rights were terminated solely under TFC § 161.001(1)(O) and best interest. The record established that father signed the Department's service plan on January 5, 2007. The record did not, however, contain a written order requiring father to comply with that service plan. The Amarillo Court of Appeals concluded that because there were no court orders specifically establishing the actions necessary for father to obtain the return of the child, written or otherwise, the Department failed to establish by clear and convincing evidence any grounds enumerated under subsection (1) of § 161.001 to support termination of father's parental rights to the child. In its post submission brief, the Department argued that father failed to preserve his complaint about the absence of a court order because he failed to raise the issue in his brief. The Amarillo Court rejected that argument, concluding, "Points of error are to be construed liberally in order to adjudicate justly." The court found that the issue of no court order was subsumed in father's complaint about the sufficiency of the evidence underlying the termination of his parental right under (O). The case was reversed and remanded. *In re B.L.R.P.*, 269 S.W.3d 707 (Tex. App.—Amarillo 2008, no pet.).

2. Removal for Abuse or Neglect Necessary

The court of appeals withdrew its prior judgment of reversal, affirming the trial court's order of termination on rehearing. On appeal, mother challenged the sufficiency of the evidence supporting the statutory termination grounds and best interest. The child and mother were living in a shelter. Mother was arrested after shoplifting cough medicine for the child. After mother did not return to the shelter, the Department was contacted. After the Department could not find mother, or reach anyone on her contacts card at the shelter, the child was removed. Mother was released from jail a day later. Among other grounds, the trial court found that mother failed to comply with court-ordered services. Mother argued that the Department did not meet (O) ground because it did not establish that the child had been removed from mother as a result of abuse or neglect. Mother argued that she was arrested and unable to return to the shelter. The issue was one of statutory interpretation, which a court reviews de novo. The plain language of 161.001(1)(O) requires that the court consider whether the Department proved by clear and convincing evidence that the child was removed from mother for abuse or neglect. The court rejected the Department's contention

that mother's leaving the child at a shelter while she went to commit a crime was sufficient to show neglect. There was no evidence that mother knew or reasonably should have known that the child would not be taken care of when she left the shelter. In addition, the Department did not prove with whom the child was left, and whether any instructions were given. Mother actually provided contact information for emergencies. However, the evidence was ultimately deemed sufficient to support (O) as the Department proved that upon mother's release from jail, she did not make any efforts to find or locate the child for over a day. *In re A.A.A.*, 265 S.W.3d 507 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

3. Evidence Established Risk, Not Abuse or Neglect

First Court of Appeals reversed termination of mother's parental rights on (O) ground, holding that the evidence was legally insufficient to support termination of mother's rights under subsection (O). C.M. came into the care of the Department just days after he was born. At the time of his birth, C.M.'s older sibling, A.S., was in the care of the Department due to allegations that mother left A.S. crying in bed for hours, attempted to mute A.S.'s cries by placing a pillow over her face, and '"yanked' the child really hard." Mother eventually relinquished her rights to A.S. and the child was placed with the child's paternal grandmother where she remained at the time of trial.

Mother argued on appeal that there was no evidence indicating that C.M. was removed due to mother's abuse or neglect. The appellate court found the evidence established that C.M. was removed due to risk rather than his sustaining any actual abuse or neglect. C.M. was clean, healthy, appropriately dressed, and free of marks or bruises when he was taken into care by the Department. Evidence that mother failed to obtain prenatal care until she was ordered to do so in the seventh month of pregnancy; failed to comply with the service plan that was court-ordered in A.S.'s case; and failed to secure housing at the time of C.M.'s birth were found by the appellate court to be "*factors [that] may indicate risk to C.M. if he were to remain under [mother's] care*;" the evidence did "*not indicate that [mother] abused or neglected C.M., leading to his removal*." (Emphasis added).

The appellate court rejected the Department's argument that mother jeopardizing C.M.'s well-being supports the notion that C.M. was removed from mother's care due to abuse or neglect. "*While mother's abusive conduct toward A.S. may indeed have jeopardized C.M.'s well-being and given the Department reason to remove C.M. under Chapter 262, it is not evidence that C.M. actually sustained abuse or neglect by mother*." (Emphasis added). "Although mother's abusive conduct toward an older sibling may be evidence of endangering conduct toward a younger sibling under subsection (E), *it does not demonstrate* that the parent engaged in abusive or neglectful conduct toward the younger sibling, as required under subsection (O)." (Emphasis added). *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV (Tex. App.—Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.).

4. Evidence Regarding Abuse or Neglect Sufficient – Who Must the Abuser Be?

On appeal, father complained the evidence was insufficient to support termination of his parental rights under TFC § 161.001(1)(O) because the child was not removed as the result of abuse or neglect "on his part" since the child was removed from mother's home. In finding father's argument without merit, the appellate court held: "subsection (O) does not require that the parent who failed to comply with a court order be the same parent whose abuse or neglect of the child warranted the child's removal." *In re D.R.A. and A.F.*, 374 S.W.3d 528 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see also In re M.D. and L.D.*, No. 10-13-00005-CV (Tex. App.—Waco Apr. 11, 2013, no pet. h.) (mem. op.).

5. Can Temporary Order Findings Prove Abuse or Neglect?

Father appealed trial court's termination of his parental rights, arguing that the evidence was legally insufficient to support (O) finding. Among the father's arguments was that termination under (O) was improper because child was removed on "concerns" of abuse or neglect, and not for "abuse or neglect." The appellate court disagreed, citing precedent from other courts of appeals in considering: (1) evidence that the Department had become involved with the child because it "received two referrals alleging neglectful supervision and physical abuse"; (2) the family service plan,

which had been admitted as an exhibit at trial, which stated "that the reason for the Department's involvement was the referrals and notes that [father] had a history of domestic violence and alcohol abuse"; (3) the Department investigator's testimony that she reached a disposition of "reason to believe" for neglectful supervision "due to allegations of alcohol abuse and domestic violence"; and (4) that the appellate "record contains the trial court's temporary order following adversary hearing, which appointed the Department as temporary managing conservator and included the findings required by section 262.201 of the family code." The court of appeals held "there were allegations of neglectful supervision specific to [the child] by [the father] that prompted the Department's investigation and subsequent removal of [the child]" and concluded that the evidence was legally sufficient to support the trial court's (O) finding. *L.Z. v. Tex. Dep't of Family and Protective Servs.*, No. 03-12-00113-CV (Tex. App.—Austin Aug. 23, 2012, no pet.) (mem. op.); *compare to In re C.B.*, No. 07-12-00065-CV (Tex. App.—Amarillo July 27, 2012, no pet.) (mem. op.) (appellate court concluded that "temporary order following the full adversary hearing", of which the trial court took judicial notice, "does not provide the evidence of abuse or neglect required for termination under the subsection (O) ground."); *see also In re A.O.*, No. 04-12-00390-CV (Tex. App.—San Antonio Nov. 14, 2012, no pet.) (mem. op.) (court of appeals held that trial court's judicial notice of temporary orders supports finding that child "had been removed for abuse or neglect.").

6. Violation of Safety Plan Held to Support Removal for Abuse or Neglect

Mother complains that the evidence was legally and factually insufficient to support termination under (O) ground because there was no evidence that children were removed due to her endangering conduct. However, the appellate court found that mother repeatedly violated the Department's safety plan which required that mother not allow her boyfriend, who had been accused of sexually abusing another of mother's children, to have any contact with the subject children. Mother's repeated acts of allowing her boyfriend contact with the children in the home resulted in their removal. The court held that evidence of mother's violation of the safety plan which had been implemented for the children's protection established that the children were removed as a result of "abuse or neglect" under (O). *In re J.C., J.C., Jr., J.C. III and S.C.*, No. 09-12-00092-CV (Tex. App.—Beaumont Oct. 18, 2012, no pet.) (mem. op.); see also *In re H.S.V., C.M.V., and T.M.V.*, No 04-12-00150-CV (Tex. App.—San Antonio, Aug. 22, 2012, pet denied) (mem. op.) (holding mother's violation of safety plan in leaving children for a week with man accused of abusing one of them which resulted in the children's removal constituted removal for neglect under (O) ground, writing "it is self-evident that a violation of a safety plan could, in fact, constitute abuse or neglect").

7. Intellectually Challenged Parent

Father complained on appeal that the evidence was legally and factually insufficient to support termination under (O). The trial court entered an order for actions necessary for father to obtain the return of the child, which required father to: (1) complete a psychological evaluation and follow its recommendations; (2) obtain and maintain appropriate housing and provide documentation; (3) obtain gainful employment and provide documentation; (4) provide pay stubs if employed; (5) document sources of income for necessities, if not employed; and (6) maintain weekly contact with his caseworker. At trial, father testified that he was twenty-six years old, lived with his mother, did not know how to drive, had never had or applied for a job, and received disability checks, but was not sure in what amount. He also testified that he had not been diagnosed with a mental illness or mental retardation. He said he thought it would cost $100-$ 200 a month to care for the child, and testified that a person's normal temperature is "about 150" but that a person with a fever would have a temperature below 90. He could not remember the child's birth date or year and thought the baby weighed "six or seven or eight ounces" at birth. He said he would feed the child Ritz crackers and "[f]ood and stuff like that" and would need to "get a ride" and a job if the child was returned to him. When father was asked if he "remember[ed] being in court and a judge order[ing] him to do stuff for [him] to be able to get [the child] back," he answered, "Yes." He admitted he had been ordered to have a psychological evaluation, but excused his noncompliance on transportation issues. He denied that he refused to participate, when he did appear, but claimed he did not under-

stand the questions. Father also admitted that he did not provide documentation to the Department regarding his apartment lease or disability payments. Father did not return to complete his testimony after the first day of trial. The psychologist testified that she never evaluated father because he missed several appointments and refused to participate when he finally did appear. She also testified that she had reviewed an MHMR psychologist's report in which father had been diagnosed with mild retardation. This was consistent with her observations of him. Regarding a mentally retarded parent's failure to complete court-ordered services, the psychologist opined that regardless of mental retardation, the standard should be "whether or not [the parent] [was] able to successfully complete those required components to demonstrate they can parent effectively." The evidence also showed that father failed to obtain appropriate housing or gainful employment, or provide documentation of either, and failed to provide documentation of other sources of income with which he could provide basic necessities.

The appellate court held that legally and factually sufficient evidence showed that father failed to comply with several provisions of the order, including refusing to perform a psychological evaluation and failing to provide information from which the Department could determine whether he could provide for the child's basic needs or heightened medical needs, supporting the trial court's finding under TFC § 161.001(1)(O). *In re C.J.G.*, No. 02-12-00293-CV (Tex. App.—Fort Worth Jan 4, 2013, no pet.) (mem. op.).; *see also In re A.W.C. and G.A.C.*, No. 11-12-00070-CV (Tex. App.—Eastland July 12, 2012, no pet.) (mem. op.) (appellate court held evidence legally and factually sufficient to support termination under (O) of father diagnosed with moderate mental retardation (IQ of 51) and mother with significant intellectual limitations (IQ of 70)).

D. 161.001(1)(P)

A trial court may order termination under (P) if it finds by clear and convincing evidence that the parent has 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: (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. TFC § 161.001(1)(P). Father challenged the legal sufficiency of the evidence to support the trial court's finding under this ground. The only evidence of father's drug use was his mother's testimony that he had a history of drug use over the past three or four years, it was a disease, and that incarceration had given him time to "clean out his system." The appellate court reasoned that because father was incarcerated for the entire six and one-half months from the child's birth to the termination hearing, "he could not have 'used a controlled substance . . . in a manner that endangered the health or safety of the child.'" Because father received his service plan only thirty four days before trial, the court determined there was no evidence father "was provided with an opportunity to enroll in, much less complete, 'a court-ordered substance abuse treatment program' while incarcerated.'" There was also no evidence father continued to abuse a controlled substance. The Department argued that father's drug use was a course of conduct that endangered the child's health and safety by subjecting the child to being left alone because the parent is once again incarcerated or committed to a drug treatment facility. The appellate court rejected this argument, finding nothing in the record to support such "speculation" because there was no evidence that father had been "jailed repeatedly or been in and out of drug treatment of any type." As a result, the court concluded that the evidence was legally insufficient to support the trial court's finding under TFC § 161.001(1)(P). Having also concluded that the evidence was legally insufficient to support the trial court's finding under (N), the court reversed the termination judgment and remanded the case. *In re A.Q.W.*, No. 04-12-00060-CV, ___ S.W.3d ___, (Tex. App.—San Antonio Jan. 23, 2013, no pet.).

E. 161.003

The trial court terminated mother's and father's parental rights to the children under section 161.003. In reviewing the case, the Texarkana Court noted that a sister court has characterized the provisions of section 161.003 as "more stringent' than the elements of section 161.001. The court rejected the assertion of the caseworker that the parents could not meet the needs of the children when the caseworker failed to identify the "specified" needs. Expert testimony indicated

that the parents could parent the child as long as she did not have any "significant medical problems." The Texarkana Court concluded that although expert testimony did show the parents suffered from a mental deficiency, it failed to show the parents are unable to meet the children's needs. Section 161.003 requires more than mental deficiency. The fact that certain aspects of parenting may be difficult is legally insufficient to support termination under section 161.003. The Texarkana Court reversed the termination. *In re A.L.M. and S.M.M.*, 300 S.W.3d 914 (Tex. App.–Texarkana 2009, no pet.).

IV. BEST INTEREST: NOT JUST AN AFTERTHOUGHT ANYMORE.

1. Evidence Legally Insufficient

On November 4, 2010, the Department received a referral alleging mother's neglectful supervision of the child, and filed a petition for protection, conservatorship and termination. At the time, mother herself was a child under the Department's custody, and she and the nineteen-month-old child were living in a supervised care facility for teen mothers and their children. The affidavit attached to the petition averred that the child was removed because: (1) on November 3, 2010, mother was arrested and jailed for assault, leaving the child without a caregiver; (2) a few days earlier, mother refused to parent the child, stating that she wanted to sleep; (3) and in October 2010, mother left her placement without explanation or a plan to return. Following an emergency hearing, the trial court appointed the Department the child's temporary managing conservator.

After an adversarial hearing, the trial court allowed mother supervised visitation and ordered her to comply with the Department's service plan. A March 2012 order following a permanency hearing reset the dismissal date to May 7, 2012, and reflected that mother had not demonstrated adequate and appropriate compliance with the service plan.

The trial court terminated mother's parental rights to the child under (O) ground and a finding that termination was in the child's best interest. On appeal, mother challenged the legal and factual sufficiency of the evidence to support both the trial court's finding under (O) and the best interest finding. She did not challenge the Department's conservatorship of the child. The appellate court concluded that the evidence was legally insufficient to support the best interest finding.

The evidence showed that mother participated in only one-third to one-half of her scheduled visits with the child. Evidence from mother's caseworkers showed that mother, did not complete services, placed her needs above the child's needs, maintained concerning ties to the family from whom she was removed, did not demonstrate a willingness to provide care, and would not be capable of parenting a three-year-old. A CASA supervisor testified that mother did not demonstrate the ability to provide a stable environment, lacked a bond with the child, who was bonded with his foster family, and lacked a support system if the child was returned to her. The foster mother testified the child is happy and bonded to his foster family, becomes "very clingy" and later has outbursts following visits with mother. A counselor who counseled the child and foster family testified that the child was happy and strongly attached to his foster family, and that she would be concerned for the child if that bond were broken.

Mother's individual counselor testified for mother. She testified that mother had improved and has the maturity and desire to apply what she learned in counseling and parenting classes, obtained her GED and plans to go to college, is married to a man who planned to treat the child as his own, and was living in an apartment. She had no concerns mother would abuse drugs or alcohol, was not concerned about mother's missed visits, and believed mother would be able to care for the child and is ready for the child to be returned. She said mother is one of two clients in her career with the resiliency to overcome anything. She recommended a monitored return, with the Department continuing to provide mother with support and guidance for at least six months. Mother testified that the criminal case against her was dismissed and she does not have a criminal record. She also testified that other than one positive drug test, she has had no problem with drug use; that she is enrolled in college; and that except for inconsistent visits she completed most of her services. Regarding her missed visits, mother said that she moved to Victoria to be closer to the child, but the child was moved to San Antonio,

after which her visits were not consistent. She also testified that although she does not have a driver's license, her husband could now drive her to visits. After her direct testimony, mother did not return to trial, and was not subject to cross examination.

The appellate court analyzed the *Holley* factors and concluded that none weighed in favor of termination. Despite evidence that the three-year-old child is happy and bonded with his foster family, the court expressed concern that the child's lack of a relationship with mother was in part due to the Department placing him in San Antonio. The court reasoned that "[t]he dynamics of [the child's] living arrangement is no evidence that [the child] would not want to live with his mother." Analyzing the second and third *Holley* factors, the court could not conclude that the trial court could have reasonably disbelieved or found incredible the testimony of mother or her counselor, and could not conclude the trial court could have formed a firm belief or conviction "that [mother's] current progress should not be considered." The court reasoned that the Department did not explain or provide evidence showing: (1) how the child's "physical and emotional needs would go unmet if [mother] continues to participate in the program as she is doing"; or (2) how mother's "present actions or omissions, if any, would pose a danger to [the child's] physical and emotional needs."

The court also determined that the evidence suggests mother has matured, improved her parenting skills through counseling, availed herself of services, set goals, and become motivated to achieve them. The court concluded as well that programs would be available to mother while, as recommended by mother's counselor, the child remains in the Department's care during a transition from a foster home to mother's home. Based on mother's plan for the child to live with her and her husband, her continuing education, and the Department's apparent plan to leave the child with the same foster family, the court concluded that this factor was either neutral or weighed against termination. Although the evidence showed mother's past instability, the court concluded that it showed her current stability. She was married and lived in an apartment, and her husband supported her and planned to raise the child as his own.

The court recognized that the evidence showed mother was inconsistent in visits, failed to timely complete services, and had placed her needs above the child's needs; however, the court determined that "[i]n light of her current progress, the Department has not shown how mother's earlier conduct shows that the existing parent-child relationship is improper." The court also credited mother's counselor's testimony that mother's history and lack of good role models could explain some of her negative behaviors, and credited mother's excuses for refusing to attend chemical dependency classes and missing visits after the child was moved to San Antonio, noting that the Department pointed to no evidence disputing mother's excuses. Finally, the court considered the evidence regarding TFC § 263.007(b) factors addressing the safe environment of the child. The court could not conclude that there was clear and convincing evidence that mother's "limited contact with her family, specifically her parents, will impair her ability to provide a safe environment for [the child]."

The court held that considering evidence that supports the finding, undisputed evidence, "and evidence that the trial court could not have reasonably disbelieved, especially the testimony regarding [mother's] current progress," no reasonable fact finder could have formed a firm belief that it was in the child's best interest to terminate mother's parental rights. In a footnote, the appellate court stated that, based on the trial court's reasoning before orally pronouncing judgment, the trial court appeared to give unreasonable weight to mother's action in leaving trial while disregarding all testimony of mother's recent improvement. *In re J.A.S., Jr.*, No. 13-12-00612-CV (Tex. App.—Corpus Christi Feb. 28, 2013, pet. denied) (mem. op.).

2. *Evidence Factually Insufficient*

In September 2008, the Department received a referral that mother was neglecting her three children. The investigator testified that she found mother's residence to be very hazardous to children, having things everywhere, animal urine and feces covering the floor, and an unknown substance in the area where the children ate. The children were dirty, had colds, and ran around "with no shoes, nothing on." Mother had been diagnosed with bipolar disorder and neither parent was employed. The Department provided

mother with homemaker and child care services. Following a report from the children's daycare that they were dirty every day and had bumps and scratches, the Department placed the children with their aunt where the children's condition did not improve. The Department filed a petition for protection and was appointed the children's temporary managing conservator in June 2009.

Mother did not do any of her court-ordered services. Mother failed to provide proof of employment and refused to submit to random drug tests. Due to mother's lack of compliance, the Department's plan was termination of her parental rights.

Mother offered a diagnostic review form at the November 2010 trial, which indicated that she was diagnosed as having mixed anxiety disorder from being separated from her children, but she was not diagnosed as having any mental health problems. Mother testified that when the Department originally came to her house, she was going through a rough time, but that she is currently engaged to her boyfriend who has agreed to help her raise the children. She admitted that she did not complete any of her services, but testified that she had gone to counseling every Wednesday but had not gotten the paperwork to verify her attendance and that she attended AA meetings every Thursday. Mother's boyfriend testified that he has been employed at the same company for thirteen years, receives a salary of $3100.00 per month with full insurance benefits, and is financially willing and able to support mother and her children. He also testified that he had recently been to mother's house and it was clean and suitable for children.

At the time of trial, the children were ages three, four, and five and all were living in separate homes. The Department's plan was for all three children to live in one home, but that had not occurred as of the time of trial. The trial court terminated mother's parental rights to all three children under (D) and (O) grounds and best interest.

On appeal, mother challenged all termination grounds and best interest. The Houston First Court found that there was some evidence to show that termination of mother's parental rights was in the children's best interest: (1) the mother's neglect; (2) abusive relationship with her husband; (3) refusal to submit to random drug tests; and (4) lack of housing and employment. The appeals court concluded that the best interest evidence was legally sufficient to support the finding. However, the Houston First Court found the evidence was factually insufficient to support the best interest finding because: (1) although the initial observations showed that the house was dirty and unsanitary, there was no evidence that the children suffered from any illness, malnutrition, or physical abuse; (2) although mother did not complete services, it "was not due to indifference or malice toward her children"—mother visited with her children while they were in the Department's custody, contacted the Department many times concerning the children, and made attempts to comply with the requirements of the service plan since her husband moved out of state; (3) the children are bonded to mother; (4) she had a plan to raise the children with her boyfriend who testified that he agreed to provide for them; and (5) the children were currently separated from each other in non-adoptive placements. The court concluded that, "Given the nature of the Mother's offending behavior and the bond between her and her children, coupled with the children's uncertain future in regard to an adoptive placement, the factfinder could not have reasonably formed a firm belief that terminating the parental rights of the person with whom the children have the best chance of being together, is in their best interest." The case was reversed and remanded as to the termination, but was affirmed as to conservatorship. *In re R.W., E.W., and B.W.*, No. 01-11-00023-CV (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mem. op.); *compare In re J.P., T.J., and D.F.*, No. 02-10-00448-CV (Tex. App.—Fort Worth Feb. 23, 2012, no pet.) (mem. op.)(evidence factually insufficient to support best interest finding where father was bonded to child, consistently financially supported child, visited child regularly, child had difficulty dealing with his best friend's death, father had a stable employment history, child was not likely to be adopted due to his age and mental health issues, and father had not abused child).

3. No Best Interest Finding Required under 161.002(b)(1)

Alleged father's parental rights were terminated pursuant to 161.002(b)(1), which allows for an alleged

father to 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 of the Texas Family Code." The court of appeals found that father judicially admitted in his brief that he was an alleged father and that he did not respond by either method required by 161.002(b)(1).

Father complained on appeal that the Department failed to prove by clear and convincing evidence that termination of his parental rights was in the best interest of the children. The Department argued that 161.002(b)(1) does not require a finding that termination is in the children's best interest. The appellate court agreed with the Department, overruling father's point of error and citing precedent that the Department "was not required to prove best interest whether father did not file an admission or counterclaim of paternity." *R.H. v. Tex. Dep't of Family and Protective Servs.*, No. 08-12-00364-CV, ___ S.W.3d ___ (Tex. App.—El Paso 2013, no pet. h.).

V. I SURVIVED TRIAL! WHAT NEXT?

1. Motion for New Trial and Dismissal Date

The Department filed suit to terminate mother's parental rights to two children. On July 18, 2006, the trial court entered an order appointing the Department temporary managing conservator of the children; the order set a dismissal date of July 23, 2007. A bench trial took place on June 28, 2007 and July 10, 2007. On July 10, 2007, the judge orally ordered mother's parental rights terminated. In August 2007, mother filed a motion for new trial. On August 21, 2007, the trial court entered a written order of termination, but on August 28, 2007, the trial court granted mother's motion for new trial. After the case was set and reset, mother moved for dismissal. The trial court never entered an order extending the time for which the case was to be retained on its docket under TFC § 263.401(b).

The Supreme Court found that at the time mother moved for dismissal of the suit in March 2008, both the one-year dismissal date and the 180-day period for the trial court to retain the suit on its docket had passed. The trial court could have retained the suit if mother waived her right to dismissal under TFC 263.402(b) by failing to make: 1) a timely motion to dismiss; or 2) a motion requesting the court to render a final order before the deadline for dismissal. The Supreme Court found that mother did not waive her right to dismissal by failing to request that the trial court render a final order before the one-year dismissal date of July 23, 2007 because the trial court did render such an order on July 10, 2007.

The Supreme Court reasoned that it would make no sense to hold that mother waived her right to dismissal when the trial court did exactly what she would have been required to request that the trial court do to avoid waiver. Moreover, when the trial court granted a new trial, the one-year dismissal date had passed and another dismissal date had not been set. At that point, mother did not have an opportunity to request that the trial court enter a final order before a dismissal date. The Supreme Court concluded that because there was no final order in place as of the time mother filed her March 2008 motion to dismiss, her motion was timely when it was filed before the Department had introduced all its evidence, other than rebuttal evidence, at the pending trial on the merits. Thus, under TFC § 263.402(b), the trial court had no discretion to deny mother's motion to dismiss the Department's suit and abused its discretion in doing so. *In re Dep't of Family and Protective Servs*., 273 S.W.3d 637 (Tex. 2009).

2. Ineffective Assistance of Counsel

On appeal, father complained of ineffective assistance of counsel. Father was not present at the brief hearing at which only the Department's caseworker testified. Although counsel knew father was in a nearby jail, counsel did not request a bench warrant to secure father's presence at trial. At trial, counsel made an oral motion for a continuance, which was denied. Counsel made no objection when the court took judicial notice of the contents in its file; did not object to the admission of uncertified criminal records; made only two objections during the Department's presentation of its evidence; conducted no cross-examination of the sole witness; offered no evidence, called no witnesses, and made no arguments on father's behalf. A divided First Court of Appeals, sitting *en banc* on rehearing, affirmed the termination. Five judges joined the majority opinion, with three of those judges also concurring in a separate opinion; three judges dissented in two

separate opinions; and one judge concurred and dissented in another opinion. *(Note: Father also challenged the legal and factual sufficiency of the evidence supporting the termination order, but only the portions of the opinions relating to ineffective assistance of counsel are discussed).*

The majority opinion did not analyze whether father's trial counsel's performance was deficient, but instead proceeded directly to a discussion of the second *Strickland* prong. *See Strickland v. United States*, 466 U.S. 668 684–87 (1984). The majority concluded that father had not made any attempt to "demonstrate that counsel's inadequacy caused the trial court to make the wrong decision," and failed to demonstrate "a reasonable probability that he would have been awarded custody of [the] child save for his trial counsel's ineptness" or that "the outcome of this case probably would have been different had counsel done a better job." Despite this holding, the majority stated that father "may request that we abate this case to the trial court for a hearing to determine whether any deficiency in counsel's performance affected the outcome of the case" and, "[i]f it did, the trial court should make appropriate findings and recommend that we grant a new trial," forwarding such findings and recommendation to the appellate court before the expiration of its plenary power. The majority upheld the termination order "[a]bsent further proceedings."

Justice Jennings issued a lengthy dissent, joined by one other justice, concluding that father's claim should have been analyzed as an actual or constructive "denial of counsel" claim under *Cronic*, and so presumed to result in prejudice, rather than as an ineffective assistance case under *Strickland*. *See United States v. Cronic*, 466 U.S. 648, 659 (1984). Justice Jennings stated that counsel was "at best, inert, and, at worst, acquiescing in DFPS's efforts to terminate" father's parental rights and had "utterly failed to subject DFPS's case to any meaningful adversarial testing," denying father "any meaningful assistance of counsel altogether" such that prejudice must be presumed. Justice Jennings challenged the majority's articulation of the prejudice prong of the *Strickland* test, stating that "[c]ontrary to the majority's claim, *Strickland* simply does not require [father] to show that his trial 'counsel's inadequacy caused the trial court to make the wrong decision'," rather, the focus for the prejudice inquiry was whether counsel's mistakes were "so serious as to deny the defendant a fair and reliable trial." Justice Jennings also called the majority's abatement procedure "bizarre and awkward" and unsupported by the majority's cited cases.

Justice Sharp issued a separate dissenting opinion also calling for reversal on the ineffective assistance of counsel issue and agreeing with much of Jennings's rationale and analysis, but disagreeing that father's sufficiency challenges could be reached outside of the context of the ineffective assistance of counsel claim.

Justice Massengale, joined by two other justices, issued a concurrence, noting that the Texas Supreme Court had applied the *Strickland* standard to review complaints of ineffective assistance of counsel in termination cases, and stating that the application of a *Cronic* analysis by the original panel diluted the Texas Supreme Court's expressly chosen standard. Justice Massengale also concluded that the facts in the case did not present a scenario to which *Cronic* applied, and so the original panel's resort to a *Cronic* analysis was unauthorized and unnecessary.

Justice Keyes concurred in the affirmance, but disagreed with the majority's implicit finding that counsel's actions were deficient, and dissented to the "majority's invitation to [father] to file a motion to abate the appeal for remand to the trial court to attempt to establish a record of ineffective assistance of counsel." Justice Keyes described the invitation as "contrary to Texas Supreme Court and Texas Court of Criminal Appeals precedent in ineffective assistance of counsel cases," "directly contrary to the clear instructions for review" of ineffective assistance of counsel complaints in termination cases, without precedent "in Texas or the United States Supreme Court," and unsupported by the majority's cited cases. *In re V.V.*, 349 S.W.3d 548 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (en banc).