Case Law Update

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Jurisdiction

Hague Convention: International Service

In re J.R., No. 09-18-00433-CV (Tex. App.—Beaumont Feb. 28, 2019, no pet.) (mem. op.)

- In April 2017, the Department filed a petition which listed "Mexico" as Father's address but noted the location was unknown.
- In June 2017, the Department filed a motion for substituted service of citation by posting, which was granted.
- In July 2017, the trial court found that Father had been served by citation by posting and appointed Father an attorney.
- In October 2018, the trial court conducted a bench trial during which the Department caseworker testified that the Department had located Father's specific address in Mexico and had sent everything through the consulate.

- On appeal, Father argued that the trial court erred in entering a final judgment terminating his parental rights because the Department had his correct address in Mexico but never served him with notice.
- The Hague Service Convention governs the service of process on a defendant located in Mexico.
- Under the Hague Service Convention, service of process upon a person located in Mexico must be made through the Central Authority of Mexico.
- Mexico has also filed declarations objecting to all alternative channels of service, which includes citation by posting.

- The Court observed the record showed that there was no evidence that the Department served the Central Authority of Mexico with its lawsuit against Father or that the Central Authority returned a certificate of service.
- Further, because Mexico has filed declarations objecting to any alternative channel of service, citation by posting to a defendant who is known to be in Mexico does not comport with the terms of the Hague Service Convention.
- The Court concluded that Father was never properly served with the Department's lawsuit as required by the Hague Service Convention, and therefore the order was void because the trial court lacked personal jurisdiction over him.

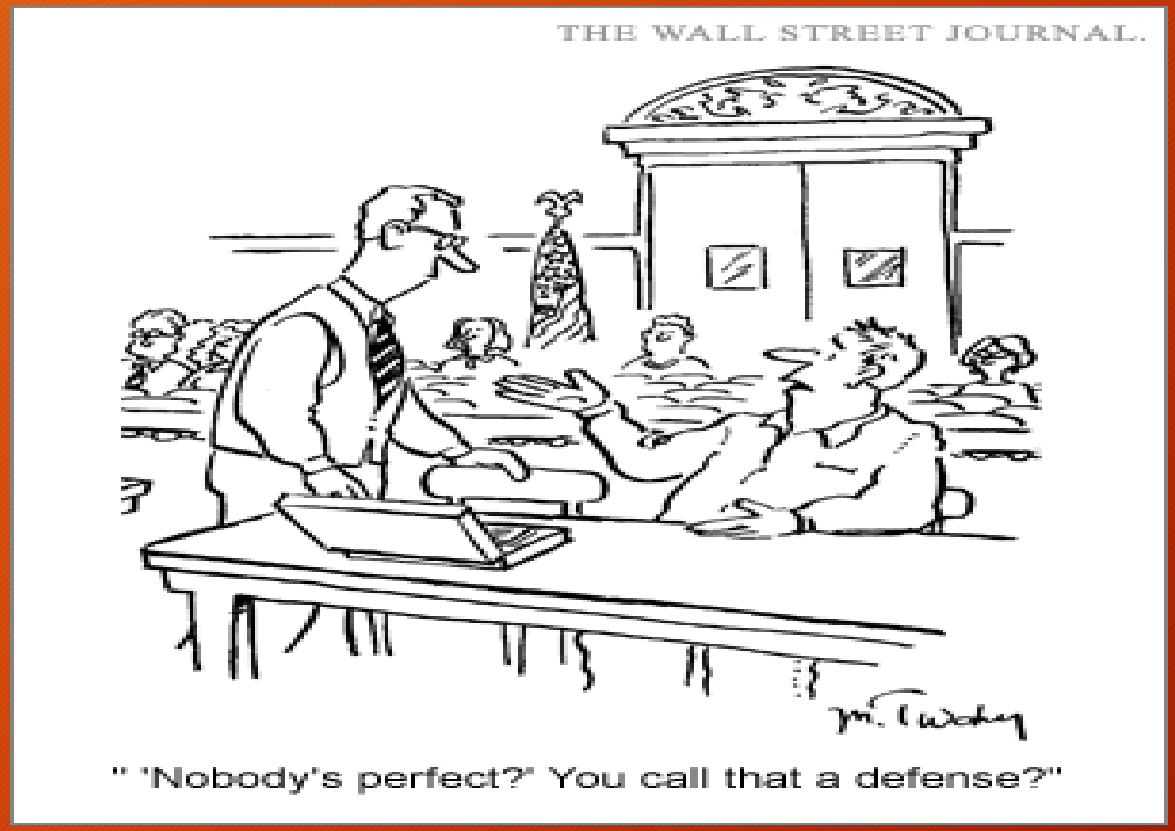
Tip and Tricks: Hague Service Convention

- Hague Service Convention applies in all civil proceedings involving service abroad and preempts inconsistent methods of service;
  - As of October 2019, 76 countries are contracting members;
  - https://www.hcch.net/en/instruments/conventions/status-table/?cid=17
- Article 1: it does not apply when the address of the person is not known;
  - Provided we conducted a diligent search.
- While Mexico specifically lodged an objection to Article 10(a), which permits service by mail, DFPS can still mail a waiver;
  - But keep in mind the waiver has to be notarized unless the person is incarcerated. TFC § 102.0091.

Other Countries

- For countries not subject to the Hague, service may be made pursuant to TRCP 108(a):
  - In a manner prescribed by the law of the foreign country;
  - As directed by the foreign country in response to a letter request;
  - In the manner provided by Rule 106;
  - Pursuant to the terms of a treaty;
  - By any other means directed by the court and not prohibited by the law of the country where the service will be made.

TFC § 107.013 – Appointment of Counsel



In re B.C., No. 19-0306, __ S.W.3d __, (Tex. Dec. 20, 2019)

- At the adversary hearing, Mother was admonished of her right to a court-appointed attorney if she submitted an affidavit of indigency.
- Throughout the pendency of the case, Mother was admonished that her parental rights were subject to termination if she did not complete her service plan.
- During the case, Mother never asked for an attorney, did not file an affidavit of indigency, and did not appear for the termination trial. No attorney was appointed for Mother.
- Mother's parental rights were terminated in July 2018.

- In August 2018, Mother asked the trial court to appoint her an attorney to appeal the termination judgment. After Mother submitted an affidavit of indigency, she was appointed an appellate attorney.
- On appeal, Mother argued in part, that she was wrongfully denied the assistance of counsel.

- Tex. Fam. Code § 107.013(a)(1)
- In a suit filed by a governmental entity . . . In which termination of the parent-child relationship . . . is requested, the court shall appoint an attorney ad litem to represent the interests of an indigent parent of the child who responds in opposition to the termination or appointment."

The court of appeals found that "there was sufficient indication" in the record of Mother's indigency such that the trial court should have "conducted further inquiry into her status", including:

- Mother's home lacking running water and power at the beginning of the case; and
- Mother was working at a fast food restaurant during the case and was attempting to secure her own housing.

- The court of appeals reversed the judgment concluding that:
  - Mother had appeared in opposition to the termination;
  - The record supported that Mother was indigent;
  - Mother was entitled to appointed counsel;
  - And therefore, the trial court erred by proceeding without appointing her an attorney.

- The Texas Supreme Court held the court of appeals erred in holding the trial court was required to conduct a pre-trial inquiry into a parent's indigency status because Mother neither claimed indigence nor filed the requisite affidavit.
- The Court explained the court of appeals' holding that the trial court was required to "conduct [ ] further inquiry" without the requisite affidavit contravenes the statutory text of TFC § 107.013.
- "Filing an affidavit of indigence is a necessary prerequisite to a determination that the parent is indigent."

- BUT the Court affirmed the reversal because the trial court failed to give mandatory statutory admonishments regarding the right to appointed counsel.
- TFC § 263.0061 requires that the trial court admonish a parent of their right to counsel, and to court-appointed counsel if the parent is indigent and appears in opposition, at the status hearing, the initial permanency hearing, and all subsequent permanency hearings.
- The Court noted Mother was present and unrepresented at several hearings falling within the ambits of 263.0061 without receiving the mandatory admonitions
  - Including at one of the most critical points in the proceeding – the permanency hearing immediately before trial.

- Following the repeated failure to properly admonish Mother, she remained unrepresented at trial and her rights to her child were terminated.

- Thus, the Court concluded the noncompliance with 263.0061 was not harmless, and reversal was required.

In re S.R., Jr., No. 10-19-00235-CV (Tex. App.—Waco Dec. 31, 2019, no pet. h.) (mem. op.).

- On appeal, the parents argued the trial court erred by not appointing them counsel at the adversary hearing.
- The parents and the Department reached an agreement at the adversary hearing which the trial court concluded meant they were not in opposition to the suit, and refused to consider appointing counsel for them.
- BUT the record indicated the parents were only in agreement with placing the child with Mother's parents – not Department involvement.

- The Court noted the record did not demonstrate that the trial court gave the parents the proper admonishments regarding their right to counsel at the adversary hearing, the status hearing, or the first permanency hearing as required by TFC §§ 107.013 and 263.0061.
- The Court observed both parents testified in these hearings without the benefit of the advice of counsel.
- Further, the testimony that was given at those hearings where they were unrepresented was included in the evidence presented at trial, and was relevant to whether they had completed their service plans and the best interest finding.

- Therefore, the error was not harmless and reversal was required.

Trial Practice

Jury Trial on De Novo

In re A.L.M.-F, No. 17-0603, __ S.W.3d __ (Tex. May 3, 2019)

Following a bench trial during which both sides called witnesses, the associate judge terminated mother's parental rights.

Mother filed a jury demand and timely filed a request for de novo hearing.

The Department moved to strike the jury demand, arguing that:

1. Mother did not have a right to a jury trial for the de novo hearing; and
2. Granting the jury demand would prejudice the Department and the children, especially in light of the difficulty and expense of recalling all the witnesses to testify.

The district court denied the jury demand, and held a bench trial during which the transcripts and exhibits from the associate-judge proceedings were admitted into evidence. No live witnesses were called to testify. Mother appealed.

- Mother could have objected to the referral to the associate judge and requested a jury trial before the referring court. She did not. TFC §§ 201.005(b), 005(c).
- Mother then could have requested a jury trial before the associate judge. She did not.

➢On appeal, Mother claimed that TFC 201.015 **guaranteed** a third opportunity to demand a jury trial in a "de novo" hearing.

- TFC § 201.015, states “A party may not demand a second jury in a de novo hearing before the referring court if the associate judge’s proposed order or judgment resulted from a jury trial”.

- SCOTX interpreted this to mean that the referring court MAY offer a jury trial on de novo if the trial in front of the associate judge was a bench trial.

Three Key Takeaways:

(1) A “de novo hearing” under Chapter 201 is **NOT** a “trial de novo”. “A de novo hearing is not an entirely new and independent action, but instead, is an extension of the original trial on the merits.”

(2) “The Legislature created a process that is mandatory when invoked but expedited in time frame and limited in scope.”

(3) Given the timelines for requesting and conducting a de novo hearing; “an expectation that referring courts would be able to accommodate first-time jury demands in de novo hearings does not comport with the overall statutory scheme.”

As to Mother's constitutional right to a jury trial argument:

1. Mother was afforded the right to demand a jury trial.
2. The distinction between a jury trial that is permissive under the law and one that is available as a matter of right is more than mere semantics.
3. When a jury trial is available as a matter of right, a timely request is presumptively reasonable and ordinarily must be granted absent evidence that it would (1) injure the adverse party, (2) disrupt the court's docket, or (3) impede the ordinary handling of the court's business.
4. Here, because a jury trial is not a matter of right, no presumption arises.

HOLDING:

Once the parties elect a bench trial before the associate judge, Chapter 201 does not confer **a right** to demand a jury trial in a de novo hearing. If a de novo hearing is requested, the referring court **has discretion** to grant a first-time jury request, but the statute cannot reasonably be read as affording the parties a right to a jury trial at that juncture.

Jury Questions

In re J.T., No. 10-19-00298-CV, __ S.W.3d __ (Tex. App.—Waco Dec. 18, 2019, no pet. h)

- Mother's parental rights were terminated following a jury trial.
- On appeal, Mother argued the trial court erroneously allowed jurors to ask whatever questions they wanted after the parties had concluded their questioning of the witness.
- There were over 165 of the jurors' questions actually allowed and asked by the trial court to the witnesses.
- Both Mother and the Department objected in writing prior to the trial and throughout the proceedings, which the trial court denied or overruled.

- The Court of Appeals noted this same trial judge was told 25 years ago that this very process was improper in a criminal trial by the highest criminal court in the state, thus constituting reversible error. *See* *Morrison v. State*, 845 S.W.2d 882 (Tex. Crim. App. 1992)
- The Court perceived of no distinction in the law between civil and criminal jury trials as to this issue, especially in a termination proceeding.

- Further, the Court agreed with the rationale and holding in *Morrison* and held that it was error to allow the jury to ask questions of the witnesses, and that it probably caused the rendition of an improper judgment or prevented the appellant from properly presenting the case on appeal.
- The Court explained it is impractical, if not impossible, to isolate in the record the impact of the evidence received in response to those 165 questions.

Termination Grounds

TFC § 161.001(b)(1)(C): Making Arrangements

In re A.R., A.R., and A.R., No. 02-18-00311-CV (Tex. App.—Fort Worth Mar. 14, 2019, pet. denied) (mem. op.)

Father's parental rights were terminated under TFC § 161.001(b)(1)(C).

- Subsection (C) provides that termination may occur if the parent has "voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months."

BACKGROUND:

- The parents have three children.
- Mother and Father never lived together and had “on-again/off-again relationship” while Mother was married to another man.
- Father had “minimal contact” with the children according to Mother.
- Father claimed he “spent time with them every day” while he lived in Wichita Falls and remained in contact with them through Mother for some time thereafter.
- January 2017-Department investigates Mother; Mother places children with relative; Relative can no longer care for children; Children placed in foster care.

KEY FACTS:

- 2013 - Child support order for the oldest child.
- 2014 - Father moved to Dallas.
- March 2015 - Father stopped paying child support.
- April 2015 – Father moved to Mexico and had not seen the children since his move. He never met the youngest child.

- On appeal: Father argued that the Department did not prove that he failed to provide adequate support for the children. He claimed that he could "arrange for the children's support by another person" and that the Department did not prove that Mother did not have sufficient resources to support them.

Under subsection (C), a parent may provide for a child's support by making arrangements for their support rather than by personally providing support.

See Holick v. Smith, 685 S.W.2d 18, 21 (Tex. 1985).

The Court of Appeals concluded there was no evidence that when Father left the children with Mother she was able to support them or expected to do so without his assistance:

- Mother had never held a full-time job (which Father more than likely knew after their three years together).
- Father was ordered to pay child support for oldest child.
- Mother expected support and never waived her entitlement to it.

IMPORTANT

“[T]he court order to provide support for one of the three children is a judicial finding that no such arrangement existed as to that child, even before the birth of the third child created the need for additional support.”

TFC § 161.001(b)(1)(D)and (E)

In re S.L.L., 2020 WL 103862, ___ S.W.3d __ (Tex. App.—Corpus Christi 2020).

- Department initially got involved following report of methamphetamine use and domestic violence.
- Case initially an order for required participation case, but child was removed in September 2018 following domestic violence incident after which Mother was transported to domestic violence shelter with child.
- Father was bailed out of jail, and Mother returned to him with the child.
- Department was concerned about Father's undisclosed mental illness. Child had observed Father "acting like people are chasing him, believing that things are following him, hiding from people [and] physically harming her mother."

- Throughout case, Mother was partially compliant, but moved frequently between Sept. 2018 and May 2019, moving or traveling to accompany Father to his criminal court proceedings in multiple counties, requiring her services to be restarted each time she moved.

- In May 2019, Mother obtained full time employment, consistently visited S.L.L., and had a negative hair follicle test. A month before trial, she enrolled in individual counseling. She enrolled in drug treatment the week before trial.

- In April 2019, Father threatened to kill himself and to prevent Mother from getting S.L.L. back. Mother left him, but then later reconciled.

- In June 2019, Father asked to engage in services. He was on felony probation in two counties and tested positive for amphetamines and methamphetamines one month before trial.

- At the time of trial, Mother was still in a relationship with Father.
- The Appellate Court considered Mother's "persistent willingness to tolerate and excuse" Father's erratic and violent behavior as supporting an endangerment finding under subsection (D).
- The Court rejected Mother's argument that her repeated decisions to leave Father demonstrated her protective capacity, because each separation was always followed by reconciliation, "a hazardous cycle pursued by Mother at the expense of her daughter's physical and emotional well-being."
- Mother's "resolve to remain with an unstable, drug-addicted, abusive individual supports an endangerment finding under subsection (D).

In re A.K.C.K., 2020 WL 62491, ___ S.W.3d __ (Tex. App.—Houston [14th] 2020).

- Mother had CPS history going back to 1991 with her oldest daughter, "Diane" (who was currently the caregiver of "Anne," age 17 and "Iris," age 15).
- Mother insisted that prior investigations were result of "people just randomly calling CPS as revenge and they just call, make false calls."
- At trial, Mother's testimony "lacked any showing of responsibility" on her part for her daughter's suffering. She continued to insist that the case is the result of false allegations by Anne's former foster parents and her belief that a witch had put a hex on her and her daughters.
- Mother's behavior towards caseworker and CASA had been hostile, belligerent, aggressive, angry, and erratic.

- While in Mother's case, Anne had attempted suicide and Iris had not consistently attended school. In Diane's care, both girls were thriving and succeeding in school, especially since visitations with Mother had stopped.

- The Court considered the following as evidence supporting the trial court's subsection (E) determination:

  - Mother's behavior towards caseworker, CASA, providers;

  - Comparison of how the girls were doing under Mother's case versus in Diane's care;

  - Mother's failure to take any responsibility for her part in her daughter's suffering

In re B.M.S., 581 S.W.3d 911 (Tex. App.—El Paso 2019).

- Children were living with Mother and her boyfriend at time of removal for drug use and domestic violence.
- At trial, Father eventually testified that he had no doubt that Mother was using drugs in front of the children because he knew "what kind of person she is."
- He believed that Mother's drug use harmed the children emotionally.

- In the decade since his separation from Mother, he visited the children sporadically and made no effort to remove them from Mother's care.

- Court considered this sufficient to support trial court's determination that Father knowingly allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being.

TFC § 161.001(b)(1)(L): Sexual Offenses and Serious Injury

In re S.G. and D.D.-G.P., No. 01-18-00728-CV (Tex. App.—Houston [1st], April 2, 2019, pet. denied) (mem. op.)

KEY FACTS:

- Father convicted of aggravated sexual assault of a child.
- Father was twenty years old at the time he committed the offense. The victim was a thirteen-year-old girl.
- Father was initially placed on deferred adjudication but was later incarcerated after violating the terms of his community supervision.
- Father was required to register as a sex offender for the rest of his life.

TFC § 161.001(b)(1)(L) allows a trial court to terminate parent rights if it finds by clear and convincing evidence that the parent “has been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child” under specific provisions of the Texas Penal Code”.

*Under Penal Code § 22.021(a)(1)(B), “a person who engages in a sexual act with a child less that 14 years of age commits an aggravated sexual assault.”

- On appeal, Father argued that the sexual encounter was consensual and that there was no evidence presented that the victim suffered "serious injury".
- In rejecting this argument, the Court of Appeals stated that "the victim's age categorically precluded consent" because "children under fourteen lack the capacity to understand the significance of agreeing to sex."
- The Court also rejected the assertion that Father's offense did not cause "serious injury" as "[s]exual activity is always accompanied by a possibility of important or dangerous consequences, including emotional or psychological hurt, and the possibility of realizing these consequences is magnified where children under the age of 14 are concerned due to their inability to meaningfully apprehend the nature of sex and its possible outcomes."

Father also argued that his conviction for aggravated sexual assault occurred 18 years prior to trial and was therefore "too distant or remote in time" to constitute sufficient evidence under subsection (L).

The Court of Appeals also rejected this argument, pointing out that Father was required to register as a sex offender for life. The Court noted that in creating a lifetime sex offender registry, "the Legislature has made a policy decision that the crime for which [Father] was convicted will never be so remote that it will no longer be a matter of legitimate public concern."

In re Z.N., 579 S.W.3d 140 (Tex. App.—Amarillo 2019, pet. filed)

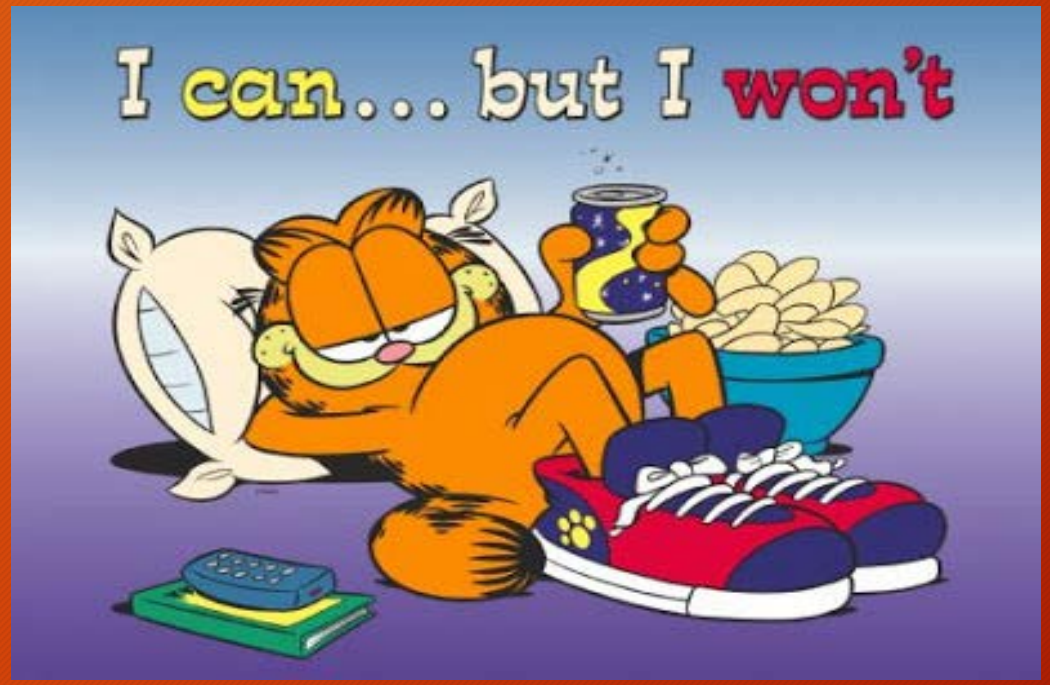
- Father argued the evidence was insufficient to support the trial court's finding under subsection (L).
- It was undisputed that Father was convicted of three acts of indecency with a child in 2008 and served a ten-year prison sentence that ended two months before the final hearing.
- Relying on the indictments and judgments in evidence, the trial court found that Father had "been convicted … for being criminally responsible for the death or serious injury of a child under" Penal Code 21.11.
- The documents indicated that Father's offenses involved three child victims, ages 4, 10, and 11, and involved contact with the genitals of each child.

- Father argued there was no proof that, by his acts of indecency, he inflicted “serious injury” on any of the child victims.
- The Amarillo Court reiterated its earlier 2001 holding that the statute's required proof of serious injury could not reasonably be inferred merely from the commission of some of the crimes itemized in subsection (L).
- The Court put indecency with a child in this category and concluded additional evidence of serious injury is required.

- In *L.S.R.*, a 2002 opinion, the Texas Supreme Court considered petitions for review in a case in which the court of appeals had deleted a subsection (L) finding from a judgment of termination.
  - The court of appeals found the record of the parent's deferred adjudication for indecency with a child, committed against a 4-year-old cousin when the parent was 16, contained no showing that the child suffered death or serious injury. It affirmed the judgment of termination based on another ground.
  - On review, the Texas Supreme Court issued an opinion concluding, "We deny the petitions for review, but disavow any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury."

- The Amarillo Court agreed with a sister court which read the disavowal in *L.S.R.* as "intimating that psychological or emotional injuries are relevant when determining whether a child has sustained 'serious injury' for purposes of subsection (L)."
- Concluding the Department produced no evidence of injury, physical or emotional, sustained by any of the 3 victims of Father's criminally indecent acts, the Court reversed the judgment.

TFC § 161.001(b)(1)(N): No Reasonable Efforts



In re M.A.S.L. and K.J.L., No. 04-18-00496-CV (Tex. App.—San Antonio, Dec. 19, 2018, no pet.) (mem. op.)

- Father contested the sufficiency of the evidence supporting the trial court's (N) finding, specifically the reasonable efforts element.

- During Father's incarceration, the children were removed from Mother's care after she exposed them to drug users and felons.
- They were placed with Father's sisters.

Three Department Caseworkers:

- Caseworker #1: Handled the referrals-no personal contact with Father, sent "courtesy worker" to the jail where he was incarcerated to interview him. Record silent as to whether Father was interviewed.
- Caseworker #2: Did not meet with Father despite making two visits to the jail. She sent Father his service plan—but did not know if he received it, and did not have any information about Father's participation in services. She also sent Father letters updating him about the case.
- Caseworker #3: Made no attempt to visit with Father during the case.

Father testified that he received paperwork from the Department about Mother, and one letter mentioning a service plan but did not receive the service plan.

In holding that the Department's actions did not constitute reasonable efforts to return the child to Father, the appellate court considered that:

(1) none of the caseworkers met with Father in person to discuss the family service plan;

(2) although the second caseworker testified she mailed Father's family service plan to the facility where he was incarcerated, she failed to provide the date she mailed the plan and there was no evidence that Father actually received it; and

(3) Father testified that he received correspondence less than two months before trial.

TFC § 161.001(b)(1)(O) Affirmative Defense

In re J.Q.J., 2019 WL 2292991, (Tex. App.—Houston [1st Dist.] 2019).

- Mother challenged trial court's subsection (O) determination, arguing that she made a good faith effort to comply with the court order.
- Mother argued that she was not able to complete her family service plan "in part due to transportation issues."
- A permanency report documented mother missing a court hearing and a parent child visit due to lack of transportation.
- Appellate court found no evidence in record that Mother's "alleged lack of transportation is not attributable to any fault of hers."

- The appellate court then went on to document that Mother also:
  - Failed to attend court on three other occasions
  - Missed three psychological appointments
  - Failed to appear for thirteen drug tests
  - Failed to complete anger management and domestic violence
- There was no evidence that Mother's non-compliance in those instances were due to transportation or any other reason that arguably cannot be attributable to Mother's own fault.
- Termination under subsection (O) affirmed.

Best Interest of the Child: MSA and Stipulations Supported Best Interest Finding

In re A.C., 560 S.W. 3d 624 (Tex. 2018)

Mediated Settlement Agreement:

- Parents stipulated to termination under (N) and (O);
- In two separate places, parties collectively agreed that termination is in the children's best interest;
- Department appointed PMC, parents appointed as non-parent possessory conservators with limited visitation rights.

The MSA also included the following:

- “Absent unforeseen circumstances”, the Department was to consent to adoption by certain individuals.
- If no adoption, PMC was to be transferred to those individuals “absent unforeseen circumstances.”
- Termination was not contingent on either adoption or placement.

After the execution of the MSA:

- Placement for two of the children backed out.
- Mother filed a motion to invalidate and modify the MSA, requesting new placement for those children and the right to designate placement.
- Mother did not repudiate her termination.
- Trial court denied Mother's motion.

The Termination Trial:

- Mother does not show up for trial.
- Trial court takes judicial notice of MSA. CW testifies about contents of MSA. GAL and AAL represent that agreement is in the children's best interest.
- Trial court rendered final order. Mother appeals, challenging legal and factual sufficiency of the evidence.

The Court of Appeals affirmed the trial court's judgment, holding that the stipulations and placement plans in the MSA were sufficient evidence of several factors relevant to the best interest determination.

On petition for review to the SC, Mother asserted that the clear and convincing evidence standard negated the evidentiary value of her best interest stipulations on the MSA and the best interest testimony at trial, which she characterized as conclusory.

HOLDING:

The SC held that “a parent’s voluntary and affirmative statements that termination of parental rights is in the child’s best interest in a mediated settlement agreement binding on the parties under section 153.0071(d) of the Family Code can satisfy, and does here, the requirement that a best-interest finding be supported by clear and convincing evidence.”

Mental Illness

In re Z.M.R. and Z.D.B., 562 S.W.3d 783 (Tex. App.—Houston [14th Dist.] 2018, no pet.)

Mother did not attend trial.

- Mother's attorney announced that Mother had been at the courthouse earlier that day, at which time she executed an irrevocable affidavit of relinquishment.
- Mother's attorney told the court that she explained the affidavit to Mother and that she understood and had no questions.

- Mother, through new counsel, filed a motion for new trial alleging "newly discovered evidence" and that she "reportedly suffers from bipolar disorder, depression and other mental health conditions and had not taken her prescribed medication for six years." As a result, Mother claimed her affidavit was involuntary.

- ON APPEAL:

- Mother argued that her "diminished mental capacity rendered her relinquishment involuntary."

- *In re K.M.L.*, 443 S.W. 3d 101, 113 (Tex. 2014):

- Voluntariness "fully litigated" at trial.

- Here Mother, signed her affidavit on the day of trial and alleged the affidavit was involuntary two months after signing it.

- *In re K.M.L.*, 443 S.W. 3d 101, 113 (Tex. 2014):

- Record contained "several" pieces of evidence about mother's mental abilities "around the time she signed the affidavit", including testimony from mother's psychiatrist and counselor regarding her "comprehension challenges".

- In contrast, in this case, most of the evidence of Mother's mental abilities came from an evaluation from "MHMRA" records six years before her relinquishment.

- *In re K.M.L.*, 443 S.W. 3d 101, 113 (Tex. 2014):

- "absolutely no evidence in the record, other than the language of the affidavit itself," that the mother understood the consequences of signing the affidavit of relinquishment."

    1. Mother's trial attorney stated that she had explained the affidavit to Mother and Mother understood it;

    2. Mother brought someone for the Department to evaluate as placement, from which the trier of fact could infer that Mother "understood she would be giving up her rights to the children and wanted the Department to appoint someone she knew as their managing conservator";

    3. GAL testified in detail about Mother's execution of the affidavit;

    4. Mother engaged in a long discussion with trial judge in which she confirmed she understood that: (1) she signed the affidavit, and (2) the "benefits of relinquishment over termination on another ground."

- Accordingly, the Court of Appeals concluded that Mother did not establish that her affidavit of relinquishment resulted from fraud, duress, or coercion.

In re J.P.-L., 02-19-00255-CV, __ S.W.3d ___ (Tex. App.—Fort Worth 2019) (no pet.)

- Mother had a history of mental illness, homelessness, drug use, and domestic violence leading to J.P.-L.'s removal in September 2018.
- Mother appeared at the adversary hearing, and after several outbursts during the court's pronouncement of its findings, Mother was escorted from the courtroom.
- After the adversary hearing, the trial court appointed Mother a guardian ad litem, stating in the order, "This Court finds Respondent Mother may not have capacity or may not be competent."

- Mother did not appear at the status hearing in November 2018.
- In January 2019, Mother's attorney filed a motion to discharge Mother's Guardian *ad litem* because the Family Code Chapter 107 did not authorize such an appointment. Mother's attorney did not secure a ruling on the motion nor did she refer the matter to probate court. Mother's guardian *ad litem* remained appointed to the case through the trial.
- Mother did not appear at the June 12, 2019 permanency hearing nor the bench trial on June 24, 2019. Mother's attorney made an oral motion for continuance at trial, which was denied.

- ISSUE ONE: Whether trial counsel's failure to file a guardianship proceeding constituted ineffective assistance of counsel.

- Citing *E.L.T.*, the Court determined that the relevant sections of the Family Code "do not prescribe a competency standard that a parent must meet before participating in a hearing or trial." 93 S.W.3d 372, 374 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

- The Court concluded that no provision of the Texas Family Code authorizes the appointment of a guardian *ad litem* for a parent in a parental rights termination case, and reviewed a number of cases that suggested the presence or absence of a guardian *ad litem* makes little difference in determining whether the parent's rights should be terminated.

- The Court noted that Tex. Disciplinary Rules Prof'l Conduct R. 1.02(g), expressly allows but does not require an attorney to institute a guardianship proceeding through probate. *In re Therford*, 574 S.W.3d 362, 372 (Tex. 2019).

- An ineffective assistance of counsel challenge requires a showing that the outcome would have been different but for counsel's unprofessional errors.

- Mother was unable to show how the appointment of a guardian *ad litem* through probate would have changed the outcome of the case other than to increase the amount of time J.P.-L. was in foster care.

- Mother's issue was overruled.

- ISSUE TWO: Whether Mother's mental health issues obligated the Department to seek termination based on TFC 161.003 (inability to care)?

- The Department did not seek termination of (and the trial court did not terminate) Mother's rights under 161.003. Nevertheless, Mother's attorney asserted that the Department had "back-doored" a termination under this section.

- The Court held that Sec. 161.003 is not the exclusive way to terminate parental rights of someone with mental illness, nor did the trial court have to assure Mother's capacity in order to effect a valid termination under 161.001.

- This issue was overruled.

The Indian Child Welfare Act

ICWA's Notice Requirement

In re S.J.H., No. 08-18-00182-CV, __ S.W.3d __ (Tex. App.—El Paso Dec. 9, 2019, no pet. h)

- Father stated that he was a member of the Blackfoot tribe, the Chippewa tribe, and the Cherokee tribe and the Department's pleadings also identified S.J.H. as a suspected Indian child.
- Under the ICWA, the Department must notify relevant tribal authorities when it seeks to terminate the parental rights to a known or suspected Indian child. 25 U.S.C. § 1912(a).
  - These notice requirements apply even as to the non-Indian parent.
- ICWA's regulations direct state courts having reason to believe a child is an Indian child to presume the child is an Indian child until proven otherwise.

- The Court concluded once S.J.H. was suspected of having Native American heritage due to her Father's claims and the Department's pleadings, she was presumptively an Indian child and notification to relevant tribal authorities was required.
- While the Department notified several Indian tribes, no notice went out to Cherokee authorities – a tribe identified by Father.
- 2 implications:
  - S.J.H. is still presumptively an Indian child and thus the beyond reasonable doubt burden applied – TC applied clear and convincing;
  - The failure to contact Cherokee officials constitutes a second, separate reversible error.

- The Court declined to issue a “conditional” judgment should it be determined that the child is not Indian, and instead opted for reversal.
  - It may create an implicit presumption that the child is *not* an Indian child by treating the failure to contact tribal authorities as a procedural error;
  - It would be an advisory opinion for the Court to determine sufficiency of the evidence under the clear and convincing evidence standard;
  - The case involved a potential adoption which could later be invalidated if procedures were not followed.

Transferring Jurisdiction under ICWA

In re Navajo Nation, No. 07-19-00202-CV, __ S.W.3d __ (Tex. App.—Amarillo 2019, orig. proceeding)

- The Navajo Nation, from Arizona, challenged the trial court's determination that "good cause" existed not to transfer the proceeding to the Navajo Nation's Tribal Court.
- Section 1911(b) creates concurrent jurisdiction in the case of Indian children not domiciled on the reservation with a presumption in favor of tribal court jurisdiction.
- A state court must defer to the tribal court unless: (1) either parent objects; (2) the tribe declines the transfer; or (3) "good cause" is shown for the retention of state jurisdiction

- The Court noted the children are “Indian children”, they do not reside on the reservation, a parent has not opposed the Navajo Nation's motion to transfer, and the Navajo Nation has agreed to accept jurisdiction.
  - Thus, the determinative issue was the application of “good cause”.
- The Court considered the 2016 BIA Guidelines which explain that this provision is intended to permit a state court to apply a modified doctrine of *forum non conveniens* to insure that the rights of the Indian child, Indian parents and the tribe are fully protected.
- “[T]he ‘good cause’ determination whether to deny transfer to Tribal court should address which court is *best positioned* to adjudicate the child-custody proceeding, not predictions about the outcome of that proceeding.”

- The Court concluded all material witnesses and evidence necessary for the custody proceedings to go forward were in Texas
  - Removal proceedings occurred in Lubbock;
  - Mother and children lived in Lubbock throughout the 19-month case;
  - All Department caseworkers and service providers are in or around Lubbock;
  - And the Department could not bear the expense of having service providers attend.

- The Court rejected arguments from the Navajo Nation that:
- Witnesses could appear telephonically – better borne by the Navajo Nation with a single representative as opposed to bringing all witnesses and evidence to Arizona; and
- It intends to place the children in services and seek to establish a guardianship for the children.
  - Per the 2016 BIA Guidelines, the trial court could not consider whether the transfer may affect the children's placement.
- The Court interpreted the trial court's order to be a finding that under the circumstances of this case, it was "best positioned" to adjudicate the pending termination proceeding under the ICWA.

Appellate Issues

In re N.G., 577 S.W.3d 230 (Texas 2019).

Parents have a history of drug use, criminal conduct, failure to comply with court-ordered services and to submit to drug testing.

- Their parental rights were terminated pursuant to TFC 161.001(b)(1)(D), (E), (O), and a finding that termination of their parental rights is in the children's best interest.
- Both parents appealed.
- Mother asserted that the trial court failed to specify the actions necessary for her to obtain return of the child.

- The appellate court affirmed finding sufficient evidence of TFC 161.001(b)(1)(O) and declined to review the sufficiency of the evidence under subsections (D) or (E).

- **Issue One:**

- Whether a parent, whose parental rights were terminated under multiple grounds, is entitled to appellate review of the section 161.001(D) and (E) grounds because of the “collateral consequences” these grounds could have on their parental rights to other children—even if another ground alone is sufficient to uphold termination.

- Section 161.001(b)(1)(M) provides that parental rights may be terminated if clear and convincing evidence supports that the parent “had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state.”

- SC held that because section 161.001(b)(1)(M) alone provides a sufficient basis to terminate parental rights based on a previous section 161.001(b)(1)(D) or (E) finding, the due process concerns, coupled with the requirement for a meaningful appeal, mandate that if a court of appeals affirms the termination on either of these grounds, it must provide the details of its analysis.

- Issue Two:

- Whether the court of appeals erred in failing to address whether the trial court's order was sufficiently specific to warrant termination under section 161.001(b)(1)(O).

- SCOTX found that the appellate court did not review the specificity of the order.

- Because a trial court must necessarily decide that a court order is sufficiently specific for the parent to comply before terminating a parent's rights under section 161.001(b)(1)(O), a trial court cannot terminate parental rights for failure to comply without first considering the order's specificity.

- The court of appeals erred in failing to address the specificity of the order, which included the service plan.

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