# Termination Case Law Update

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**TABLE OF CONTENTS**

**Page**

# I. PRE-TRIAL ISSUES

## A. INSUFFICIENT EVIDENCE OF REASONABLE EFFORTS UNDER 262.201

On May 21, 2019, the Department received a referral alleging the abuse and neglect of the child by Mother and Father and conducted an investigation. On July 1, 2019, the Department filed a petition for required participation in services or for conservatorship in a suit affecting the parent-child relationship, and the trial court ordered Mother to submit to drug testing on July 23, 2019. Mother's July 23 hair follicle test was positive for opiates and heroin, and the Department amended its petition on July 30, 2019, to include grounds for termination of Mother's parental rights. The trial court signed an order for protection of a child in an emergency, and the Department removed the child on that same day.

At the adversary hearing on August 27, 2019, the trial court signed temporary orders appointing the Department as the child's temporary managing conservator. Mother sought mandamus relief asserting that the trial court erred in refusing to return the child to her at the conclusion of the adversary hearing. Specifically, Mother argued that the Department failed to use reasonable efforts to prevent the child's removal and claimed that continuation of the child in the home was a viable option because her grandmother was willing to stay in the home to keep the child there.

The trial court is required to order the return of the child at the conclusion of the adversary hearing unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that: "the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal." TFC § 262.201(g)(2).

At the adversary hearing, the caseworker testified that Mother's grandmother had offered to stay in the home with Mother and supervise her with the child, but the immediate supervisor refused this offer. The caseworker also testified that Mother's home was clean, with a bedroom for the child, and food to eat. Mother's grandmother testified to the Department's refusal of her offer to stay with Mother and supervise Mother's contact with the child.

The Court concluded that in light of the testimony and lack of evidence that the Department had made reasonable efforts to prevent the need for removal, there was no evidence to support the trial court's finding that there was an urgent need for protection that required the immediate removal of the child or that reasonable efforts were made to eliminate or prevent the child's removal from the home. Quoting *N.M.N.*, the Court reasoned that while the Department does not have to ignore a positive drug test, "the Texas Family Code provides a range of mechanisms to address controlled substance abuse by parents." *See In re N.M.N.*, 524 S.W.3d 396, 405 (Tex. App.—Houston [14th] 2017, orig. proceeding). The Court therefore granted Mother's request for mandamus relief and directed the trial court to vacate the August 27 temporary orders and ordered the return of the child to Mother. *In re K.L.M.*, No. 14-19-00713-CV (Tex. App.—Houston [14th] Nov. 14, 2019, orig. proceeding) (mem. op.).

## B. GUARDIAN AD LITEM FOR PARENT IN TERMINATION CASE NOT AUTHORIZED

The Court of Appeals rejected Mother's complaint that her counsel was ineffective for failing to file a guardianship proceeding in the probate court. The Court pointed out that the Texas Family Code provides for appointment of a guardian *ad litem* for the children but not for the parents. After a lengthy analysis of existing case law and how similar issues have been handled in other courts,

the Court held that it was "unclear at best . . . how a guardian *ad litem* might have changed the outcome other than to increase the amount of time [the child] would spend in foster care." The Court also held "as the law currently stands, even assuming, without deciding, that her appointed counsel was ineffective by opting not to initiate a separate guardianship proceeding in the probate court, Mother cannot show on this record that there is a reasonable probability that the trial's result was not reliable." *In re J.P.-L.*, 592 S.W.3d 559 (Tex. App.—Fort Worth, Dec. 19, 2019, pet. denied) (mem. op.).

## II. TFC § 263.401

### A. FAILURE TO TIMELY COMMENCE

On June 28, 2017, the Texas Office of the Attorney General (OAG) filed a petition to establish Father's paternity to two of Mother's children along with a SAPCR pertaining to all three children in the same pleading. The trial court entered a default temporary order on December 5, 2017, but never entered a final order.

On January 8, 2018, pursuant to Chapter 261 of the Family Code, the Department filed a *Motion for Orders in Aid of Investigation* in the same cause number as the OAG SAPCR. An order granting the Department immediate investigatory access to the children was granted the same day. On March 1, 2018, the Department filed an original petition to terminate Mother's and Father's parental rights to all three children in the same cause number as the OAG SAPCR, asserting Family Code chapter 262 as the basis for jurisdiction. The trial court entered an emergency order appointing the Department as the temporary managing conservator of the children the same day, triggering a statutory dismissal date of March 4, 2019.

Shortly before the trial on the merits, Father filed a motion for continuance. However, there was no record made of the hearing on Father's motion. The trial court made an entry in the court's case management system that indicated the trial court "granted extension and reset on or before April 30, 2019." The dismissal date of March 4 passed, and neither Mother nor Father filed a motion to dismiss the proceeding. The bench trial commenced on March 26, 2019, and on that same day the trial court signed an order purporting to grant an extension of the dismissal deadline under TFC § 263.401(b), extending the dismissal deadline to August 30, 2019, but leaving blank the line for entry of a new trial setting as required by TFC § 263.401(b). At the conclusion of the trial, the trial court granted termination as to both Mother and Father and named the Department as the children's permanent managing conservator. Both parents then appealed arguing in part that the trial court failed to timely commence trial and therefore had lost jurisdiction under TFC §263.401.

The parties disputed on appeal which version of TFC §263.401 applied to the proceeding. TFC § 263.401 was amended with an effective date of September 1, 2017, and included a savings clause indicating the changes were only applicable to SAPCRs filed on or after the effective date.

TFC § 263.401 states, in pertinent part:

> (a) Unless the court has commenced the trial on the merits or granted an extension under Subsection (b) or (b-1), on the first Monday after the first anniversary of the date the court rendered a temporary order appoint the Department as temporary managing conservator, the court's jurisdiction over the suit affecting the parent-child relationship filed by the Department that requests termination of the parent-child relationship or requests that the Department be named conservator of the child is terminated and the suit is

> automatically dismissed without a court order.

TFC § 263.402 was also amended to remove subsection (b), which stated: "A party to a suit under this chapter who fails to make a timely motion to dismiss the suit under this chapter waives the right to object to the court's failure to dismiss the suit. A motion to dismiss under this subsection is timely if the motion is made before the trial on the merits commences."

The Department first argued that the filing of its termination petition was merely an intervention in the original SAPCR filed by the OAG in June 2017, thereby invoking the former version of TFC § 263.401 and 263.402 for this case. However, the Court of Appeals disagreed, pointing out that he Department urged chapter 262 as the basis for the trial court's jurisdiction and the lack of a final order in the original SAPCR required the Department to file its subsequent suit as an original proceeding. Combined with the fundamental differences in relief sought between SAPCRs filed by the OAG and those filed by the Department, the Court of Appeals held the Department had invoked the trial court's jurisdiction after the effective dates of the amendments to sections 263.401 and 263.402.

The Court then went on to analyze Mother and Father's jurisdictional challenge under the amended versions of those sections. The Court observed that while at least one appellate court has held that a trial court may properly use a docket sheet entry to render an order of extension valid, TFC § 263.401(b) also requires the order to: "(1) schedule a new dismissal date, (2) make any necessary temporary orders for the safety and welfare of the child, and (3) set a final hearing date." The Court concluded that the docket entry in this case satisfied none of those requirements. Moreover, the Court held that the trial court was unable to extend the deadline via the order signed on March 26, 2019, because the deadline had already passed, and orders rendered after the trial court loses jurisdiction are generally void. Accordingly, the Court of Appeals held that the trial court lacked subject matter jurisdiction at the time of its termination judgment and declared it void. *In re A.F., W.J., A.J., and J.J.*, __ S.W. 3d __, No. 02-19-00117-CV (Tex. App.—Fort Worth Sept. 24, 2019, no pet.).

### B. New Judge Does Not Divest Court of Jurisdiction

Father contended the order terminating his parental rights was void because the trial court lost jurisdiction when it failed to commence the trial on the merits before the dismissal deadline under TFC § 263.401(a). The Court of Appeals disagreed.

The dismissal deadline was September 30, 2019. On September 25, 2019, the case was called for announcements, the parties announced ready, the Department made an opening statement in which it stated that Father was the child's alleged father and it was seeking termination based on his agreement to sign a waiver of interest as to any possible parental rights he might have, and the Department presented the testimony of two witnesses. The Department requested a recess to address some procedural matters; Father did not object, and the trial court announced a recess. An October 2019 order included a finding that genetic testing had been completed, adjudicated Father as the child's biological father, and dismissed the presumed father. Pursuant to an order recessing and resetting the final trial, the trial reconvened on November 20, 2019—presided over by a different judge. After the trial, the trial court signed an order terminating Father's parental rights under subsections 161.001(b)(1)(D) and (E).

Father did not dispute that a trial on the merits commenced on September 25, before the dismissal deadline, as required by TFC § 263.401. Nor did he dispute that the trial could have recessed after it commenced on September 25 and then continued

on November 20 without the trial court losing jurisdiction. Instead, he argued that the proceedings on November 20 constituted a "new trial," not a continuation of the trial that began on September 25, because they were presided over by a different judge than the one who presided on September 25. Thus, Father contended that because this new trial did not commence before the September 30 dismissal deadline, the trial court's jurisdiction expired before it rendered the termination order and that order is void.

The Court of Appeals rejected Father's argument. It stated that Father "[did] not cite any authority to support his argument that a substitution of a judge after a trial has commenced is necessarily prohibited or that proceedings held by a successor judge are converted, in effect, into a new trial." The Court wrote that contrary to Father's contention, "it is well established in Texas law that a change in judges, even midway through trial, may occur and that this change, standing alone, does not deprive the trial court of jurisdiction over the case."

The Court concluded that based on the record showing that on September 25, the trial court asked for announcements, the parties announced ready for trial, the Department called and presented the testimony of two witnesses, and Father's counsel cross-examined the witnesses, the trial had already "substantively commenced" when the trial court granted a recess. It held, "Because the trial court timely commenced a trial on the merits on September 25, and because the November 20 trial proceedings were a continuance of the September 25 proceedings and not a 'new trial,' we conclude that the trial court had jurisdiction over the suit to terminate [Father's] parental rights." *S.A. v. Texas Dep't of Family and Protective Servs.*, No. 03-19-00884-CV (Tex. App.—Austin Apr. 29, 2020, no pet. hist.) (mem. op.).

### C. COURT TIMELY COMMENCED TRIAL

Mother and Father each challenged the termination of their parental rights on grounds that the trial commenced after the scheduled dismissal date. Appellants argued the termination decree was void because the trial court's jurisdiction expired before trial commenced.

A trial court automatically loses jurisdiction if the court does not commence the trial on the merits or grant an extension by the one-year dismissal deadline provided by TFC § 263.401(a). It was undisputed that before the trial court's jurisdiction expired, it signed an order with the requisite findings granting an extension under section 263.401(b), setting the case for trial on April 8, 2019, and ordering that the suit shall be dismissed on April 20, 2019—a date within the 180-day extension period permitted by section 263.401(b).

Before the trial date, the parties signed and filed a Rule 11 agreement which set pretrial deadlines to exchange and make objections to exhibits. The order provided in pertinent part, "The parties hereby agree to reset the trial to April 15, 2019. The parties also agree to start and stop the trial on April 15, 2019. Trial will resume on May 15, 2019." On April 15, 2019, the parties appeared for trial and made announcements, the Department's counsel stated, "We're just doing a start and stop", and Mother's counsel confirmed the case would begin that morning but then "be recessed" until a future date. The trial court and counsel discussed whether exhibits should be admitted. The Department called an investigator who testified briefly, relating the duration of her experience, when she received the case, and that the allegations were physical neglect of the children. The children's attorney *ad litem* then requested that the trial be stopped pursuant to the parties' Rule 11 agreement, and the trial court recessed the trial. Trial recommenced in October 2019, and the trial

court signed an order terminating Mother's and Father's parental rights in November 2019.

Appellants contended that the trial did not commence on April 15 because the April 15 proceeding was a "sham" done with the "sole intent" to retain the case on the court's docket beyond the automatic dismissal date, the court's jurisdiction terminated on April 20, and the November 2019 termination order was void. The Court of Appeals agreed with the Department's argument that trial commenced on April 15, and therefore, the trial court retained jurisdiction when it signed the termination order. The court determined that several recent cases holding that the trial commenced before the dismissal deadline supported its conclusion that the trial commenced in this case on April 15. It concluded that the following actions showed that trial on the merits commenced on April 15. The trial court called the case for trial on April 15, and the parties made announcements. The parties and the trial court discussed preliminary matters, including potential objections to exhibits, and although the Department and Mother expressed readiness to address the issue, the trial court decided to address the admission of exhibits when the trial was "continued and we finish it up." The Department's investigator was sworn and briefly testified before the court recessed.

The Court also rejected Mother's additional argument that the Rule 11 agreement to "start and stop" the trial on April 15 showed that trial did not actually commence on that date. The Court held, "To 'commence' means to 'start.' This trial started on April 15. How long it progressed before recessing, when it 'stopped,' or whether it 'started' and 'stopped' on April 15 by agreement, does not alter the conclusion that trial *started* for purposes of section 263.401(c) on April 15—the salient issue."

The Court acknowledged the appellants "plausibly" suggested that starting a trial only to introduce minimal evidence before recessing the proceeding indefinitely "allows a termination case covered by section 263.401 to linger contrary to legislative intent." It responded that "[t]he legislature, however, is free to address that concern and could have done so in recent amendments by stating for example that a trial court's jurisdiction expires on a date certain unless the court signs a final order by that date. But section 263.401 requires only that trial on the merits 'commence' by the deadline, and here trial commenced before that deadline and before the court lost jurisdiction." The court overruled Mother's and Father's issue and affirmed the termination order. *In re Z.S., C.S.-T., T.S-T., T.S-T., and T.S-T,* No. 14-19-00891-CV, ___ S.W.3d __ (Tex. App.—Houston [14th Dist.] Apr. 28, 2020, no pet. h.).

## III. APPOINTMENT OF COUNSEL

### A. BURDEN IS ON PARENT TO PROVE INDIGENCE

On July 5, 2017, the day of his scheduled adversary hearing, Father submitted an application for appointed counsel. In it, he reported that his income was $38,000 with a monthly income level of $2,800 and a timeshare worth $7,000. The court denied his application and the hearing was reset.

At the adversary hearing held on July 14, 2017, the court reiterated that it denied his application for appointed counsel because his income was too high, but admonished Father that he always has a right to claim counsel and "file a new financial affidavit at any time" if he is indigent. Father claimed that he could not afford the retainer for an attorney and his truck had just been impounded, to which the trial court replied that it would take the matter up again at the next hearing because he was "on the cusp" of qualifying for an appointed attorney. After the court explained the process of submitting a financial affidavit to seek such

appointment, Father replied "I'll try and retain one."

Father did not appear at the next hearing in August 2017. At the December 2017 hearing, Father reported that he was making $3,000 per month. The trial court admonished Father again of his right to file an application for a court-appointed attorney at any time; however, he did not file one. For the next eleven months, Father did not appear before the court.

On October 31, 2018, Father appeared at a permanency hearing for the case and requested a court appointed attorney, to which the trial court responded: "Now?" The trial court recessed Father's hearing so that he could complete an application for court appointed counsel, noting that "we just got built in reversible error" if the hearing were to proceed on that day. Father was found to qualify for a court appointed attorney and one was appointed that day. Notably, he was appointed the same attorney who was representing him in another concurrent Department case, who the trial court noted was familiar with the facts of the underlying suit. A jury trial commenced forty days later and Father's parental rights were terminated.

TFC § 107.013(a) provides indigent parents the statutory right to counsel in Department parental termination cases. To trigger this right, section 107.013(d) requires a parent who claims indigence to file an affidavit of indigence.

On appeal, Father contended that the trial court denied him an attorney for fifteen months "during critical stages of the termination proceeding." The Court of Appeals rejected this claim, stating that "Father ignores the span of almost eleven months in which he failed to appear before the trial court, just as he ignored the trial court's repeated entreaties to update his [affidavit of indigence]." The Court considered that there was initially conflicting evidence before the trial court when Father first sought an attorney. Further, the Court also noted that "Nor can we conclude that the appointment of Trial Counsel, who the record indicates was already familiar with the parties and the issues, came so late that its timing (forty days before trial) was an abuse of discretion." *In re S.C.*, No. 02-18-00422-CV (Tex. App.—Fort Worth June 13, 2019, pet. denied) (mem. op.).

### B. Mandatory Duty to Admonish Parent Regarding Appointment of Attorney at Every Hearing

The Department removed the child from Mother's care based on allegations of drug use and sale in the home, ongoing domestic violence, and lack of electricity and running water. Mother appeared without counsel at the adversary hearing and was admonished of her right to appointed counsel if she was indigent and informed that she would need to fill out "some forms" for the trial court to be able to determine her indigency. Mother appeared without counsel at the permanency hearings but was not admonished of her right to appointed counsel at those hearings. Mother did not appear at the pretrial hearing or the bench trial and was not represented by counsel at either. After a brief evidentiary hearing, the trial court terminated Mother's parental rights, after which Mother filed an affidavit of indigency and a pro se notice of appeal. The trial court found Mother indigent and appointed counsel to represent her on appeal.

The intermediate court reversed and remanded for a new trial, holding that Mother was entitled to appointed counsel because she appeared in opposition of the suit and "there was sufficient indication in the record that she was indigent such that the trial court should have conducted further inquiry into her status."

TFC § 107.013(d) states: "The court shall require a parent who claims indigence under Subsection (a) to file an affidavit of indigence in accordance with Rule 145(b) of the Texas Rules of Civil

Procedure before the court may conduct a hearing to determine the parent's indigence under [section 107.013]." The Texas Supreme Court disagreed with the intermediate court's conclusion that the trial court was obligated to conduct further inquiry into Mother's status without the requisite affidavit of indigence.

However, the Court went on to conclude that the trial court did fail to properly admonish Mother of her right to appointed counsel as provided by section 263.0061, which states, "At the status hearing under Subchapter C *and at each permanency hearing* under Subchapter D […] the court shall inform each parent not represented by an attorney of: (1) the right to be represented by an attorney; and (2) if a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney. The "repeated" failure of the trial court to properly admonish Mother of her right to appointed counsel at each permanency hearing was not harmless, resulted in her remaining unrepresented at trial, and required reversal. As the appellate court had already reversed the trial court's termination order, the Court affirmed the court of appeals' judgment and remanded the case for a new trial. *In re B.C.*, 592 S.W.3d 133 (Tex. December 20, 2019). *See also In re S.R. Jr.*, No. 10-19-00235-CV (Tex. App.—Waco December 31, 2019, pet. filed) (mem. op.) (holding that because evidence at trial included conduct and testimony of the parents at the adversary, status, and first permanency hearing when they were indigent and unrepresented by counsel the trial court's failure to admonish parents of their right to court appointed counsel at those hearings was not harmless).

### C. Denial of Appointment of Counsel

The Department filed its petition for protection, conservatorship, and termination two days after the child tested positive for amphetamines at his birth in October 2017. On November 1, 2017, Mother filed her *Application for Appointment of Attorney & Affidavit of Indigence*. That same day, a former associate judge signed an order finding Mother indigent and appointed counsel to represent her. In March 2018, Mother chose to retain a lawyer. However, Mother's retained counsel filed a *Motion to Substitute Counsel* in August 2018 citing Mother's failure to cooperate. There were no orders in the clerk's record granting the motion to withdraw.

Trial commenced on September 14, 2018. On that day, Mother requested a court-appointed attorney and moved for a continuance. She told the court, "I need a court-appointed one, if you can." The trial was then recessed for two weeks. When trial recommenced, the trial court asked Mother if she desired an attorney "only if an extension [was] granted?" Mother replied, "I need one regardless. I would like one." The trial continued and both Mother's verbal motion for continuance and her request for court-appointed counsel were denied. Mother remained unrepresented throughout the trial and her parental rights were terminated.

Following the trial, Mother filed a *de novo* request. Her request listed the issue of her lack of representation at the trial on the merits. The *de novo* hearing commenced in November 2018. Mother, still without counsel, indicated she "almost" had enough money to retain an attorney but was unsure she could obtain one. She requested a continuance. The hearing was recessed after the Department introduced evidence regarding the child's placement. The *de novo* hearing resumed in February 2019. Mother was not present due to her arrest the night before and subsequent hospitalization. The hearing was recessed again, and Mother was appointed counsel after the referring court declared, "[it] is going to be my intent to appoint [Mother] an attorney, so I'll give that attorney an appropriate amount of time to get prepared." In May 2019, the *de novo* hearing resumed. The referring court made it known that it had read and would consider the reporter's record from the trial on the merits. The

Department offered the six volumes from the trial on the merits, and the records were admitted without objection. Both the Department and Mother then offered additional evidence. After taking the matter under advisement, the referring court signed an order terminating Mother's parental rights.

On appeal, Mother argued that the appointment of counsel or the *de novo* hearing did not cure the trial court's failure to appoint her counsel for the trial before the associate judge, resulting in a violation of her right to due process.

In rejecting the Department's arguments that Mother waived her right to counsel, the Court reasoned that Mother was first declared indigent when the termination proceedings were initiated in 2017. It determined that because Mother's indigency was unchallenged and therefore remained intact, she was denied the right to counsel because her indigent status remained intact throughout the proceedings "even though she retained counsel for a brief period".

The Department also argued that the trial court's failure to appoint Mother counsel at the trial on the merits was harmless because she was subsequently appointed counsel for the *de novo* hearing. The Court also rejected this argument. It reasoned that because the referring court announced it was considering the record from the trial on the merits before the associate judge, "it expressly indicated that it was considering evidence developed during a part of the proceeding where [Mother's] right to counsel was violated and where the Department evidence was not subjected to the rigors of cross-examination in an adversarial process." As such, the Court held that "[c]ommencing the *de novo* hearing anew with [Mother] having court-appointed counsel did not cure the error caused by the trial court in denying [Mother] appointed counsel for the entire trial on the merits – a critical stage of the termination proceedings." *In re J.F., II*, 589 S.W.3d 325 (Tex. App.—Amarillo 2019, no pet.).

## IV. UCCJEA – Substantial Compliance

Father and Mother married in Nevada, where the children were born. In April 2017, they divorced, and a Nevada court granted full custody of the children to Mother. In January 2018, Mother moved to Texas while Father remained incarcerated in Nevada for assaulting Mother. In April 2018, the children were removed by the Department in Texas and in November 2018, Mother filed a plea to the jurisdiction, asserting that the Nevada court, and not the Texas trial court, had continuing, exclusive jurisdiction based on the divorce decree.

The day after Mother filed her plea to the jurisdiction, the Texas trial court conferred with the Nevada court, during which the Nevada court determined that Texas was the more convenient forum and deferred jurisdiction to Texas. The trial court denied Mother's plea to the jurisdiction. In April 2019, Mother relinquished her parental rights and Father's parental rights were terminated in a jury trial. Father appealed.

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the trial court that makes the initial child custody determination generally retains exclusive continuing jurisdiction over any future custody determinations; however, the court with exclusive continuing jurisdiction can relinquish its jurisdiction.

While it is undisputed that the Nevada court relinquished its jurisdiction to the Texas court, Father claimed on appeal that the trial court lacked jurisdiction because it failed to follow several procedural requirements of the UCCJEA. This included failing to: (1) specify a deadline for the parties to obtain an order from the Nevada court pertaining to jurisdiction; (2) immediately confer with the Nevada court regarding jurisdiction; (3)

provide the parties with an opportunity to present facts and arguments before a final decision on jurisdiction was made; and (4) make a record of the telephonic hearing between the Texas and Nevada courts.

The Court of Appeals rejected Father's assertion, stating that "although the trial court did not comply fully with the above procedural requirements, the record reflects that the trial court conferred with the Nevada court and obtained an order from the Nevada court declining to exercise jurisdiction; provided notice to the parties of its telephonic hearing with the Nevada court; held a hearing on the mother's plea to the jurisdiction, at which time the parties were permitted to present argument on the jurisdictional issue; and allowed the parties to submit briefing on the issue before making its final decision on jurisdiction."

The Court concluded that because the Texas court "substantially complied with the essential procedural requirements of the UCCJEA and fully satisfied the central goals of the act", any error of the trial court's procedures was rendered harmless. *J.W. v. Texas Dep't of Family & Protective Servs.*, No. 03-19-00260-CV (Tex. App.—Austin Aug. 20, 2019, pet. denied) (mem. op.); see also *In re J.P. and A.P.*, 598 S.W.3d 789 (Tex. App.—Fort Worth 2020, no pet.) (Texas court had jurisdiction where trial court substantially complied with UCCJEA in communicating with Michigan court).

## V. INTERVENTION

### A. TFC § 102.004

In a termination proceeding brought by the Department against Father after he was incarcerated and charged with murdering Mother, the Court of Appeals granted maternal Grandfather mandamus relief from the trial court's denial of Grandfather's petition for leave to intervene and be heard on his claims seeking conservatorship and possessory rights to the children.

After Mother's death, the Department filed suit seeking to terminate Father's parental rights. Maternal Grandfather filed petition to intervene, asserting standing under TFC § 102.004(b), and three other provisions. The Department contested Grandfather's standing to intervene. After an evidentiary hearing, the trial court denied Grandfather the right to intervene because it found no reason that allowing Grandfather to intervene "would benefit the court's responsibility to decide what was in the best interest and safety of the children."

The Court analyzed and found dispositive Grandfather's asserted standing to intervene under TFC § 102.004(b), which provides in relevant part that:

> the court *may grant* a grandparent or other person, subject to the requirements of Subsection (b-1) if applicable, deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this chapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

TEX. FAM. CODE § 102.004(b) (emphasis added). The Court stated that TFC § 102.004(b) requires Grandfather to establish only that appointing the sole living parent, Father, to be the children's managing conservator would significantly impair the children's physical health or emotional development. It observed that the Department did

not present any evidence to dispute Grandfather's pleadings and evidence on that jurisdictional fact.

The Department argued that the "may grant" language in TFC § 102.004(b) gave the trial court discretion to look beyond the statutory requirement in TFC § 102.004 to decide whether Grandfather had the right to intervene, allowing the trial court to evaluate whether the intervention would serve the children's best interest. The Department contended granting Grandfather's intervention was not in the children's best interest because his presence in the suit would complicate the issues in the case.

The Court recognized that a statute's use of the term *may* rather than *shall* usually indicates the Legislature intended to make the provision discretionary. But it also stated that a statute's use of the term *may* "does not permit trial courts complete discretionary authority: trial courts do not have discretion to make decisions in an arbitrary or unreasonable manner, without reference to guiding rules or principles." The Court determined "it is not clear whether the Legislature intended to allow the trial court to look to other criteria regarding standing beyond the one stated for grandparents in section 102.004(b)." However, it stated, "[h]ad the Legislature intended other criteria to apply to standing, the Legislature could have easily placed that additional criteria into the statute." It went on to point out that the Department did not dispute that Grandfather presented evidence of the criteria for standing expressly stated in TFC § 102.004(b).

The Court held that even if the Department was correct that courts may determine at hearings challenging a grandparent's standing whether, as a matter of standing, the children's best interest will be served by allowing a fit grandparent the right to intervene into a pending SAPCR, the Department presented no evidence to meet its burden to rebut Grandfather's evidence that allowing him to intervene would serve the children's best interest. It stated that if the Department was correctly interpreting the statute, "Grandfather merely need[ed] to raise a fact issue on the best-interest issue to establish he [had] a right to be heard." It determined that Grandfather met his burden by presenting evidence showing the circumstances the children were in due to Mother's death, testimony from Grandmother and Grandfather showing that the children's interest would be better served if Grandfather had a role in their lives, and Grandmother's testimony that Grandfather was not a dangerous person. Thus, the Court concluded "the only evidence before the trial court reveals that issues of material fact exist about whether awarding Grandfather legal rights to the children would be in their best interest."

The Court also rejected the Department's argument that the trial court could have reasonably determined that allowing Grandfather to join the SAPCR would complicate and delay the trial. It held that "even if the *may grant* language gave the trial court that authority, a matter we need not expressly decide, the trial court abused its discretion based on the evidence in the record." Specifically, when the trial court heard Grandfather's request to intervene, no trial date had been set; although immediately after denying Grandfather's intervention, the trial court granted the Department's request and set the case for trial five months after the case began, nothing in the record suggests that a statutory extension would have been required to dispose of the case within the one-year dismissal deadline if Grandfather had been allowed to intervene; and nothing in the record shows why the Department wanted such a quick trial setting.

The Court concluded Grandfather demonstrated he had a justiciable interest in the pending SAPCR, and the trial court abused its discretion by denying Grandfather's right to be heard. Because Grandfather had no adequate legal remedy to be heard on his rights to custody or possession of his grandchildren, the Court held he was entitled to

mandamus relief directing the trial court to grant Grandfather's request seeking leave to intervene. *In re M.B.*, No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.).

## VI. TRIAL

### A. TRIAL BY CONSENT

Father's parental rights were terminated pursuant to TFC §§ 161.001(b)(1)(D), (E), (H), (N), and (O). The Court of Appeals held the evidence was legally insufficient to support termination findings under TFC §161.001(b)(1)(D) and (E) and reversed the portion of the termination order containing those findings. However, the Court held the evidence was sufficient to support termination under subsection (O) based on Father's failure to comply with his court-ordered service plan.

On appeal, Father contended that the only predicate statutory ground pled by the Department in its amended petition was TFC § 161.001(b)(1)(D). He argued the trial court therefore lacked jurisdiction to make findings on the other four predicate statutory grounds for termination contained in the final order because those grounds were not supported by the pleadings.

The Court stated that "[u]nder Texas Rule of Civil Procedure 310, a judgment must conform to the pleadings; however, issues not raised in pleadings may be tried by express or implied consent. To determine whether an issue was tried by consent, courts examine the record to determine if the issue was tried as opposed to evidence being presented on the issue." When the evidence on the issue is developed without objection under circumstances indicating both parties understood the issue was being contested, an unpled issue may be deemed tried by consent. If a party allows an issue to be tried by consent and fails to raise the lack of a pleading before submission of the case, the party cannot later raise the pleading deficiency for the first time on appeal.

The Court explained that the court-ordered service plan was admitted into evidence. Father and other witnesses testified without objection about Father's failure to comply with his service plan. Finally, no objection was made when the Department requested termination based on Father's failure to comply with his service plan. Consequently, the Court held that the issue of whether Father's parental rights should be terminated based on his failure to comply with his court-ordered service plan was tried by consent. *In re C.J.G.*, No. 04-19-00237-CV, __S.W.3d __(Tex. App.—San Antonio Oct. 30, 2019, no pet.)..

### B. QUESTIONS FROM JURY IMPROPER

Mother appealed the termination of her parental rights based on the trial court allowing each juror to ask, "whatever questions they had for each witness after the parties concluded their questioning of each witness." The Court of Appeals relied on the reasoning in *Morrison v. State*, 845 S.W.2d 882 (Tex. Crim. App. 1992) in holding it was error to allow the jury to ask questions of the witnesses. The Court further concluded that allowing the jury to do so "probably caused the rendition of an improper judgment or probably prevented the appellant from property presenting the case to" the appellate court. The Court pointed out that there were 165 questions from jurors asked of the witnesses, and "it is impractical, if not impossible, to isolate in the record the impact of the evidence received in response to those questions and determine what, if any, impact it had on the judgment." The Court remanded the matter for a new trial.
*In re J.T.*, 594 S.W.3d 782 (Tex. App—Waco 2019, no pet.).

### C. NO RIGHT TO SELF-REPRESENTATION

Father appealed termination of his parental rights, arguing the trial court erred in failing to allow him to represent himself. The Court of Appeals observed that although criminal defendants have the right to waive counsel and represent him or herself, "the same right does not exist in a termination proceeding once counsel has been appointed." The Court went on to note that a parent's right to counsel in a termination proceeding is based in Texas statute, and is not a constitutional right. Moreover, "[t]he plain language of the Code deprives the trial court of the authority to permit the withdrawal of such attorney ad litem absent a finding of good cause" and the waiver of right to counsel must be knowing and intelligent.

Father argued that he was entitled to represent himself under TRCP 7, which provides that "[a]ny party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court." The court rejected this argument, explaining that the right to self-representation under TRCP 7 is not absolute and "[t]he provisions of the Family Code regarding appointment of counsel override any conflicting rule of procedure."

The Court also held that the trial court did not err in refusing Father's request to represent himself because of his mental health issues and demeanor during trial. The Court pointed to statements by the trial court indicating that Father's comments during trial were not relevant to the trial and made no sense. The Court also pointed out that Father's "behavior on the second day of the termination hearing was similar to that exhibited on the first day – he attempted to raise collateral matters rather than focusing on the issues central to the termination. [Father] exhibited little self-control, talked about the conspiracy against him, and accused the court of bias and prejudice." The Court of Appeals held that this behavior coupled with his mental illness justified the trial court's refusal to allow Father to represent himself, as his request to waive counsel was not a knowing and intelligent decision *In re T.W. and X.W.*, No. 10-18-00379-CV (Tex. App.—Waco May 22, 2019, pet. denied) (mem. op.).

### D. POSSESSORY CONSERVATORSHIP APPOINTMENT MUST BE SUPPORTED BY EVIDENCE

Following a bench trial, Mother was appointed possessory conservator with an unrelated, nonparent appointed as managing conservator. Mother appealed, arguing the trial court abused its discretion in finding that appointing her as managing conservator "would significantly impair the [child's] physical health and emotional development."

TFC § 153.131(a) provides:

> Unless the court finds that appointment of the parent or parents would not be in the best interest of the child because appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

At trial, the Department pointed to concerns about Mother's mental health and her failure to visit the child as grounds to deny Mother managing conservatorship. The nonparent cited concerns about Mother's mental health and was concerned that a return of the child to Mother would quickly fail because Mother was unwilling to get treatment.

Department Caseworker Amanda Carter testified the Department received a referral of neglectful supervision "due to Mother's untreated mental illness", among other allegations. Ms. Carter related Mother completed her service plan, but testified Mother was not following the service provider's recommendations, specifically the psychological evaluation recommendation that Mother needed to be "medication compliant." Ms. Carter testified that during a January 2019 home visit, she observed there were only four pills missing from Mother's daily prescriptions that had been filled in August 2018. Ms. Carter testified this was a concern for the Department because the original referral was for neglectful supervision "due to Mother's untreated mental health. And her not being medication compliant shows that she's not treating her mental health." Mother claimed she was attending weekly treatment sessions, but evidence introduced at the February 2019 trial indicated her last session was in August 2018.

The evidence from the counseling sessions indicated Mother completed her counseling sessions, but Ms. Carter testified that based on her review of Mother's psychological evaluation, she had concerns as to whether Mother was sufficiently mentally stable to protect the children. Ms. Carter also testified she had not seen a change in Mother's mental state during the case. Ms. Carter testified she had visited Mother's home, which had rooms for the children, Mother was in the process of getting beds for the children, and there was food in the home. When asked whether anything felt unsafe about the apartment, Ms. Carter only stated there was a strong smell of bleach but admitted that Mother was probably cleaning in preparation for the Department visit.

The Court of Appeals stated that the appellate record "contains little evidence regarding the nature of Mother's mental illness, the prescribed treatment for it, or, most importantly, its effect on her ability to care for her children." The removal affidavit remarked that Mother "hurts herself a lot and is going to hospitals". The affidavit also revealed that Mother told the investigator she had been diagnosed with Bipolar disorder and schizophrenia, although she had not gotten treatment for "years" and was not taking her medication. Evidence at trial indicated diagnoses of Generalized Anxiety Disorder and Post Traumatic Stress Disorder, although she was not showing symptoms.

The Court noted that no physician or counselor testified at trial to help clarify Mother's mental health issues, and although there was a psychological report ordered for Mother, it was not introduced into evidence. Although Ms. Carter testified Mother was not taking her medication, she did "not testify about the symptoms that the medications were prescribed to address."

The Court of Appeals cited to established caselaw to state that a parent's mental illness alone is not sufficient to show a child's physical or emotional development will be significantly impaired by parental custody.

Accordingly, the Court of Appeals held that the evidence presented at trial was insufficient to overcome "[t]he strong presumption that the best interest of a child is served by appointing a natural parent as managing conservator." The Court cited to *In re B.B.M.*, 291 S.W.3d 463 (Tex. App.—Dallas 2009, pet. denied) in holding "[t]here was no evidence that Mother's 'specific, identifiable behavior or conduct,' 'demonstrated by specific acts or omissions,' will probably harm [the child.]"

Specifically, the Court held that:

> Carter testified that the Department did not recommend designating Mother as managing conservator because "the issue here was untreated mental health." She testified that Mother had been given additional time—from September 2017 to the

> time of trial in February 2019—to be medication compliant, but was not. But as we have noted, the Department's evidence did not (1) identify Mother's illness with any certainty, (2) show the effects of the untreated illness on Mother's ability to care for [the child], or (3) show probable harm [the child].
>
> Without evidence that Mother's untreated mental health "would significantly impair" [the child]'s "physical health or emotional development," the Department failed to meet its burden to establish that it is not in [the child]'s best interest to appoint Mother as managing conservator

The Court of Appeals reversed the portion of the trial court's order appointing Mother as possessory conservator and remanded to the trial court.
*In re A.M.*, No. 05-19-00412-CV (Tex. App.—Dallas Aug. 29, 2019, no pet.) (mem. op.).

### E. TRE 803(6)

On appeal of the termination of her parental rights, Mother complained that the trial court abused its discretion in admitting the drug test results in which her nine-year-old and five-year-old children both tested positive for methamphetamine. Specifically, she complained that the exhibits were hearsay and complained as to the lack of testimony from the chemist who performed the tests.

TRE 803 provides that certain types of evidence are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness. Subsection (6) states:

> ***Records of a Regularly Conducted Activity***. A record of an act, event, condition, opinion or diagnosis if:
>
> (A) The record was made at or near the time by – or from information transmitted by someone with knowledge;
> (B) The record was kept in the course of a regularly conducted business activity;
> (C) Making the record was a regular practice of that activity;
> (D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and
> (E) The opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. "Business" as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

Mother claimed that the trial court's admission of the drug test results violated the confrontation clause and also that *In re K.C.P.*, 142 S.W.3d 574 (Tex. App.—Texarkana 2004, no pet.) which she claimed stood for the proposition that admission of the drug test results was an abuse of discretion in the absence of someone to testify as to the qualification of the tester, the equipment used, and the testing procedure. The Court of Appeals rejected both of these claims and found that the trial court did not abuse its discretion.

The Court of Appeals first remarked that "[a]ttached to each of the complained-of exhibits in this case was an affidavit by the custodian of records of Texas Alcohol and Drug Testing Service. The affidavits pertained to hair, urine, and

oral fluid testing. The affidavits indicated that "strict chain of custody procedures" were utilized and that the testing was performed by a certified scientist utilizing gas chromatography/mass spectrometry instruments and reviewed by a licensed medical review officer."

The Court of Appeals noted that the affidavits generally tracked the language of Rule of Evidence 803(6), which sets out the requirements for the hearsay exception for records of regularly conducted business activity, and Rule of Evidence 902(10), which sets out the requirements for authentication purposes of an affidavit that accompanies business records. The Court found that the "affidavits attached to the complained-of exhibits in this case provide information regarding the chain of custody, the testing procedures, and the qualifications of the analysts" and "[w]e find no evidence to indicate a lack of trustworthiness with respect to the exhibits." *In re E.B. and M.B.*, No. 11-19-00001-CV (Tex. App.—Eastland Aug. 22, 2019, no pet.) (mem. op.)

### F. Failure of Order to Comport with Pleadings

During the Department's termination suit, the child was initially placed with Foster Parents. The adoptive mother of the child's half-brother informed the Department she was interested in becoming the child's foster parent, and about four months into the pendency of the case, she became a licensed foster parent. Shortly thereafter, the Department's goal changed from reunification of the child with Mother to termination of Mother's parental rights.

The Department requested permission to move the child to the adoptive mother of the child's half-brother. The associate judge denied the request, and the Department requested a de novo hearing before the district court. Before the de novo hearing, Foster Parents filed a petition in intervention seeking their appointment as sole managing conservators, or alternatively to adopt the child. They also requested to be appointed as temporary managing conservators and asked that the child be placed with them for the duration of the suit. The district court affirmed the associate judge's order to keep the child in her placement with Foster Parents, ordered the child placed into the home of the half-brother's adoptive mother for periodic visits, found Foster Parents lacked standing to intervene, and ordered that their petition in intervention be struck. A petition in intervention was then filed by the adoptive mother of the child's half-brother (Intervenor).

Following a bench trial before the associate judge, the trial court signed an order terminating Mother's parental rights to the child and appointing the Department as the child's sole permanent managing conservator. The termination order also ordered the child to remain in the foster home and the Department to proceed to permanency with Foster Parents and process the adoption in 40-90 days, unless an appeal was filed. The child's parents did not appeal.

Intervenor appealed the termination order's specific orders regarding placement and adoption. First, she argued the order was void insofar as it ordered the Department to proceed with permanency of the child with Foster Parents and ordered the Department to process the adoption by Foster Parents because that relief was not pled or tried by consent. Second, she argued the trial court had no authority to order that the child was to remain placed with Foster Parents or to order the Department to consent to the child's adoption by Foster Parents because no limitation on the Department's sole managing conservatorship was requested by any party. The Court of Appeals agreed.

The Court held that the matter of the child's adoption was not pled or tried by consent because the Department's petition raised only issues of termination and conservatorship; although Foster

Parents attempted to intervene and raise the issue of adoption, their petition in intervention was struck, and Intervenor did not raise the issue of the child's adoption by either her or Foster Parents. The Court also held that the matter of permanency and adoption by Foster Parents was not tried by consent, reasoning that because Foster Parents' intervention failed, they were not parties at trial and did not present affirmative evidence relevant to the issue of adoption. It noted that among other things, Foster Parents did not present evidence to prove the Department consented to their adoption or that an exception existed to the requirement for consent. Because the pleadings did not notify, Intervenor, the Department, or the attorney and guardian *ad litem* of Foster Parents' claim for adoption, and the record does not show that they understood the issue of adoption was involved, the Court concluded that the record did not support the trial court's judgment ordering the Department to proceed to permanency with Foster Parents and to process the adoption.

Further, the court stated that no pleadings were filed or evidence adduced at trial that would give the Department, Intervenor, or the attorney and guardian *ad litem* fair notice of the custody restriction the trial court imposed. Foster Parents did not have any pleadings on file and did not adduce any evidence at trial to support the child's placement in their home, and no party developed the record regarding Foster Parents' custody of the child. Notably, the Court stated, "even considering the relaxed pleading standards as to custody" described in *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967), "we hold that the trial court's judgment ordering [the child's] placement with [Foster Parents] is not supported by the pleadings and was not tried by consent." Because the Court could not say the parties had fair notice of the placement issue, it concluded that the order as to placement was void.

Holding the judgment was not supported by pleadings or tried by consent, the Court reversed the judgment's orders that the child remain in her placement with Foster Parents and that the Department proceed to permanency with Foster Parents and process the adoption. *In re J.O.*, No. 04-19-00381-CV (Tex. App.—San Antonio Dec. 11, 2019, no pet.) (mem. op.).

## VII. TERMINATION GROUNDS

### A. 161.001(b)(1)(C)

In 2014, the trial court modified the prior SAPCR, appointed Grandparents sole managing conservators of the child, and appointed Mother and Father possessory conservators with visitation rights. Grandparents subsequently brought forth an involuntary private termination proceeding. At the time of trial, the child was ten years old and had lived with Grandparents all his life, except a period of about six months when he was two years old.

The trial court terminated Mother's rights pursuant to TFC §§ 161.001(b)(1)(A), (B), and (C) (among others). The relevant subsections provide:

"[t]he court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:

(1) That the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;

(C) 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[.]

The Court addressed these three subsections together because Mother contended on appeal that she did not *voluntarily* leave the child with Grandparents because she left him pursuant to a court order. The Court ultimately determined that because the original SAPCR order was the only document from that proceeding entered into the record, and "the record did not indicate the circumstances under which the original SAPCR order was entered and whether Mother agreed to the arrangement, the Court concluded Grandparents failed to establish that Mother left the child with them voluntarily.

The Court distinguished the case from *In re H.S.*, No. 05-16-00950-CV (Tex. App.—Dallas Dec. 6, 2016, no pet.) (mem. op.), which upheld termination despite Father's argument that he left the children with Grandmother pursuant to court order. In *H.S.* there was evidence that Father participated in the conservatorship proceeding but made no request to be named managing conservator or to oppose Grandmother's request to be named managing conservator.

Instead, the Court found that Mother's argument was analogous to *In re J.K.H.*, No. 06-09-00035-CV (Tex. App.—Texarkana Sept. 16, 2009, no pet.) (mem. op.). In *J.K.H.*, the court of appeals determined that the "question is whether [the father] voluntarily left [the children] in the possession of mother". Accordingly, the *J.K.H.* court concluded the father did not leave the children with the mother voluntarily because the default divorce decree required the father to leave the children with mother despite the evidence that the father had voluntarily missed visits.

Because there was insufficient evidence to support the requirement that Mother had *voluntarily* left the child with Grandparents, the judgment was reversed. *In re B.C.H.*, No. 09-18-00437-CV (Tex. App.—Beaumont May 2, 2019, no pet.).

### B. TFC § 161.001(b)(1)(D) and (E)

#### *1. Scalp Infection*

The evidence established that the child had a "severe fungal infection on her scalp and several patches of missing hair." Father admitted knowing for two months that the child's scalp condition was serious, and he admitted he failed to treat the condition like he should have. He claimed he spoke to a doctor about the child's scalp issues, but the medical records did not support his contention. Father also maintained that the child pulled out her own hair, but this claim was similarly unsupported by the evidence which established the child did not engage in self-harm behaviors.

There was also evidence that the child's weight fell below the growth chart. Despite Father's insistence that the child refused to eat, the Court observed that the evidence demonstrated Father forced the child to stand in a corner with her hands above her head for long periods as punishment for not eating. While in care, there was evidence that the child ate "with both fists" at school and was not picky about her food. There was also testimony that the child was "very excited to eat anything". The child's doctor testified that the child's "pre-existing conditions were triggered by her many moves and caregivers, and her negative environment" with Father. The child's therapist testified that the child's behaviors in Father's home "abated once she entered the Department's care", indicating "there was some difficulty with [the child] managing herself in that setting." The therapist added, "[t]here's some stressor that [the child's] experiencing that's causing her to act out."

TFC § 161.001(b)(1)(D) allows a trial court to order termination if it finds by clear and convincing evidence that the parent has knowingly

placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child.

TFC § 161.001(b)(1)(E) allows a trial court to order termination if it finds by clear and convincing evidence that the parent has engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children.

In determining that the evidence was legally and factually sufficient to support the jury's TFC §§ 161.001(b)(1)(D) and (E) findings, the Court of Appeals concluded that Father's "failure to properly treat [the child's] scalp condition, *standing alone,* could lead a reasonable factfinder to determine that he endangered the child's physical well-being." Further, the Court determined that a "reasonable factfinder could conclude that something was happening in the home of [Father] . . . that was causing the child to refuse to eat, and to have extreme tantrums." Accordingly, the Court held that "the evidence is legally and factually sufficient to support the jury's findings that [Father] violated subsections (D) and (E). *In re I.W.*, No. 12-19-00027-CV (Tex. App.—Tyler June 28, 2019, pet. denied) (mem. op.).

### 2.. *Exposing Child to Second-Hand Smoke*

The trial court found that Mother "[k]nowingly placed or knowingly [the child] to remain in conditions or surroundings . . . which endanger[ed] the physical or emotional well-being of [the child]" pursuant to TFC § 161.001(b)(1)(D).

In its analysis of subsection (D), the Court of Appeals considered evidence that Mother was advised in October 2018 that cigarette smoke caused the child "to become congested, to constantly have a runny nose, and to have trouble breathing", yet when the child returned from unsupervised visits with Mother she "usually" smelled like cigarette smoke. Further, while Mother testified in March 2019 that she only smoked outdoors and never around the child, she admitted that she had not stopped smoking and instead "limited her cigarettes to two a day, vaped, and used nicotine gum." The Court noted two physicians testified that due to the child's reaction to smoke, including vaping fumes, which act as an irritant that worsens her asthma, "[the child's] health is endangered with possible permanent effects on her lung development by exposure to smoke." The Court also considered that Mother's current environment, in which she proposed to have the child visit or live, consisted of a one-bedroom shared apartment that had a heavy odor of smoke and full ashtrays inside.

Accordingly, the Court concluded that the child's exposure to Mother's second-hand smoke supported a finding of physical endangerment. *In re A.J.S.*, No. 13-19-00126-CV (Tex. App.—Corpus Christi-Edinburg Aug. 1, 2019, no pet.) (mem. op.); *see also In re B.T.K.*, No. 04-19-00587-CV (Tex. App.—San Antonio Feb. 26, 2020, no pet.) (mem. op.) (Subsections (D) and (E) were determined to be legally and factually sufficient, in part, based on evidence that Mother continued to smoke despite her awareness of the child's asthma diagnosis.); *In re K.W. and T.W.*, No. 09-19-00442-CV (Tex. App.—Beaumont Apr. 9, 2020, no pet. (mem. op.) (Under subsection (D), the Court considered that Mother admitted being a smoker and drug user; the children were diagnosed with bronchitis, and one of the children was diagnosed with pulmonary issues, when they came into the Department's care.)

### *3. Health Effects of Drug Use*

Expert testimony admitted at trial showed that Father's initial drug test levels for cocaine were "off the charts," indicating at least daily use that

could damage the heart and cause a heart attack even years after the person has stopped using. The Court of Appeals concluded that "the potential for overdose or death exposes a child to loss or injury that constitutes endangerment under subsection (E)." *In re A.G.,* No. 14-18-01089-CV (Tex. App.—Houston [14th Dist.] June 6, 2019, pet. denied) (mem. op.).

### *4. Failure to Take Responsibility*

In its recitation of the evidence presented at trial, the Court of Appeals noted Father took little responsibility for his failure to complete his services. Rather, he blamed Mother, claiming she stole his car and left him without transportation. Further, the Court pointed out Father offered various excuses for his failure to complete the assigned tasks in his service plan. These excuses included depicting himself as a victim of his circumstances, pointing to family tragedies, blaming his lack of transportation, and faulting his Department caseworker for not doing more to help him—despite his admission that she personally drove him to some appointments, offered him bus passes, and attempted to make other accommodations for him.

On appeal, Father challenged each of the grounds upon which the trial court granted termination, including TFC § 161.00(b)(1)(E). In finding the evidence sufficient to support the trial court's endangerment finding, the Court took into account Father's failure to complete his service plan. In doing so, the Court pointed out that Father failed to take full responsibility for his noncompliance with the service plan, instead blaming his circumstances and the Department caseworker despite her efforts to help him. *In re A.S. and S.S.*, No. 02-19-00429-CV (Tex. App.—Fort Worth Apr. 30, 2020, no pet.) (mem. op.).

### *5. Economic Disadvantage*

Mother's rights were terminated pursuant to TFC §§ 161.001(b)(1)(D) and (E). Mother asserted the record showed that the only "deliberate and conscious course of conduct" that she engaged in was poverty. Family Code subsection 161.001(c) provides in relevant part that "[a] court may not make a finding under Subsection (b) and order termination of the parent-child relationship based on evidence that the parent…is economically disadvantaged…"

The Court of Appeals noted the final order of termination expressly stated that its order terminating Mother's parental rights was not based on evidence of her economic disadvantage. Further, the Court explained the domestic violence in the home and Mother's continuous illegal drug use, including while she was pregnant, constituted evidence of endangerment. The Court accordingly concluded that the evidence was legally and factually sufficient to establish that Mother violated subsections (D) and (E). *In re A.F., A.F., and A.F., Jr.*, No. 10-19-00335-CV (Tex. App.—Waco Mar. 19, 2020, no pet. h.) (mem. op.).

### **6.** *Children's Improvements*

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

At the onset of its analysis, the Court of Appeals noted the Department's caseworker testified that Mother's behavior had been hostile, belligerent and aggressive. Further, the child advocate team leader testified that Mother had demonstrated angry and erratic behavior during the ten years she had been assigned to the family. Her report, and the Department's report, detailed multiple instances of Mother's unstable and threatening behavior. The Court pointed out that Mother's trial testimony was erratic and lacked any showing

of responsibility for the children's suffering. Moreover, Mother had been under Department investigation since 1991, yet testified she believed this case was brought about by false allegations and witchcraft. Mother admitted she told the children she believed a witch put a hex on the family.

At the time of trial, the two teenage children were living with their older half-sister. The Court noted that while in Mother's care, one child had attempted suicide, and the other child was not going to school consistently and was behind academically. Referencing her placement with her sister, one child stated, this is "the best life she has ever had." The Court pointed out that the girls had shown notable turnarounds and were thriving and succeeding in school since visitation with Mother stopped. Accordingly, the Court concluded the evidence was legal and factually sufficient to support the 161.001(b)(1)(E) finding. *In re A.K.C.K., In re I.G.K.*, Nos. 14-19-00549-CV, 14-19-00551-CV (Tex. App.—Houston [14th Dist.] Jan. 7, 2020, no pet.) (mem. op.).

### *7. Medical Neglect of Unborn Child*

Mother presented to a hospital at thirty-four weeks pregnant, leaking fluids, and experiencing contractions. Hospital staff determined that her condition threatened the life of both Mother and the fetus if Mother did not undergo a C-section immediately. Mother left the hospital ten hours later, against medical advice and with knowledge of the risk to Mother and the unborn child. Mother returned to the hospital later that day and the child was born the following day. Both Mother and the child tested positive for amphetamine, and the child also tested positive for methamphetamine. Mother again left the hospital against medical advice, and the Department filed suit.

In analyzing termination under subsection (E), the Court specifically considered as medical neglect and endangering conduct Mother's decision to leave the hospital "despite knowing she and her soon-to-be-born child risked death" if she not did undergo a C-section. *In re B.G.G., a/k/a A.G. and J.G.G., a/k/a J.G.*, No. 14-19-00278-CV (Tex. App.—Houston [14th] June 20, 2019 no pet.) (mem. op.).

## C. TFC § 161.001(b)(1)(L)

Father was convicted of three counts of sexual indecency with a child under Penal Code section 21.11 involving victims who were four, ten, and eleven years old on the date of the offenses. These offenses occurred approximately five months before the child's birth. Father was sentenced to a ten-year term for each offense, second degree felonies, to be served concurrently. His termination trial was held two months after his release and he was terminated under TFC § 161.001(b)(1)(L).

Subsection (L) provides that the trial court may order termination of the parent-child relationship if the court 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 the following sections of the Penal Code. . . (iv) Section 21.11 (indecency with a child)".

During the trial, the Department admitted the indictments and judgments from Father's three convictions. Additionally, the Department caseworker testified the Department had "concerns with placing" the child with Father because of "previous convictions" but indicated she did not know anything about the details of these convictions and no other evidence was presented regarding Father's

convictions. Father appealed, arguing the Department produced no evidence that any of the child victims suffered "serious injury" as required by (L). The court of appeals agreed and reversed based on legal insufficiency, concluding that although the factfinder is permitted to draw reasonable inferences, the Department failed to prove "serious injury merely by proving a conviction for indecency with a child." Thus, "the Department here produced no evidence of injury, physical or emotional, sustained by any of the three victims of [Father's] criminally indecent acts."

The Department filed a petition for review with the Texas Supreme Court, arguing that a factfinder may reasonably infer that a serious injury occurred from a conviction for indecency with a child and is consistent with the Court's sentiments expressed in its per curiam opinion accompanying the denial of a petition for review in *In re L.S.R.*, 92 S.W.3d 529 (Tex. 2002). Further, the Department contended other policy considerations supported such a holding, including the logistical challenges of finding evidence for offenses committed years earlier and concerns with retraumatizing the victims. In contrast, Mother acting as amicus curiae, asserted that the Legislature indicated by the statute's construction that the Department must present particularized proof of both the qualifying offense and "serious injury".

The Texas Supreme Court began its analysis by reviewing its per curium opinion in *L.S.R.* Like the present case, the father was convicted of sexual indecency pursuant to section 21.11 of the Penal Code. The court of appeals affirmed the trial court's judgment on another ground, holding no evidence supported the (L) finding because there had been "no showing that [the child] suffered death or serious injury as a result of" the conduct underlying the father's conviction. Rejecting the State's argument that serious injury may be inferred from proof of the conviction, the court of appeals held "that where death or serious injury is not an element of the offense, the conviction or deferred adjudication is not by itself sufficient evidence to support termination". In denying the parents' petition for review, the Court "disavow[ed] any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury." The Court observed that since *L.S.R.* the courts of appeals have diverged on whether a finding of "serious injury" under subsection (L) requires evidence beyond a conviction of indecency with a child.

Consistent with its statement in *L.S.R.*, the Court held that a conviction for indecency with a child can support a reasonable inference of serious injury to the child, and therefore can constitute legally sufficient evidence that the parent was "criminally responsible" for the "serious injury of a child." The Court reached this conclusion based on the plain language of subsection (L) and section 21.11 of the Penal Code. The Court reasoned that for the purpose of satisfying (L), "a conviction for an enumerated offense can imply that a serious injury has occurred based on the nature of the offense and the injury that will likely result". Further, the Court observed that the plain language of section 21.11 provides the necessary reasonable basis for a factfinder to infer that serious injury occurred, as it "necessarily entails an action by a person against a child in a manner that is sexual in nature." Quoting a statement made by one court of appeals, the Court noted "'[s]exual activity' with a child 'is always accompanied

by a possibility of important or dangerous consequences, including emotional or psychological hurt.'"

Thus, the Court reasoned that "[g]iven the physical, emotional, and psychological harm that can (and often does) result from the actions that constitute indecency with a child, a trier of fact may draw the 'reasonable and logical' inference that a conviction for indecency with a child, standing alone, resulted in serious injury to the child for the purpose of predicate ground (L)." The Court explained that a parent may refute an inference of serious injury by producing controverting evidence of serious injury in a given case. In this case, Father was convicted of three counts of sexual indecency involving intentionally or knowingly engaging in sexual contact with each child by touching their genitals. The Court concluded from these convictions the trial court could reasonably infer that the child victims suffered serious injury, and no evidence was introduced to refute that inference. Accordingly, the Court granted the Department's petition for review and reversed the court of appeals' judgment as to Father. *In re Z.N.*, No. 19-0590, __ S.W.3d __ (Tex. 2020).

### D. TFC § 161.001(b)(1)(N)

#### *1. No Reasonable Efforts Necessary*

The infant child came into care because Mother persisted in improperly feeding him and he was extremely malnourished. Prior to this child's birth, the Department removed other children from Mother's care three times because she failed to provide them with proper nutrition, kept them in "extremely unsanitary" conditions, and failed to generally provide for their basic needs.

On appeal, Mother argued the evidence was legally and factually insufficient to support the trial court's TFC § 161.001(b)(1)(N) finding because the Department did not prove it made reasonable efforts to return the child to her, the first element of subsection (N). Mother argued that despite the Department's contention that aggravated circumstances waived the requirement of reasonable efforts, the Department did not introduce proof of an aggravated circumstances finding at trial.

Termination of parental rights under subsection (N) requires clear and convincing evidence that a parent has:

Constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:

(i) The department has made reasonable efforts to return the child to the parent;
(ii) The parent has not regularly visited or maintained significant contact with the child; and
(iii) The parent has demonstrated an inability to provide the child with a safe environment.

The Court recognized that although the Department's implementation of a family service plan is considered a reasonable effort to return the child to the parent, the trial court may waive the requirement of a service plan and "other reasonable efforts if the court finds that the parent subjected the child to 'aggravated circumstances." TFC § 262.2015(a). The Court further observed that while the Department did not plead aggravated circumstances in its original petition, its *Status Report* provided notice that "[t]he Department is seeking aggravated circumstances on [Mother] due to CPS involvement that led to termination of parental rights to two of her

children." Further, following the adversary hearing, the trial court entered its *Temporary Order* in which it expressly found aggravated circumstances in the child's case based on the involuntary termination of Mother's parental rights to two other children pursuant to TFC § 161.001(b)(1)(D) and (E). Finally, a Department caseworker testified that Mother had two prior Department cases which resulted in the termination of her parental rights to two children and the appointment of a relative as permanent managing conservator of a third child. Thus, the Court concluded the evidence was legally and factually sufficient to support an aggravated circumstances finding.

The Court further decided that even if the record did not contain an aggravated circumstances finding, the evidence demonstrated the Department made reasonable efforts to return the child to Mother. Accordingly, the Court concluded the Department proved by clear and convincing evidence that (1) Mother subjected the child to aggravated circumstances; and (2) the Department made reasonable efforts to return the child to Mother, though not required to do so; and therefore the evidence was legally and factually sufficient to support termination of Mother's parental rights under subsection (N). *In re X.A.S.*, No. 05-19-01082-CV (Tex. App.—Dallas Mar. 3, 2020, no pet.) (mem. op.).

### *2. Safe and Stable Environment*

The Department first became involved with the child and his siblings in 2013. The children were initially removed in January 2014, and the three eldest children were placed with Mother in November 2015 with Mother ultimately regaining managing conservatorship of the eldest children in October 2016. The subject child remained in the Department's managing conservatorship due to his special needs, which included cerebral palsy, congenital scoliosis, autism, seizures, hearing loss, significant developmental delays, and requiring twenty-four hour care.

The Department continued to work towards reunification of the child with Mother, requiring in her family service plan that she: (1) complete parenting classes relevant to the child's special needs; (2) participate in individual and family counseling; (3) allow the Department to conduct home evaluations; (4) attend the child's medical appointments and developmental therapies in person or by phone; and (5) visit the child at his placement at least once per month.

In January 2019, the Department filed a petition to modify and terminate Mother's rights pursuant to section 161.001(b)(1)(N). Termination pursuant to subsection (N) requires, in part, clear and convincing evidence that: "the parent has demonstrated an inability to provide the child with a safe environment." Mother argued that if the environment she had provided was unsafe, the Department would have sought removal of her other children. The Court of Appeals rejected this argument stating that her "inference is without application of significant factors . . . because it is undisputed that [the child] differs greatly from Mother's other three children." The Court recognized that the child's "physical and mental delays render him especially vulnerable to abuse and neglect", and although the child had progressed significantly, the child's "developmental success relies on the continual intervention and access to care."

In determining that Mother was unable to provide the child with a safe environment, that Court considered that Mother "declined to attend parenting classes, participate in family therapy; allow the Department to conduct home evaluations; and be present in person or via telephone during any of [the child's] medical appointment and developmental therapy sessions." The Court also considered that Mother's plan was to have her daughter care for the child when she

was at work and Mother still had to be instructed as to suitable foods to feed the child, who was prone to asphyxiation, a month prior to trial.

The Court concluded that the child's developmental progress was contingent on receiving "continued and consistent care" and that Mother was unable to provide the child a safe environment because she remained "unaware of the extent of [the child]'s limitations and what [his] daily care entails" in determining the evidence was sufficient to support the trial court's finding under subsection (N). *In re F.L.B., A.C.B., J.G.B., and E.B.M.*, No. 13-19-00319-CV (Tex. App.—Corpus Christi-Edinburg Dec. 5, 2019, no pet.) (mem. op.).

### *3. Inability to Provide Care*

In Father's second issue, he argued the evidence was legally insufficient to support terminating his parental rights under TFC § 161.001(b)(1)(N). Specifically, Father contended the Department failed to prove he demonstrated an inability to provide the child with a safe environment because he produced evidence that the child's paternal grandmother could provide the child with a safe environment.

In support of his argument, Father relied on *In re D.S.A.*, 113 S.W.3d 567 (Tex. App.—Amarillo 2003, no pet.) in which the Amarillo Court stated that "it is quite conceivable that one in prison may still be able to do so by, at the very least, leaving the ward in the capable hands of a relative, friend or spouse." However, the Court of Appeals concluded *D.S.A.* is factually distinguishable because that case addressed a parent's claim that subsection (N) is inapplicable when a parent is in prison, whereas in this case Father failed to show he was incarcerated. The Court reasoned "[t]he fact that a parent who is *not* incarcerated arranges for a relative or someone else to care for the child does not negate other evidence in the record from which a trial court could conclude Father is unable to provide a safe environment for the child." Further, Father admitted it was "disputed" as to whether the child's paternal grandmother was able or competent to care for the child.

Even so, the Court noted that multiple witnesses testified Father failed to complete services or maintain contact with the Department, and that the child did not want to see Father because her last memory of Father was him choking Mother. Accordingly, the Court concluded there was sufficient evidence for the trial court to have formed a firm belief or conviction that Father had demonstrated an inability to provide the child with a safe environment. *In re A.H.*, No. 09-19-00167-CV (Tex. App.—Beaumont Oct. 3, 2019, no pet.) (mem. op.).

### *4. Ability to Provide Long-Term Care*

In his first issue, Father challenged the legal and factual sufficiency of the evidence to support the termination of his parental rights under the third element of subsection (N), that he demonstrated an inability to provide the children with a safe environment.

The Court of Appeals noted Father was unemployed, admitted to a recent arrest for possession of a controlled substance, and tested positive for cocaine and marijuana at the time of the Department's initial investigation. Further, Mother restricted his access to the children due to his drug use months before the Department's involvement. Moreover, during the case Father did not participate in any services offered by the Department aside from a few supervised visits with the children, and there was no evidence presented at trial of Father's ability to parent them. Based on these facts, the Court concluded that it could be deduced that Father lacked the ability or desire to provide the children with a safe and stable environment.

Father pointed to evidence of an approved home study of the paternal grandmother as indication he could provide a safe environment for the children. However, the Court observed that while the grandmother was approved for placement, she indicated she was only willing to keep the children temporarily until they were returned to Mother and would only consider a long-term placement if neither parent could keep them. Further the Court noted that no evidence suggested Father intended to relinquish his parental responsibilities to his mother or that the paternal grandmother maintained any relationship with the children during the case. Instead, the Court considered that Father was arrested for possession of a controlled substance "very close" to the time of the children's removal and tested positive for cocaine and marijuana at the beginning of the case. Thus, the Court concluded, "[d]ue to Father's history of drug use and his failure to engage in services, his ability to provide a safe environment for [the children] is highly suspect." *In re B.C and P.C.*, No. 07-19-00098-CV (Tex. App.—Amarillo July 30, 2019, no pet.) (mem. op.)

### 5. *Significant Contact, Reasonable Efforts, Safe Environment*

In February 2015, the Department filed a termination suit which resulted in an agreed judgment appointing the Department as permanent managing conservator and Mother and Father as possessory conservator. In January 2018, the Department filed a second suit for termination of Mother's and Father's parental rights, and after a bench trial their rights were terminated.

On appeal, Mother argued in part that the evidence was legally and factually insufficient to support the trial court's finding that she constructively abandoned the children pursuant to TFC § 161.001(b)(1)(N).

Regarding reasonable efforts, Mother blamed the Department for not developing a service plan for her after the prior judgment appointing her a possessory conservator. The Court of Appeals pointed out, however, that the Department could not be faulted under the circumstances because Mother refused to meet with the Department caseworker to discuss her service plan on multiple occasions, even stating she was "not going to do anything for the Department." The Court reasoned the Department could not assess Mother's present situation and determine what reunification services she needed without this meeting. Thus, the Court concluded that under these circumstances, the trial court could have concluded the caseworker's attempts to meet with Mother constituted reasonable efforts to return the children to her.

Mother next argued the evidence was insufficient to establish that she had not regularly visited or maintained contact with the children because she claimed her visitation was contingent on a therapist's recommendation that never came. The Court pointed out that, to the contrary, the children's therapist wrote there were no restrictions on Mother's visitation, and both caseworkers told Mother she could visit the children. The first caseworker informed Mother she could visit the children by scheduling a visit through Kidshare but she never did. The second caseworker testified Mother did not ask about visiting the children until two months before trial. She told Mother that they needed to meet and discuss the prior judgment and the service plan before a visit could take place but Mother refused to meet with her. Mother also refused the caseworker's request to see her home to determine if it was appropriate for visits. The Court disregarded Mother's criticism of the caseworker's insistence on a meeting before visitation began, concluding the trial court could have found that it was reasonable given Mother's lack of cooperation. Further, the prior judgment permitted Mother to schedule a visit through Kidshare but she opted not to do so. In finding this element was satisfied, the Court noted undisputed

evidence established Mother had not visited the children in three years and nothing indicated she made any attempts to maintain contact with them.

As to the third element, Mother argued that her home was necessarily a safe environment because her other children lived there at the time of trial, explaining the Department closed its case involving those children after providing her with family-based services. The Court, however, was not persuaded by her argument because "[e]vidence that other children were allowed to remain with Mother in a different case does not necessarily show that Mother would be able to provide the children in *this* case with a safe environment." Further, the Court reasoned a "safe environment" involves other factors beyond simply providing a safe physical environment, such as adequate parenting skills and a parent's willingness and ability to cooperate with and facilitate an agency's close supervision. Regarding parenting, the Court pointed out that Mother had not had contact with the children for three years, a caseworker testified the children had no bond with her, and two weeks before trial Mother admitted she believed the children would be better off without her. Further, the Court concluded Mother's unwillingness to meet with the Department caseworker or allow her to visit her home showed that Mother was not willing and able to cooperate with the Department's close supervision of the children. Accordingly, the Court concluded the evidence the evidence was legally and factually sufficient to support the trial court's finding under subsection (N). *In re N.A.V., P.A.V., A.J.V., L.V. and J.G.*, No. 04-19-00646-CV (Tex. App.—San Antonio Mar. 17, 2020, no pet.) (mem. op.)

### E. TFC § 161.001(b)(1)(O)

#### *1. Specificity of Order*

Mother's rights were terminated pursuant to TFC §161.001(b)(1)(O). Mother appealed, in part arguing that the record did not show there was a court order "specifically establish[ing] the actions necessary for [her] to obtain the return of the child[ren]" as the service plan was not entered into evidence, the court did not announce it was taking judicial notice of the plan, and "the caseworker only gave a very general description of its terms in her testimony."

TFC §161.001(b)(1)(O) allows for termination of parental rights where a parent:

> Failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child

The Appellate Court first noted that it is presumed the trial court took judicial notice of its orders. The Court next turned to the temporary order, which contained the following warning:

> THE COURT FINDS AND HEREBY NOTIFIES THE PARENTS THAT EACH OF THE ACTIONS REQUIRED OF THEM BELOW ARE NECSSARY TO OBTAIN THE RETURN OF THE CHILDREN, AND FAILURE TO FULLY COMPLY WITH THESE ORDERS MAY RESULT IN THE RESTRICTION OR TERMNATION OF PARENTAL RIGHTS.

The Court went on to note that the temporary order required Mother to comply with each requirement in the Department's original or amended service

plans. Further, the trial court expressly approved the Department's service plan during a July status hearing and incorporated it by reference into the order.

Mother's service plan required her to: 1) complete a drug treatment program as recommended from her Center for Health Care Services drug assessment; 2) submit to random drug screens and test negative on all drug tests; and 3) submit to and complete a psychological evaluation and comply with all resulting written recommendations in the evaluation.

The caseworker for the Department testified Mother completed a psychological evaluation, but Mother could not proceed with the therapy as recommended therein because Mother had failed to complete her drug treatment program. The caseworker testified Mother tested positive for drugs throughout the case and admitted she was continuing to abuse drugs. At trial, Mother denied knowing she was testing positive for drugs but also contradictorily stated she had recently entered drug treatment.

Accordingly, the Court held the trial court's orders "specifically established the actions necessary for [Mother] to obtain the return of her children" and that the "requirements of the plan are clear and specific enough to support a finding under subsection (O)." The Court of Appeals held the trial court could have reasonably believed that Mother failed to complete her treatment program and that Mother continued to test positive for drugs throughout the case. The Court determined that based on this evidence, the trial court could have determined Mother failed to comply with specific requirements of her service plan as required by subsection (O). *In re A.J.W., J.W.Jr., R.L.A.W., and J.L.W.*, No. 04-19-00346-CV (Tex. App.—San Antonio Nov. 27, 2019, no pet.) (mem. op.)

### *2. Specificity of Order*

Mother appealed the sufficiency of the evidence supporting termination of her parental rights under TFC § 161.001(b)(1)(O). Mother argued that the evidence was not sufficient to show she failed to comply with a court order because she completed most of her services "other than the positive drug tests for small amounts of drugs." Mother also argued that the requirement that she attend AA/NA meetings was not court-ordered and not clearly incorporated into the service plan.

The Court of Appeals noted that it would not reverse termination because of substantial compliance with a service plan but would consider whether the order was sufficiently specific that the failure to comply warranted termination.

The service plan was incorporated into a trial court order in January 2018. The service plan required Mother to remain drug free during the case and test negative on all drug screens during the case stating:

> [Mother] will submit between the hours of 8:00 am and 5:00 pm. The agency will pay all fees for these services. In the event that [Mother] is a no call no show for two appointments then [Mother] will be responsible for the fees associated with those services. She will need to bring her identification to every test. If she fails to submit to a drug test it will be considered a positive. She will be contacted by DFPS the morning she is to appear for testing. She must maintain negative tests throughout the life of the case.

The Court held that this provision specifically informed Mother that she would receive a phone call instructing her to test and she must submit to

those tests as requested. The Court went on to say that by stating Mother has to test negative on all drug screens, the order was sufficiently specific that she was to remain drug free throughout the case. The Court pointed out that Mother never argued the order was vague with respect to the fact it did not tell her where to submit to drug testing, and as Mother appeared for drug screens multiple times, it supported the conclusion that this was not an issue. Citing *In re N.G.*, the Court of Appeals held that the order was sufficiently specific to inform Mother of her obligation to submit to drug screens. *In re N.G.*, 577 S.W.3d 230 (Tex. 2019).

As to the AA/NA meetings, in April 2018, at Mother's request, the trial court modified its order stating Mother could attend 12 AA/NA meetings "in lieu of 12 group therapy sessions," as long as after her completion of individual counseling, her therapist would determine if further group counseling was still needed. The Court again cited to *N.G.*, reciting that the trial court is in the best position to address specificity of these orders, including resolving "concerns or confusion about the requirements a parent must satisfy to obtain return of a child under Department conservatorship." The Court held that the "April 2018 modification of the order is an example of the trial court resolving concerns about the requirements [Mother] needed to satisfy to obtain return of her children. This order was sufficiently specific because it informed [Mother] that she was obligated to attend either 12 group therapy sessions or attend 2 meetings of Narcotics Anonymous of Alcoholics Anonymous. The evidence at trial was that [Mother] did neither." Termination of Mother's parental rights was affirmed. *In re D.K.J.J., D.K.D.J., D.D.J., Jr., D.Q.D.J., D.K.J.J., and B.B.B.*, No. 01-18-01081-CV (Tex. App—Houston [1st Dist.] June 13, 2019, pet. denied) (mem. op.); *see also In re S.B.*, 07-19-00146-CV (Tex. App.—Amarillo Nov. 5, 2019) (mem. op.) (service plan sufficiently specific under guidelines from *N.G.*)

### *3. Affirmative Defense Burden of Proof*

Mother challenged the sufficiency of the evidence supporting termination of her parental rights under TFC § 161.001(b)(1)(O). Mother did not contradict the fact she failed to comply with the provisions of her court-ordered service plan; instead, Mother claimed that the Department failed to make reasonable efforts "to enable her to have the children returned and that the Department and the trial court failed to allow [Mother] an extended time to demonstrate that she could properly parent the children."

The Court of Appeals rejected Mother's argument. It pointed out that the trial court had previously extended the statutory dismissal date pursuant to Father's request, and that the Department attempted to help Mother but "she continued to make choices detrimental to her ability to have the children returned to her." As such, the Court concluded that Mother "did not testify at trial, nor did she present any evidence to prove by a preponderance of the evidence that she was unable to comply with the provisions of her service plan and that she had made a good faith effort to comply but had been unable to comply due to no fault of her own." *In re A.H., F.H., K.H., and C.H.*, No. 11-19-00028-CV (Tex. App.—Eastland, July 18, 2019, no pet.) (mem. op.).

### *4. Evidence Sufficient Where No Service Plan in Record*

Mother's rights were terminated pursuant to TFC § 161.001(b)(1)(O). Mother challenged the existence of a court order establishing actions necessary for the return of her children. Mother argued that because the service plan was not filed with the court, admitted into evidence at trial, or made an order of the court, the Department failed to meet its burden under this subsection.

The Court of Appeals noted that the trial court signed a temporary order requiring Mother to

participate in specific services and "to comply with each requirement set out in the Department's original, or any amended, service plan during the pendency of this suit." The Court further noted that the trial court reaffirmed this temporary order when it stated in an order that it had reviewed the Department's service plan for Mother and found it "reasonable, accurate, and in compliance with previous orders of the Court," and that the order stated Mother had reviewed, understood, and signed the service plan.

The Court went on to say that the caseworker's testimony provided "competent evidence as to specific actions in the court-ordered service plan that the trial court had established for Mother to obtain the return of her children." The Court further noted that the trial court could have taken judicial notice of its pretrial orders and credited testimony of the Department's caseworker to conclude that Mother had failed to fulfill specific court-ordered services. The Court accordingly held, "Although Mother's service plan was not filed with the trial court, other competent evidence in the record is legally and factually sufficient to support the trial court's finding that Mother failed to comply with a court order that specifically established the actions necessary for her to regain custody of her children." *In re V.A.G., C.M.G., and M.R.G.* 04-19-00449-CV (Tex. App.—San Antonio Nov. 13, 2019, no pet.) (mem. op.).

### F. TFC § 161.001(b)(1)(R)

Mother's parental rights were terminated pursuant to TFC § 161.001(b)(1)(E), (O), and (R). She challenged the finding that she violated subsection (R). Subsection (R) provides that termination is warranted if the trier of fact finds by clear and convincing evidence that "the parent has been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription." TFC § 161.001(b)(1)(R).

On appeal, Mother did not deny that she ingested a marijuana-laced baked good. Instead, she argued that she unknowingly ingested the marijuana and, therefore, it was not within her control to cause the child to be born with marijuana in his system. The Court recognized that it did not find any legal authority to support Mother's argument that subsection (R) requires intention on the part of the Mother. Further, the Court noted that the trial court could have reasonably disbelieved Mother's testimony that she accidently ingested the marijuana given her prior positive drug test and high testing level. Based on the evidence of Mother's positive drug test during her pregnancy, Mother's admission that she consumed marijuana, and the child's meconium tests results, the Court determined that this evidence was sufficient to establish that Mother was the cause of the child being born addicted to a controlled substance. *In re L.A.J.*, No. 14-18-01039-CV (Tex. App.—Houston [14th Dist.] May 30, 2019, pet denied) (mem. op.).

### G. TFC § 161.003

On appeal, Mother argued the evidence was legally and factually insufficient to support the trial court's TFC § 161.003 finding. Under section 161.003(a), a trial court may order termination if it finds by clear and convincing evidence that: (1) the parent has a mental or emotional illness or mental deficiency that renders the parent unable to provide for the physical, emotional, and mental needs of the child; (2) the illness or deficiency, in all reasonable probability, proved by clear and convincing evidence, will continue to render the parent unable to provide for the child's needs until the 18th birthday of the child; (3) the department has been the temporary or sole managing conservator of the child of the parent for at least six months preceding the date of the hearing on the termination; (4) the department has made reasonable efforts to return the child to the parent; and (5) the termination is in the best interest of the child. Mother only challenged subsections (1) and

(2), arguing that the Department failed to show how her diagnoses rendered her unable to provide for the child now or in the future.

Mother gave birth to the child in 2016 while she was incarcerated at the Bexar County jail. While previously denied termination, the Department again sought termination of Mother's parental rights a few months after her release from prison in 2018. At trial, the Department presented evidence that Mother was diagnosed with multiple mental illnesses, including bipolar disorder, ADHD, depression and anxiety, which rendered her unable to provide and care for the child. The Department caseworker testified that Mother failed to progress to a point where she could independently care for herself or meet the physical, emotional, and mental needs of the child following her release from prison. Further, she testified Mother moved to six different group homes and was hospitalized in a psychiatric facility multiple times over the course of a year and a half. The caseworker also expressed concern about whether Mother could care for the child because she expressed "very intense suicidal ideations" each time she spoke to her, and the evidence reflected one of her psychiatric hospitalizations occurred because she tried to commit suicide. She related Mother needed constant monitoring and medication management because she could not consistently maintain her doctor's appointments which were required for medication refills.

Nevertheless, Mother argued that despite this evidence, her psychologist could not testify that she could never parent the child "because she's never had an opportunity to ever demonstrate her ability to parent…" The Court pointed out, however, that TFC 161.003 requires only that the Department produce evidence that the mental deficiency, *in all reasonable probability*, renders the parent unable to care for the child. The Court reasoned "[i]n all reasonable probability" does not require proof beyond a reasonable doubt or "scientific certainty." The Court noted the psychologist testified she performed a psychological evaluation of Mother and determined she had problems with short-term memory and focusing due to ADHD. She further testified Mother had difficulty expressing empathy, did not have a good understanding of normal child growth and development, and acted impulsively. When asked about the permanency of Mother's deficiencies, her psychologist testified that while the others may come and go, Mother's bipolar was permanent. Based on the record as a whole, the Court concluded the trial court could have formed a firm belief or conviction that in all reasonable probability, Mother's mental deficiencies rendered her unable to care for the child now and in the future. *In re M.A.*, No. 04-19-00648-CV (Tex. App.—San Antonio Feb. 26, 2020, no pet.) (mem. op.).

## VIII. BEST INTEREST

### A. DESIRES OF THE CHILD

Father admitted that he had a PCP problem for the past five years and he refused the court-ordered drug tests because he knew his hair follicle test would return positive. The Court of Appeals noted in its analysis of the first *Holley* factor – the desires of the child – that Father had spent little time with the child because his visits were suspended as a result of his failure to submit a negative drug test. *In re Z.H.*, No. 14-19-00061-CV (Tex. App.—Houston [14th Dist.] June 27, 2019, no pet.).

### B. EMOTIONAL AND PHYSICAL NEEDS AND EMOTIONAL AND PHYSICAL DANGER

#### *1. Testimony from Children Balanced against Mother's Actions*

The Department removed the children after Mother gave birth to the youngest child and the child tested positive for cocaine and marijuana. Mother's parental rights were subsequently

terminated after a jury trial. On appeal, Mother challenged the legal and factual sufficiency of the jury's best interest determination.

In considering the emotional and physical needs of the children in its best interest analysis, the Court of Appeals recognized that the older two children testified that Mother provided for their basic needs of food, shelter, and clothing. The children also testified that the Mother "routinely required" them to attend school, directed them to do chores, and encouraged them to behave politely. In addition, one of the children testified that she had difficulty making new friends while in the Department's care due to the numerous placements, but that she had friends when she lived with Mother. Both older children testified that the frequent placements had been "hard on them".

In contrast, the Court of Appeals noted that the Department's caseworker testified that one of children reported that there was not enough food when he lived with Mother. The Court also considered the evidence that "when in Mother's care, the children had been exposed to drug use, domestic violence, gang involvement, and Mother's repeated encounters with police."

The Court concluded that the jury was entitled to find that the factor relating to the emotional and physical needs of the children weighed in favor of termination of Mother's parental rights. *In re K.H., Q.H., Q.H., and S.R.*, No. 02-19-00247-CV (Tex. App.—Fort Worth Nov. 22, 2019, no pet.) (mem. op.).

#### *2. Parents Minimizing Medical Needs*

Father appealed the termination of parental rights arguing in part that the evidence was insufficient to support the trial court's best interest finding. Under the second and third *Holley* factors, the Court of Appeals pointed out that the children have significant mental, behavioral, and developmental needs. These needs were being addressed through medication, counseling, and by being placed in separate foster homes. The Court stated that there was "significant evidence" that Father did not take the children's needs seriously, instead testifying that the children were "typical boys" and the children were simply "a little slower." Father told the Department's caseworker that there was "nothing wrong" with the children, they were simply "acting out," "trying to gain attention," and would "be fine" if they were allowed to return home. Father testified that his plan if the children were returned to him was to take the children to a provider to "find out what's the real issue going on" with the children. Father related that he would wean the children off their medication and talk to a doctor about the decision, as "every doctor sees something different." The Department's caseworker testified that one of the children "would probably cause serious harm to himself or somebody else" if he were taken off his medication. The Court found "[f]rom this evidence, the trial court could have found that Father could not adequately provide for the children's needs and that his failure to take the children's mental and behavioral issues seriously enough presented a danger to them." The termination of Father's parental rights was affirmed. *In re A.D.K., C.D.K., and J.Z.K.*, No. 06-19-00019-CV (Tex. App.—Texarkana May 15, 2019, pet. denied) (mem. op.)

### C. PARENTING ABILITIES

The Court of Appeals noted in its analysis of the fourth *Holley* factor – the parenting abilities of the parties seeking custody – that Mother failed to act to protect her nine-year-old younger brother, who was not the subject of the suit, from physical abuse at the hand of Father.

In a forensic interview, Mother's brother accused Father of intentionally burning him with a hot fork. At the time of trial, the detective investigating the

offense had obtained a warrant for Father's arrest, but the warrant had not yet been executed.

Because the injury to Mother's brother was consistent with his statement that Father had intentionally held the hot fork against his skin, the Department found the child credible and found reason to believe that Father had injured the child. In a discussion with the Department, Mother claimed the injury was an accident and her brother had been manipulated by his father to say it was intentional. At trial, Mother testified that her brother told her he did not know whether Father burned him intentionally. Because Mother insisted Father did not intentionally burn the child, the Department conservatorship worker became concerned about Mother's ability to protect her own child who was the subject of the suit.

The Court noted that although Mother had completed her parenting classes, she failed to protect her younger brother from physical abuse at the hands of Father and concluded that this factor weighs in favor of the best interest finding.
*In re E.A.R., a Child,* 583 S.W.3d 898 (Tex. App.—El Paso 2019, pet. denied)

### D. Other Considerations

#### *1. Threats to Return to Unsafe Location*

Mother, a Guatemalan national, sought asylum in the United States, had a deportation order entered for her, and was being held in a detention center at the time of trial. During the pendency of the case, and prior to her deportation, Mother made several threats toward the caseworker, including threatening to return the children to Guatemala if they were returned to her. In its analysis of the *Holley* factors, the Court of Appeals considered that Mother had threatened to return the children to Guatemala, a place she left to escape abuse. *In re F.R. aka F.R. aka F.R., A.L.R., I.R.L. aka I.R.L.,* No. 07-19-00215-CV (Tex. App.—Amarillo Nov. 4, 2019, pet. denied)

#### *2. Differentiating Parents*

During the Department's case, Father completed his entire service plan in four months and tested negative on every drug test requested by the Department. Father obtained the return of the children under an order for monitored return six months before trial. The child's Court Appointed Special Advocate testified at trial that although Father struggled financially, he had "worked hard to find the necessary community resources to provide the children with a safe place to live" and "had shown that he was willing to go through whatever resource he needed to provide for the children."

In contrast, Mother failed to attend trial, did not complete any of her required services, was unemployed throughout the case, failed to regularly visit with the children, and maintained her relationship with an abusive boyfriend during the case. The trial court terminated Mother's parental rights and appointed Father as the children's sole managing conservator.

Mother appealed, asserting that the evidence was legally and factually insufficient to support the trial court's finding that termination of her parental rights was in the children's best interest.

In analyzing the *Holley* factors regarding the emotional and physical needs of the children and the emotional and physical dangers to the children, the Court considered that: (1) one child had suffered injury in Mother's care and did not want to visit with Mother; (2) the other was exposed to methamphetamine by Mother; (3) Mother chose her relationship with her boyfriend over her relationship with the children; and (4) Mother did not visit with the children for the last 6 months of the case. The Court concluded that Mother "had not met the physical and emotional needs of the children and had exposed them to physical and emotional danger, both before and during the

case." Notably, the Court contrasted this evidence against Father's hard work during the case "to provide for the emotional and physical needs of the children and to protect the children." The Court of Appeals affirmed the termination of Mother's parental rights. *In re A.M. and A.M.*, No. 06-19-00037-CV (Tex. App.—Texarkana July 25, 2019, no pet.) (mem. op.).

### *3. Parentification*

In considering the emotional needs of the children, the Court of Appeals noted testimony that the eldest child was "what they called parentified", acted as the younger child's "mother", and that it was "causing problems between these two sisters". The children's relative caregiver, Aunt, testified that "we have to often remind her that it's not her job to take care of [her sister] anymore, that that is our responsibility, that it's okay to be her sister", which was "something new" to the child. Ultimately, because "[s]he just got to be a little girl" in her Aunt's care, "the parentified role no longer exists between the two girls" and they "have their own identities". The Court found this factor weighed in favor of the trial court's best interest determination. *N.P. and J.P. v. Tex. Dep't of Family and Protective Services*, No. 03-19-00217-CV (Tex. App.—Austin Aug. 22, 2019, no pet.) (mem. op.).

## IX. POST-TRIAL

Following a bench trial, the associate judge made "an oral associate judge's report of termination of Mother's parental rights". Mother filed a timely request for a *de novo* hearing before the district court, and before a final judgment was signed, filed a premature notice of appeal. Mother then moved to abate the appeal so that the district court could hold a *de novo* hearing and enter a final order. Before the Court of Appeals ruled on the motion to abate, and before holding a *de novo* hearing, the district court signed a final order of termination.

Under TFC § 201.015(a) and (b), when an associate judge makes a recommendation or a temporary order, any party may request a *de novo* hearing before the referring court, specifying the issues that will be presented to the referring court. When properly requested, the *de novo* hearing is mandatory. TFC § 201.015(f). The Court of Appeals held that "[a] referring court errs if it fails to hold a properly requested *de novo* hearing and signs a final order of termination", and "[t]he failure to hold such a hearing is presumed harmful." Therefore, the Court reversed the part of the order terminating Mother's parental rights and remanded the case for a *de novo* hearing. *In re E.O.*, No. 01-19-00207-CV (Tex. App.—Houston [1st Dist.] Aug. 27, 2019, no pet.) (mem. op.).

## X. ICWA

### A. FAILURE TO COMPLY WITH EXPERT WITNESS REQUIREMENT

During the Department's case, the child was confirmed by the Hopi Tribe to be an Indian child under ICWA. At trial, the Department did not seek termination of Mother's parental rights, but instead sought placement of the child with Grandmother or with the child's foster parents.

The Hopi Tribal representative testified at trial regarding the child's placement, expressed concerns regarding Grandmother's home, and related "the tribe believed it was in the child's best interest to remain in the current foster placement". She also stated that Mother's parental rights should remain intact and any visits be supervised by the foster parents.

The trial court entered an order naming the foster parents as the child's permanent managing conservator and Mother the child's possessory conservator. The trial court further found that "custody with an Indian parent or relative would

result in serious emotional or physical danger to the child" and that placement with a parent "would significantly impair the physical health or emotional development of the child." The trial court concluded that placement with the foster parents was in the child's best interest.

Mother appealed, arguing in part that the trial court failed to comply with ICWA regarding expert witness testimony. Pursuant to 25 U.S.C.A.§ 1912(e) a trial court may not order foster care placement unless the court determines by clear and convincing evidence, including testimony of a qualified expert witness, 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.

Under CFR § 23.122(a), a qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe. Further, a person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. Finally, the social worker "regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child" under CFR § 122(c).

The Court of Appeals found that the Department's caseworker could not serve as an Indian expert under ICWA. Moreover, the tribal representative "testified to no facts to establish herself as a qualified expert" and there was no evidence presented regarding her "background, education, training, experience, her position in the tribe, or even the name of the tribe itself." The Department conceded the tribal expert did not testify regarding her qualifications or even what tribe she represented.

The Court of Appeals reversed the trial court's order, concluding that the trial court failed to comply with the ICWA requirement of qualified expert testimony before appointing the foster parents as the child's permanent managing conservators. *In re D.L.N.G.*, No. 05-19-00206-CV (Tex. App.—Dallas July 17, 2019, no pet.) (mem. op.); see also *N. M. v. Texas Dep't of Family and Protective Servs.*, No. 03-19-00240-CV (Tex. App.—Austin Sept. 26, 2019, no pet.) (mem. op.) (Termination order reversed where no qualified expert witness testified as required under the ICWA).

### B. STRICT ADHERENCE TO NOTICE PROVISIONS REQUIRED

The Department was appointed temporary managing conservator of the child in November 2017 after he and Mother tested positive for amphetamines at his birth. On April 1, 2019, the Department filed a "Notice of Pending Custody Proceeding Involving an Indian Child," addressed to Mother, Father, and the Bureau of Indian Affairs stating that the child "is believed to be a member of or eligible for membership in a federally recognized tribe or an Indian child under ICWA." The certificate of service indicated that the notice was sent return receipt requested, but no return receipt appeared in the record.

An hour before trial was scheduled on May 13, 2019, Mother filed a "Motion for Continuance and Petition to Transfer to Court of Jurisdiction over Indian Child if Determined Eligible." The trial court held a brief hearing on the motion before beginning the trial, at which Mother testified that she was not enrolled in a tribe to her knowledge but that she believed her paternal grandparents were members of the Blackfoot and Cherokee tribes. The trial court denied the motion.

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." 25 U.S.C.A. § 1912(a). ICWA further defines an Indian child as "any unmarried person who 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." 25 U.S.C.A. § 1903(4). Pursuant to relevant federal regulations and BIA Guidelines, a court has reason to know that a child is an Indian child when a party states that the child is Indian or when a party or officer of the court or agency tells "the court that it has discovered information indicating that the child is an Indian child."

The Court of Appeals held that the Department's April 1, 2019, notice and Mother's testimony that her grandparents were Cherokee and Blackfoot gave the trial court reason to know the child was an Indian child. The Court concluded that strict compliance with the notice provisions of ICWA was required and found that the notice in this case did not strictly comply with the provisions. The Court conditionally upheld the termination, abating the appeal and remanding back to the trial court to determine whether ICWA applies to the case after strict compliance with ICWA notice requirements. *In re A.E.*, No. 02-19-00173-CV (Tex. App.—Fort Worth Oct. 1, 2019, pet. denied) (mem. op.).

### C. NO ERROR IN REFUSAL TO TRANSFER TO TRIBAL COURT

The Navajo Nation sought mandamus relief after the trial court denied its motion to transfer the matter to the Navajo Nation's Tribal Court in Arizona. The Navajo Nation challenged the trial court's determination that good cause existed to deny the transfer to trial court pursuant to 25 U.S.C.S. 1911(b).

25. U.S.C.A. 1911(a) provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child

However, pursuant to 25 U.S.C.A. 1911(b):

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

In this case, the original petition was filed on October 25, 2017. After providing the required notices, the Navajo Nation informed the Department in June 2018 it was unable to verify the children's eligibility for tribal membership. In August, the Navajo Nation advised the Department that the children were actually enrolled members and subject to ICWA protections. The Navajo Nation intervened in the case. The Navajo Nation did not offer any potential relative placements or tribal placements during the proceedings, and Mother failed to

attend multiple hearings. During the first day of trial, the tribal representative made an oral motion to transfer jurisdiction of the proceedings to the Navajo Nation's tribal court in Arizona. When the tribal representative made the motion, she had "exhausted the Navajo Nation's efforts to look for placement with family members and there was no opportunity for placement or adoption with other members of the Navajo Nation."

The trial court denied the motion, finding there was good cause to hear the case in Texas. The trial court noted the final hearing had already commenced, the proceedings were at an advanced stage, and the evidence necessary to decide the case could not be properly presented to the tribal court without undue hardship to the parties and witnesses.

The Court of Appeals related the evidence showed Mother and the children have lived in Texas throughout the proceedings, which lasted over nineteen months. The removal occurred in Lubbock, all service providers for both the children and Mother were in Lubbock, the children were placed in Lubbock, and the caseworkers were in Lubbock. The Court went on to state there was no mechanism for the Texas Department to bear the cost of having service providers attend the proceedings in Arizona if the case were transferred. Although the Navajo Nation asserted the witnesses could testify by telephone if the case were transferred, the Court determined it was better to have the trial in Texas, so the trial court could more easily make credibility and reliability determinations for each witness. The Court recited that the Bureau of Indian Affairs guidelines state that a "good cause" determination whether to deny a request to transfer to trial court "should address which court is best positioned to adjudicate the child-custody proceeding". The Court accordingly determined the trial court was proper in determining there was good cause to deny the transfer. *In re Navajo Nation*, 587 S.W.3d 884, (Tex. App.—Amarillo Sept. 10, 2019, no pet.).

### D. NOTICE PROVISIONS

The Department was named temporary sole managing conservator in November 2017. In January 2018, the Department filed a status report indicating that "the child may be an Indian child as reported by Father, and that [the child's] Indian child status was yet to be determined." In March 2018, the Department sent notice to the Bureau of Indian Affairs. In May 2018, the Department filed a permanency report that again identified the child as "a possible Indian child." The Department filed an amended petition in May 2018 that maintained its request for termination pursuant to the terms of ICWA.

At trial, the Department's caseworker testified that Father informed her that he "may be" a member of the Blackfoot tribe and the Cherokee tribe. The caseworker confirmed that notices of inquiry were sent to each tribe, and the exhibit volume shows that notices went out "return-receipt requested' to the Blackfeet Tribe of Montana/Blackfeet Nation; the Chippewa Cree Tribe of the Rocky Boys; the Minnesota Chippewa Tribe; the Chiricahua Apache NDE Nation; the BIA's Rocky Mountain Regional Director; and the BIA's Albuquerque Regional Director. The Court of Appeals observed that there was no evidence in the record showing that notice was sent to the Cherokee tribal officials. Mother's parental rights were subsequently terminated.

On appeal, Mother argued, in part, that the trial court erred by failing to inquire whether the child was an Indian child as required by ICWA, and by failing to notify proper tribal authorities.

Pursuant to the ICWA, the Department is required to notify relevant authorities when it seeks to terminate the parental rights to a child that is suspected or known to be an Indian child. 25 U.S.C.A. § 1912(f). Here, the Court of Appeals

concluded that because Father had stated he was a member of the Blackfoot tribe, the Chippewa tribe, and the Cherokee tribe, and because the Department's own pleadings identified the child as a suspected Indian child, the presumption that the child was an Indian child was triggered under ICWA's regulations. Further, the Court stated that the presumption holds "unless and until" it is shown that the child is not an Indian child. 25 C.F.R. § 23.107(b)(2).

The record shows, and the Department did not dispute, that although the Department made "a broad effort" to contact several tribes in the case, the record did not show that notice was ever sent to the Cherokee authorities, or that the Cherokee authorities ever made a determination regarding the child's eligibility. Relying on a status report in which Mother denied the child's status as an Indian child, the Department instead argued that despite the presumption set by the federal regulations, the trial court was "free to find that [the child] was not an Indian child and to apply default non-ICWA state termination proceedings." In rejecting this argument, the Court of Appeals noted that the report did not establish on what basis Mother made the assertion or what evidence Mother had contradicting Father's claim of Indian heritage. The Court further noted that the Department's own pleadings referred to the child as a "suspected" Indian child. Therefore, the Court concluded that the "state of the record and the pleadings" were insufficient to overcome the presumption that the child was an Indian child, and it held that the Department's failure to contact Cherokee officials, despite Father's claims of Cherokee heritage, constituted reversible error.

The Court next contemplated its actions given that reversal was required under ICWA. Citing several decisions in which other Courts have "(1) abated the termination appeals; (2) remanded cases to the trial court so that proper notice could be provided to tribal authorities and the trial court could determine whether the subject children were Indian children; and (3) conditionally affirmed the termination order in the event that the trial court concluded that the subject children were not Indian children", the Department urged the Court to render a merit decision despite the existence of reversible error.

The Court expressed its concern with issuing a "conditional" judgment as it would create "an implicit presumption that the child is not an Indian child by treating the failure to contact tribal authorities as a simple procedural error standing in the way of an inevitable affirmance". It concluded that federal regulations "make clear that in cases like this one, the courts are to presume that the subject child *is* an Indian child until proven otherwise." In addition, the Court stated that it would be "advisory" and "inappropriate" to speculate on whether the evidence was sufficient under either the clear and convincing standard or the reasonable doubt standard required by ICWA. The Court then explained that "abating the appeal and imposing an expedited timeline for a trial court decision" risks the prevention of full and fair litigation on the issue of the child's tribal status.

Alternatively, the Court opined that a "[r]emand for further proceedings" provides all parties with the opportunity to ensure that the mandates of ICWA are met "that makes sense for the parties, the trial court, and Cherokee officials." Consequently, the Court reversed the trial court's judgment terminating Mother's parental rights and remanded the case back to the trial court for further proceedings. *In re S.J.H.*, 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.).