Case Law Update

DFPS Appellate Unit

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2021 Hill Country Ad Litem Seminar

Pre-Trial Issues

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.)

- Did trial commence?

- Mother and Father each allege that the trial commenced after the scheduled dismissal date; argued the termination decree was void because the trial court's jurisdiction expired before trial commenced

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.)

- TFC § 263.401(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
  - Notably, 401 is jurisdictional and a violation of the deadline is an automatic dismissal

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.)

- 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)

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.)

- 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: "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."

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.)

- On April 15, 2019 – the trial date
  - parties appeared for trial and made announcements
  - Department's counsel stated, "We're just doing a start and stop"
  - Mother's counsel confirmed the case would begin that morning but then "be recessed" until a future date
  - Court and attorneys discussed admission of certain exhibits
  - 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
  - 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

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.)

- Appellants argued on appeal that the commencement on April 15 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
- Court of Appeals agrees with the Department that trial commenced on April 15, and therefore, the trial court retained jurisdiction when it signed 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.)

- Court of Appeals ruled that trial commenced on April 15, based on:
  - 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

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.)

- Court of Appeals also rejects Mother's claim that the Rule 11 agreement to "start and stop" the trial on April 15 showed that trial did not actually commence on that date
- Court of Appeals responded: "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."

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.)

- Court acknowledges the appellants' suggestion that allowing the Department to introduce minimal evidence before recessing the proceeding indefinitely "allows a termination case covered by section 263.401 to linger contrary to legislative intent."
- Court of Appeals held: "[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."
- Again, the key is that commencement can include taking up preliminary matters and brief testimony

In re A.R., 11-20-00152-CV (Tex. App.—Eastland Dec. 10, 2020, no pet.)

- Mother's appeal asserted that the trial court abused its discretion when it failed to grant a continuance and an extension of the dismissal date pursuant to an emergency order issued by the Texas Supreme Court in response to the COVID-19 pandemic.
- The Texas Supreme Court has issued and continuously amended an emergency in response to the COVID-19 pandemic. These contain orders suspending typical procedural and scheduling rules across all areas of law. These are designed for the safety of all parties and in response to the limitations that COVID-19 have put on the court system.
- This includes suspension of the Child Protection 1 year dismissal deadline.

In re A.R., 11-20-00152-CV (Tex. App.—Eastland Dec. 10, 2020, no pet.)

- The 17th Emergency Order Regarding COVID-19 State of Disaster:
- 3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:

  a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020;
- *4 b. in all proceedings under Subtitle E, Title 5 of the Family Code, specifically including but not limited to Section 263.401(b):

  (i) modify or suspend a deadline or procedure—whether imposed by statute, rule, or order—for a stated period not to exceed 180 days;

  (ii) extend the dismissal date for any case previously retained on the court's docket for an additional period not to exceed 180 days from the date of this Order.

In re A.R., 11-20-00152-CV (Tex. App.—Eastland Dec. 10, 2020, no pet.)

- When the case was called for trial via Zoom on June 2, 2020, Appellant's trial counsel announced “not ready” and requested a continuance based upon the Seventeenth Emergency Order.
- The Court denied it.
- As the appellate court noted: The record reflects that Appellant had quit participating in her services prior to the beginning of the COVID-19 pandemic, that all of her services could have been done “virtually,” and that she did not even appear—via Zoom or otherwise—for the final hearing on termination.
- Courts have wide discretion when it comes to granting and denying continuances and extensions.
- It was well within the trial court's discretion to deny Appellant's request for a continuance despite any assertion that Appellant needed more to time to complete her services because the COVID-19 pandemic had disrupted her services.

In re B.C., 592 S.W.3d 133 (Tex. December 20, 2019)

- Texas Supreme Court addresses appointment of counsel for indigent parents
- Specifically, the trial court's duty to admonish parent regarding appointment of attorney at every hearing
- 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

In re B.C., 592 S.W.3d 133 (Tex. December 20, 2019)

- 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.
- The trial court terminated the Mother's parental rights
- After trial, 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

In re B.C., 592 S.W.3d 133 (Tex. December 20, 2019)

- Court of Appeals 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]."
  - In other words, the law explicitly requires an affidavit of indigence to trigger the appointment of counsel.
- Department filed a Petition for Review

In re B.C., 592 S.W.3d 133 (Tex. December 20, 2019)

- 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 Supreme 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
  - 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
- "[R]epeated" 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, which was a due process violation requiring reversal
- ***The Supreme Court*** *has spoken and made it absolutely critical for parents to receive an admonishment* ***if they appear at a hearing***

In re G.E.D., 09-20-00226-CV (Tex. App.—Beaumont Jan 21, 2021)

- **Failure to admonish at each hearing where the parent is present**
- Trial court informed father at one hearing of his right to appointed counsel if indigent, and that this right would continue throughout the process.
- Although father appeared at every hearing, the trial court did not admonish him at the status review hearing and at each permanency hearing.
- The appellate court could not conclude that this was harmless and reversed and remanded for new trial.

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- TFC § 102.004 and Intervention
- This was an incredibly unfortunate case where father murdered mother.
- After Mother's death, the Department filed suit seeking to terminate Father's parental rights.
- Maternal grandmother received placement of the child and the parties were attempting to fast track the lawsuit.
- Maternal Grandfather filed petition to intervene, asserting standing under TFC § 102.004(b)
- 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."

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- TFC § 102.004(b)
  - 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

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- 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
- Department did not present any evidence to dispute Grandfather's pleadings and evidence on that jurisdictional fact

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- Department argued that "may grant" language allows the trial court 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
- Department also argued that intervention is not in the child's best interest, as it would complicate the issues in the case

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- Court recognized that a statute's use of the term *may* rather than *shall* usually indicates the Legislature intended to make the provision discretionary
- However:
  - 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 stated that "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)."
- "[h]ad the Legislature intended other criteria to apply to standing, the Legislature could have easily placed that additional criteria into the statute."
- Court 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).

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- 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
- Court 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."

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- 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
- 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."

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- 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.
- "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."
  - 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

In re M.B., No. 09-19-00247-CV (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (mem. op.)

- 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 J.L., E.M., and D.M., Jr., 02-20-00114-CV (Tex. App.—Fort Worth Sept. 3, 2020, no pet.)

- Contested trial heard by Associate Judge in which Mother's parental rights were terminated.
- On appeal, Mother argued that the Associate Judge erred by failing to provide a court reporter for the hearing.
- Here, rather than provide a court reporter to make a record of the hearing, the Associate Judge made an electronic recording of the proceedings.

In re J.L., E.M., and D.M., Jr., 02-20-00114-CV (Tex. App.—Fort Worth Sept. 3, 2020, no pet.)

- Under the Texas Family Code, when an associate judge presides over a hearing that is neither a jury trial nor a contested final termination hearing, the record may be preserved by a court reporter provided by a party, the associate judge, or the referring court; alternatively, "in the absence of a court reporter or on agreement of the parties," the record may be preserved by some other method approved by the judge, such as an electronic recording. Id. § 201.009(a),(b), (c).
- But when an associate judge presides over a **jury trial or a contested final termination hearing,** "[a] **court reporter***is required* to be provided," and no other means of preserving the record is permitted. *Id.* § 201.009(a) (emphasis added).

In re J.L., E.M., and D.M., Jr., 02-20-00114-CV (Tex. App.—Fort Worth Sept. 3, 2020, no pet.)

- Court of Appeals found that as a contested final termination hearing, section 201.009 required a court reporter and did not authorize the Associate Judge to use an electronic recording.
- The reason for this is the due process right to an appellate review of the final order.
- Without a court reporter, there is no proper record that an appellate court can review and analyze.
- The case was reversed and remanded for further proceedings.

Termination Grounds

161.001(b)(1)(D) and (E)

- 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
- These are the most common termination grounds that are used, in addition to (O) failure to comply with court order… A big part of the reason is that the facts and circumstances of a child's removal usually fall within the ambit of (D) or (E)

In re I.W., No. 12-19-00027-CV (Tex. App.—Tyler June 28, 2019, pet. denied) (mem. op.)

- Medical neglect
- 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

In re I.W., No. 12-19-00027-CV (Tex. App.—Tyler June 28, 2019, pet. denied) (mem. op.)

- 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.
  - 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."

In re I.W., No. 12-19-00027-CV (Tex. App.—Tyler June 28, 2019, pet. denied) (mem. op.)

- 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."
- 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 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.)

- Mother challenges sufficiency of evidence supporting subsection (E)
- Department's caseworker testified that Mother's behavior had been hostile, belligerent and aggressive.
- 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.

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.)

- 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.

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.)

- 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.**
- Court concluded the evidence was legal and factually sufficient to support the 161.001(b)(1)(E) finding

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)"

In re Z.N., No. 19-0590, __ S.W.3d __ (Tex. 2020)

- Recent Texas Supreme Court case, the Court has been unusually active in taking up parental termination cases
- 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 subject 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)

In re Z.N., No. 19-0590, __ S.W.3d __ (Tex. 2020)

- During the trial, the Department admitted the indictments and judgments from Father's three convictions
- 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.

In re Z.N., No. 19-0590, __ S.W.3d __ (Tex. 2020)

- Father appealed the sufficiency supporting termination of his rights under subsection (L), arguing the Department produced no evidence that any of the child victims suffered "serious injury" as required by (L)
- 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."
- Department Filed a Petition for Review, one of my attorneys, Leslie Capace, actually wrote it.

In re Z.N., No. 19-0590, __ S.W.3d __ (Tex. 2020)

- Texas Supreme Court first reviewed a prior decision in *L.S.R.*
  - father was convicted of sexual indecency pursuant to section 21.11 of the Penal Code
  - 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
  - In denying the parents' petition for review, the Court left a footnote where it "disavow[ed] any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury."

In re Z.N., No. 19-0590, __ S.W.3d __ (Tex. 2020)

- In this case, the Supreme 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."
  - 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"
  - 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.'"

In re Z.N., No. 19-0590, __ S.W.3d __ (Tex. 2020)

- 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)."
- A parent may refute an inference of serious injury by producing controverting evidence of serious injury in a given case

In re Z.N., No. 19-0590, __ S.W.3d __ (Tex. 2020)

- Here, 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.
- The Court granted the Department's petition for review and reversed the court of appeals' judgment as to Father.

161.001(b)(1)(O)

- 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
  - **A trend in the last couple of years has been an emphasis on the specificity of the service plan and court orders**

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.)

- Mother appealed termination of her parental rights arguing, in part, 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]"
  - Mother argues:
    - 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."

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.)

- Appellate Court first noted that it is presumed the trial court took judicial notice of its orders
- 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
- Temporary order required Mother to comply with each requirement in the Department's original or amended service plans.
- Trial court expressly approved the Department's service plan during a July status hearing and incorporated it by reference into the order

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.)

- 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

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.)

- 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; and
  - 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

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.)

- 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 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 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.)

- Another specificity challenge
- 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.

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.)

- The service plan was incorporated into a trial court order in January 2018.
- 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

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.)

- 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.
- 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.
- 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

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.)

- 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.
- 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."

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.)

- The Court held that:
  - "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.
- *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.*)
- These cases truly illustrate the importance of the trial court and of status and permanency review hearings. They allow courts and parents to ask their questions and to resolve any concerns about the steps necessary for a child's safe return home.

Best Interest

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976)

- The Supreme Court's non-exhaustive list of factors to consider in termination of a parent's rights:
- (1) the child's desires; (2) the current and future physical and emotional needs of the child; (3) the current and future emotional and physical danger to the child; (4) the parental abilities of the parties seeking custody; (5) whether programs are available to assist those parties; (6) plans for the child by the parties seeking custody; (7) the stability of the proposed placement; (8) the parents' acts or omissions that may indicate that the parent-child relationship is not proper; and (9) any excuse for the parents' acts or omissions.

In re D.L.W.W., 01-20-00507-CV (Tex. App.—Houston [1st] Dec. 22, 2020)

- Mother and Father's challenge to the trial court's best interest finding.
- The court of appeals determined that the evidence of Mother and Father's drug use at the beginning of the Department's case, and Father's admission that he was convicted for possessing cocaine in 2014, was legally and factually sufficient evidence to support the subsection (E) finding. However, the court found that the evidence was factually insufficient to support the trial court's best interest determination.

In re D.L.W.W., 01-20-00507-CV (Tex. App.—Houston [1st] Dec. 22, 2020)

- In sustaining Mother and Father's best interest challenge, the court noted that the evidence demonstrated: (1) Mother and Father last used illegal drugs at the beginning of the case and had been actively engaging in drug treatment; (2) Mother and Father had not directly exposed the children to domestic violence; (3) Mother and Father last engaged in criminal activity in 2014; (4) Mother had her own residence and Father was living with his mother; and (5) the children were bonded to Mother and Father.
- Significantly, the Department testified to having no problem naming father as possessory conservator.
- In considering the evidence which supported the trial court's endangerment finding, the court concluded that the trial court did not abuse its discretion in appointing the Department as the children's sole managing conservator. Affirmed in part; Reversed and Remanded.

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.)

- Parents minimizing medical needs under *Holley* factors 2/3
- Father appealed the termination of parental rights arguing in part that the evidence was insufficient to support the trial court's best interest finding

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.)

- The children have significant mental, behavioral, and developmental needs which were being addressed through medication, counseling, and by being placed in separate foster homes while in the Department's care
- Court stated that there was "significant evidence" that Father did not take the children's needs seriously, citing:
  - Father testified 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."

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.)

- 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.
- In analyzing the emotional and physical needs of the children and the emotional and physical dangers to the children, 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.M. and A.M., No. 06-19-00037-CV (Tex. App.—Texarkana July 25, 2019, no pet.) (mem. op.)

- Best interest considered separately for parents
- Following trial, Mother's parental rights were terminated; Father was named 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 re A.M. and A.M., No. 06-19-00037-CV (Tex. App.—Texarkana July 25, 2019, no pet.) (mem. op.)

- Evidence regarding Father:
  - 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 re A.M. and A.M., No. 06-19-00037-CV (Tex. App.—Texarkana July 25, 2019, no pet.) (mem. op.)

- Evidence regarding 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,
  - maintained her relationship with an abusive boyfriend during the case.

In re A.M. and A.M., No. 06-19-00037-CV (Tex. App.—Texarkana July 25, 2019, no pet.) (mem. op.)

- Under 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

In re A.M. and A.M., No. 06-19-00037-CV (Tex. App.—Texarkana July 25, 2019, no pet.) (mem. op.)

- 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.
- Just because it is in the best interest of a child for one parent to retain parental rights does not transfer to the other parent. Each parent is considered separately.

Post-Trial

In re E.O., No. 01-19-00207-CV (Tex. App.—Houston [1st Dist.] Aug. 27, 2019, no pet.) (mem. op.)

- Right to de novo trial if request is timely filed
- 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

In re E.O., No. 01-19-00207-CV (Tex. App.—Houston [1st Dist.] Aug. 27, 2019, no pet.) (mem. op.)

- 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).

In re E.O., No. 01-19-00207-CV (Tex. App.—Houston [1st Dist.] Aug. 27, 2019, no pet.) (mem. op.)

- 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

Indian Child Welfare Act

In re A.E., No. 02-19-00173-CV (Tex. App.—Fort Worth Oct. 1, 2019, pet. denied) (mem. op.)

- Department was appointed temporary managing conservator of the child in November 2017
- 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."
- certificate of service indicated that the notice was sent return receipt requested, but no return receipt appeared in the record

In re A.E., No. 02-19-00173-CV (Tex. App.—Fort Worth Oct. 1, 2019, pet. denied) (mem. op.)

- 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

In re A.E., No. 02-19-00173-CV (Tex. App.—Fort Worth Oct. 1, 2019, pet. denied) (mem. op.)

- 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"

In re A.E., No. 02-19-00173-CV (Tex. App.—Fort Worth Oct. 1, 2019, pet. denied) (mem. op.)

- 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.
- **Is the child Cherokee or Blackfoot?**
- **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 S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.)

- **Another notification case**
- 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
- 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

In re S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.)

- 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

In re S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.)

- Pursuant to 25 U.S.C.A. § 1912 (a) and(f), 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.
- 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).

In re S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.)

- It was undisputed 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 re S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.)

- 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

In re S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.)

- The Court next contemplated its actions given that reversal was required under ICWA
  - The Department urged the Court to render a merit decision despite the existence of reversible error, citing to other 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

In re S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.)

- 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".
- Court 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."
- Court also 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.
- "[A]bating 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

In re S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.)

- 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 A.W. and M.W., 590 S.W.3d 68 (Tex. App.—Texarkana 2019, pet. denied)

- Father identifies Muskogee Creek and Cherokee ancestry
- Department sent notice to the Muskogee Creek and Cherokee
- Letters received
- At trial, evidence regarding Mother's ancestors being listed on the *Dawes Rolls*
- List of all the people who were a part of specific tribes as of 1887. Included in these were people who were emancipated slaves living on the reservation. Since then, some tribes have said descendants of those people listed on the rolls no longer qualify for membership

In re A.W. and M.W., 590 S.W.3d 68 (Tex. App.—Texarkana 2019, pet. denied)

- 25 USC 1903(4)
- "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe
- Decided by THE TRIBE
- NOT decided by:
  - State court
  - Caseworker
  - CASA
  - Parents

In re A.W. and M.W., 590 S.W.3d 68 (Tex. App.—Texarkana 2019, pet. denied)

- Trial court found the children were not Indian children and were not subject to ICWA
- Parents appealed, citing direct descendant of person listed on Dawes Rolls
- Appellate Court held that the Tribe is determinative of tribal eligibility.
- Here, both Muscogee Tribe and Cherokee Nation responded to their notice with letters that the children in the suit were not considered "Indian Children" in relationship to their tribes.
- It is not the parents' belief, but the determination of the Tribe in accordance with its own Tribal eligibility rules.

In re Navajo Nation, 587 S.W.3d 884 (Tex. App.—Amarillo Sept. 10, 2019, no pet.)

- **Unusual situation of a Tribe filing in the Appellate Cout**
- 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)

In re Navajo Nation, 587 S.W.3d 884 (Tex. App.—Amarillo Sept. 10, 2019, no pet.)

- 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

In re Navajo Nation, 587 S.W.3d 884 (Tex. App.—Amarillo Sept. 10, 2019, no pet.)

- 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 re Navajo Nation, 587 S.W.3d 884 (Tex. App.—Amarillo Sept. 10, 2019, no pet.)

- Original petition filed by the Department 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.

In re Navajo Nation, 587 S.W.3d 884 (Tex. App.—Amarillo Sept. 10, 2019, no pet.)

- 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.

In re Navajo Nation, 587 S.W.3d 884 (Tex. App.—Amarillo Sept. 10, 2019, no pet.)

- 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.

In re Navajo Nation, 587 S.W.3d 884 (Tex. App.—Amarillo Sept. 10, 2019, no pet.)

- 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

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