Case Law Update

PRESENTED BY:

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TDFPS APPELLATE DIVISION

12TH ANNUAL CHILD PROTECTION COURT AD LITEM SEMINAR
KERRVILLE, TX VIA ZOOM
FRIDAY, FEBRUARY 25, 2022

Pre-Trial Issues

N.J. v. Tex. Dep't of Family and Protective Servs., 613 S.W.3d 317 (Tex. App.—Austin Oct. 2020, pet. filed)

- The Department filed an original petition for conservatorship and to terminate fifteen-year-old Mother's parental rights.
- No citation directed to Mother was issued or served on her.
- Mother appeared personally with her court-appointed attorney at the adversary hearing.
- Mother filed an answer to the Department's suit.
- Mother appeared at trial and opposed termination of her parental rights.
- The jury terminated her parental rights.

- On appeal, Mother argued the order terminating her parental rights was void; she argued the court lacked personal jurisdiction over her because she was never served.
- The Department agreed that Mother was never personally served, but argued she had waived service by appearing before the court and participating in proceedings with an attorney.

- The Appellate Court noted that while this is the general rule, this case was different because the Mother was a minor here.
- "[i]t is well established, however, that a minor is non suis juris, meaning a minor is considered to be under a legal disability and therefore lacks the capacity to sue or consent to suit". The Court accordingly held that "a minor cannot by her voluntary appearance waive service or consent to the jurisdiction of the court."
- The Court noted that when a minor is named in a suit, the minor must generally be served with process, but a minor can be properly served through a legal guardian or next friend. When a minor is served through a guardian or next friend, whether the court has personal jurisdiction depends on "whether the minor's interests have been properly protected and whether a deficiency in notice or due process has been shown."

- Here, there was no indication that Mother's parents were not served, nor any guardian or next friend.
- Further, Mother remained a minor throughout the trial proceedings. Therefore, her trial appearance did not waive the necessity of personal service.
- The case was reversed and remanded.

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

- Father argued he was denied procedural due process because he was not properly admonished of his right to appointed counsel and such denial caused error that rendered an improper judgment.
- Indigent parents who appear in opposition are entitled to court appointed counsel under TFC 107.013.
- TFC § 263.0061(a)(1): The trial court must provide an admonishment at the status hearing and permanency hearing to a parent who is not represented by an attorney of the right to be represented by an attorney, and if they are indigent and appear in opposition of the suit, of their right to a court-appointed attorney.

- Father appeared without counsel at adversary hearing and the trial court informed father of his right to appointed counsel if indigent, and that this right would continue throughout the process.
- Although father appeared at every subsequent 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 D.T., No. 20-0055, __S.W.3d __ (Tex. 2021)

- Does a parent have a right to effective Retained Counsel?
- Nearly two decades ago, the Supreme Court held that indigent parents in government initiated termination cases have the right to effective appointed counsel. As a result, parents have a right to raise ineffective assistance claims on appeal.
- The Supreme Court did not extend this parents who retained their own counsel, and as a result, 13 of the 14 Courts of Appeals have denied ineffective assistance of counsel claims against retained counsel.

- In *D.T.*, the Supreme Court decided to address this issue.
- Here, Mother had been found indigent and the trial court appointed her a lawyer; however, six months before trial she chose to retain her own attorney to represent her.
- This attorney appeared at permanency hearings and also appeared at the jury trial, and was actively involved throughout the four day trial.
- Mother's parental rights were terminated and although her retained counsel filed a notice of appeal, did not file a motion for new trial or take the necessary steps to preserve legal and factual sufficiency challenges. This counsel was also suspended from the practice of law 30 days after filing the notice of appeal.

- Because mother had been found indigent during the case, she was subsequently appointed appellate counsel, who raised the issue of ineffective assistance of retained counsel.
- The Supreme Court looked at TFC subsection 107.013(a–1)(1), which "unambiguously mandates that, if a parent in a government-initiated termination case is unrepresented at the parent's first appearance, trial courts shall inform the parent of the right to be represented by an attorney."
- The Court noted this was distinct from TFC 107.013(a) which requires the appointment of counsel for indigent parents who appear in opposition.

- The Court also looked to Criminal cases, which allow defendants to raise ineffective assistance claims regardless of whether they are appointed or retained.
- "As in criminal proceedings, state-initiated termination proceedings invoke the need for the protection of fundamental liberty interests."
- The Court held that "a parent who responds in opposition to a government-initiated suit seeking termination of the parent–child relationship may assert a claim for ineffective assistance of counsel on appeal regardless of whether the parent's counsel was appointed or retained."
- Nevertheless, the Supreme Court held that mother did not receive ineffective assistance from her counsel.

In re G.X.H., Jr. and B.X.H., No. 19-0959, __S.W.3d __ (Tex. 2021)

- The dismissal date was September 24, 2018.
- On August 27, 2018, the Department filed both a Motion for Continuance and a Motion to Retain Suit on the Court's Docket and Set a New Dismissal Date, the latter expressly stating that extraordinary circumstances necessitated that the children remain in the temporary managing conservatorship of the Department and that continuing the Department as the child's temporary managing conservator was in the child's best interest.
- The Department submitted a proposed order, but the trial court did not sign it.

- The trial court made a docket entry on August 29, 2018 indicating that the parties agreed to a continuance, agreed to a trial date of October 17, 2018 and that an extension was granted to reach that date.
- Trial began on October 17th and Parents' rights were terminated.
- The Court of Appeals reversed and dismissed the case.
- The Department brought the case before the Supreme Court, arguing that the docket sheet entry was sufficient to satisfy Section 263.401(b).

- The Supreme Court then noted that TFC § 101.026 expressly provides that in a SAPCR, the court may pronounce or render an order on its docket sheet.
- Mother and Father contended that any extension was invalid because the findings required by § 263.401(b) do not appear in the record.
- The Supreme Court noted that it is the Parents' burden to provide the record on appeal and that they failed to provide a record of the hearing in which the trial court considered and granted the extension. Therefore, it is implied that the TFC § 263.401(b) findings were made on the record at the oral hearing.

- Significantly, the Supreme Court held that claimed defects relating to the specific requirements of § 263.401(b) are not jurisdictional and must be preserved for appellate review.
- As such, the Supreme Court reversed the Court of Appeal.

In re J.J., No. 07-20-00361-CV (Tex. App.—Amarillo, Apr. 30, 2021, no pet. h.) (mem. op.)

- Mother contended the trial court lost jurisdiction when it ordered a monitored return of the child to her, but failed to expressly retain the cause on its docket and schedule a new dismissal date pursuant to TFC § 263.403(b)(2).
- TFC § 263.403 allows the court to extend he dismissal deadline of a case based on a monitored return to a parent or a transitioned return to a parent contingent on parent's completion or remaining service plan provisions. If a court renders such an order, 263.403(b) requires that the court:
  - (1) include in the order specific findings regarding grounds for the order; and
  - (2) schedule a new date, not later than the 180th day after the date the temporary order is rendered, for dismissal of the suit unless a trial on the merits has commenced.

- Here, the initial dismissal deadline was April 20, 2020, but the trial court ordered a monitored return to Mother on February 11, 2020. While the monitored return order lacked a new dismissal deadline, it did schedule a final hearing and stated that placing the child in Mother's home while retaining jurisdiction was in the child's best interest.
- Unfortunately, the monitored return did not last and the trial court entered an order ending the monitored return on April 29, 2020 and scheduled a new trial and dismissal date. Mother's parental rights were ultimately terminated.

- On appeal, Mother argued that the termination order was void because the trial court lost jurisdiction due to its failure to expressly state new dismissal deadline in its original monitored return order pursuant to 263.403(b)(2).
- While the Court of Appeals acknowledged "that TFC § 263.403(b)(2) required the trial court to set a new dismissal date but noted that "[e]qually apparent is the legislature's failure to provide a consequence for a court neglecting the task. When faced with such a situation, sister courts have hesitated to read consequences into the statute."
- In contrast, look to TFC 263.401, which is explicitly jurisdictional with a consequence of dismissal for noncompliance.

- The Court of Appeals essentially found that in contrast to TFC 263.401, section 263.403(b) is not jurisdictional and that the trial court did not lose jurisdiction for its failure to state a dismissal date in its monitored return order.

COVID Extensions

47th Emergency Order Regarding COVID-19 State of Disaster Misc. Docket No. 22-9005

- Since March 2020, the Texas Supreme Court has issued 47 emergency orders during the COVID-19 pandemic, including multiple orders addressing the conduct of court proceedings—extending dismissal dates in Department suits and conducting remote proceedings, including trials.
- The 47th Emergency Order was issued January 19, 2022, and expires on April 1, 2022. The outside dismissal dates have not changed from the Supreme Court's 45th Emergency Order, which have had the practical effect of terminating COVID extensions as we knew them under the prior emergency orders on February 1, 2022.

- The 47th Emergency Order does, however, authorize limited extensions:
  - The 47th order authorizes a Regional Presiding Judge to approve extension of a case that has previously been extended under section 263.401 or under a COVID extension for up to 60 days upon good cause shown.
  - This requires an order from the Regional Presiding Judge approving the extension
- Moving forward, cases that have not been extended at all must adhere to the statutory scheme, and may only be extended as authorized by 263.401(b) or (b-1). A COVID extension is no longer an option as an initial extension.

In re J.-R.A.M., No. 10-20-00221-CV (Tex. App.—Waco Dec. 30, 2020, pet. filed) (mem. op.)

- In his second issue, Father claimed that the trial court lacked subject matter jurisdiction to proceed to a final trial because the trial was not commenced prior to the written dismissal date and no extension had been made pursuant to the Texas Supreme Court's COVID-19 emergency orders.
- The initial dismissal date was February 10, 2020.
- Due to a delay in paternity testing, a 180-day extension was granted prior to that dismissal date, to August 8, 2020, in accordance with Section 263.401(b).
- The trial was set for a date in June, and then in July 2020, but was reset to August 11 without objection due to issues with conducting the trial in-person in a courtroom that was large enough to accommodate social distancing protocols due to COVID-19.
- No written order extending the trial court's jurisdiction beyond August 8, 2020 was signed.
- At July permanency hearing, trial court and parties did discuss needed arrangements for the trial which had been set at the earliest possible date.

- On August 10, 2020, Father filed a motion to dismiss asserting the trial court had lost jurisdiction and raised the issue on August 11 before the trial started.
- Trial court determined it had extended its jurisdiction due to the Supreme Court's emergency orders and therefore had retained its jurisdiction to proceed.
- The 18th and 22nd Emergency Orders, identical in language as they pertain to extending Department suits, were in effect during the relevant times frames.
- Father argued that a written order was required to extend the proceedings pursuant to the Emergency Order, and was required to contain the § 263.401(b) elements, and that it would be a violation of his due process rights to not require that new trial and dismissal dates be entered in an extension order.
- The Department contended that § 263.401(b)'s requirements do not apply, and Father was not denied due process.

- The Court reasoned, "While the emergency orders do expressly require compliance with Section 263.401(a) regarding an initial extension, they do not expressly require compliance with an extension granted after the initial extension."
- "We find that the trial court extended the jurisdiction of the trial court as it was required to do pursuant to the emergency orders ("all courts in Texas may ... and must to avoid risk ...) to a time when the trial court was able to safely conduct the hearing due to COVID-19. The failure to enter a written order or to specifically set a dismissal date did not affect the validity of the trial court's extension such as to deprive it of jurisdiction. An oral rendition of an extension is sufficient to comply with the Family Code."
- Delay of three days not so significant as to deny him his right to due process pursuant to the emergency orders

In re A.W. a/k/a A.R.W., 623 S.W.3d 519 (Tex. App.—Waco 2021, no pet.)

- On appeal, Mother asserted the order of termination was void because the trial court lost jurisdiction when it failed to make the mandatory findings in its order granting an extension.
- The Department filed its Original Petition on November 26, 2019, and the mandatory dismissal date was November 25, 2020.
- On November 23, 2020, the Department filed a Motion to Extend Time for Hearing based on the COVID pandemic as an extraordinary circumstance. The trial court granted the motion that same day without holding a hearing. The order simply stated:
  - On November 23, 2020, the Court considered the Respondent's Motion for Extension, and after reviewing the evidence and hearing the arguments, the Court finds that the Motion should be GRANTED. The case shall be extended until December 30, 2020.

- IT IS THEREFORE ORDERED, the Court determines that this suit shall be extended with a Dismissal date of December 30, 2020 in the County Court at Law in Bosque County, Texas. Final Hearing set December 15, 2020 @ 9:00 (via Zoom)

- The Court noted the trial court's order did not contain the findings required by TFC § 263.401, and the record did not contain any oral findings by the trial court.
- The requirements of TFC § 263.401(b) are still applicable even if the deadlines are extended as a result of the COVID-19 pandemic, the Department's only basis for requesting the extension.
- The Twenty-Ninth Emergency Order states that if a case has not yet entered an extension order pursuant to § 263.401(b), then an extension order entered under COVID provisions must still adhere to its requirements.
- While the Department's motion made reference to COVID, the trial court's order did not.
- Because the court's order did not meet the requirements of § 263.401(b), the court lost jurisdiction before the order of termination was entered. Therefore, the order was void.

Denials of COVID Extensions

In re A.R., No. 11-20-00152-CV (Tex. App.—Eastland Dec. 20, 2020, pet. denied) (mem. op.).

- 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 A.L.H., No. 04-20-00452-CV (Tex. App.—San Antonio Mar. 24, 2021, pet. denied) (mem. op.).

- When the trial started, Mother requested a continuance, arguing she was struggling with drug addiction, the COVID-19 pandemic had increased her anxiety, and she needed more time to reengage in drug treatment. The trial court denied her request.
- Mother's motion for continuance was not supported by an affidavit as required by Rule 251, and therefore the Court presumed the trial court did not abuse its discretion when it denied the motion.
- Further, Mother never engaged in services prior to the COVID-19 pandemic, and since the pandemic began, showed no signs of progress. Shortly before the trial, Mother completed a 30-day inpatient drug treatment program, but relapsed after she completed it.
- Accordingly, the trial court did not abuse its discretion in denying her motion.

Other COVID Issues: Virtual Trial

E.N. v. Tex. Dep't. of Family and Protective Servs., No. 03-21-00014-CV (Tex. App.—Austin June 17, 2021, no pet. h) (mem. op.).

- Jury trial was held via remote videoconferencing due to the COVID-19 pandemic in December 2020.
- Father participated by videoconference from a federal penitentiary in South Carolina.
- Father had filed written objections arguing that a remote jury trial violated his due process rights, and moved for a continuance until an in-person trial was possible.
- Trial court overruled his objections, and denied his motion. Father appealed.
- Department argued there was no abuse of discretion under the circumstances.

E.N. v. Tex. Dep't. of Family and Protective Servs., No. 03-21-00014-CV (Tex. App.—Austin June 17, 2021, no pet. h) (mem. op.).

- The 26th Emergency Order relevant to this case provided:
- [A]ll courts in Texas may in any case, civil or criminal ... without a participant's consent ... allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means[.]"
- Remote jury proceedings were permissible in civil cases if the court had "considered on the record any objection or motion related to proceeding" with a remote trial.
- First, the Austin Court declined to hold that due process requires that parents facing termination of their rights must enjoy the same treatment as criminal defendants under the emergency orders.
- Although due process requires courts to afford "heightened judicial protection" to parental rights, protections generally do not rise to the level of what is required in criminal proceedings (e.g., beyond reasonable doubt standard).

E.N. v. Tex. Dep't. of Family and Protective Servs., No. 03-21-00014-CV (Tex. App.—Austin June 17, 2021, no pet. h) (mem. op.).

- Procedures did not pose such a "risk of an erroneous deprivation" of Father's rights as to weigh in favor of delaying the trial.
- District courts of Travis County created uniform procedures for conducting uniform jury trials that addressed the unique concerns posed by remote jury proceedings.
- each panelist stay "visible and centered in their Zoom tiles at all times".
- once trial is underway, the trial court would ensure the panel members were following the admonishments.
- Child also had an interest in securing "a final decision on termination so that adoption to a stable home or return to the parents is not unduly prolonged."
- Father argued proceeding with remote trial does not advance this interest: Child will remain with the same caretaker.
- District court had no way of knowing how long the Supreme Court would continue to authorize additional extensions. Once stopped, each of the cases where a court had granted an extension would have to be tried before the automatic dismissal date—here the district court estimated thirty parental-rights-termination cases.
- Under these circumstances, Child's interest in securing a prompt decision on the merits supported proceeding with a remote trial.

E.N. v. Tex. Dep't. of Family and Protective Servs., No. 03-21-00014-CV (Tex. App.—Austin June 17, 2021, no pet. h) (mem. op.).

- "Balancing the interests of Father, [the child], and the Department in light of the 'practical requirements of the circumstances'—conducting court proceedings during the COVID-19 pandemic—we conclude that due process did not require that Father have an in-person trial."

In re A.T.M., G.B., and P.F.L., No. 13-21-00008-CV (Tex. App.—Corpus Christi June 24, 2021, no pet. h) (mem. op.).

- On appeal, Father argued that the trial court erred by conducting the first day of the termination trial without his physical presence in the courtroom because termination proceedings are "quasi-criminal" in nature.
- While concluding Father failed to preserve his issue for appellate review, the Court explained that even if Father had objected to his telephonic appearance and moved for the issuance of a bench warrant, he had not shown that the trial court would have erred in denying such a motion.
- Citing Z.L.T. for its holding that an inmate does not have an absolute right to appear in person in every court proceeding, the Court noted that here the trial court was authorized, subject only to constitutional limitations, to order Father to participate remotely in the termination trial, even without his consent, in order to avoid the risk associated with the COVID-19 pandemic.

In re A.T.M., G.B., and P.F.L., No. 13-21-00008-CV (Tex. App.—Corpus Christi June 24, 2021, no pet. h) (mem. op.).

- There is nothing in the record indicating that Father's telephonic appearance, meaningfully deprived him of any constitutional right.
- Although there were times when Father could not hear the witnesses, he was able to communicate that fact to the trial court, and the trial court instructed the witnesses to repeat their testimony on each occasion.
- Further, Father appeared physically at the second part of the trial, during which he gave his testimony.

Other COVID Issues: Visitation

In re J.A.V., No. 08-20-00181-CV, --- S.W.3d --- (Tex. App.—El Paso Jan. 29, 2021, no pet.).

- Mother's parental rights were terminated to the child pursuant to subsection (E), among other grounds, and she appealed.
- The child ultimately came into care in September 2019 after testing positive for opiates at birth, and experienced withdrawal symptoms that had to be treated with morphine. Mother admitted using cocaine and hydrocodone, was observed slumped over the child, and said that she knew "she shouldn't take Hydrocodone while holding the baby."
- The Department caseworker testified Mother did not participate in any of her court-ordered services and refused monthly drug tests.
- Mother claimed to have housing and employment, but neither could be verified.

In re J.A.V., No. 08-20-00181-CV, --- S.W.3d --- (Tex. App.—El Paso Jan. 29, 2021, no pet.).

- Mother sought inpatient mental health treatment several times.
  - First: detoxing and actively withdrawing from heroin.
  - Later admission: Admitted struggling from chemical dependency.
- Mother visited Child in the beginning, and was lovingly but "emotional".
- After the COVID-19 pandemic began, Mother said she could not participate in virtual visits with Child because they did not have a smartphone.
  - Mother could have taken public transit to a public library and accessed the technology necessary to participate.
  - She could have called the child on the phone so she could hear their voices, but Mother did not do so.
- The Department tried to work with Mother to resume in-person visits.
  - May 2020: Mother became "very hostile" and "aggressive", said the caseworker was attempting to "trick them" or would not accommodate their schedules.
  - June 2020, Mother failed to visit without explanation.
  - Mother did visit with Child on a few weeks before trial.

In re J.A.V., No. 08-20-00181-CV, --- S.W.3d --- (Tex. App.—El Paso Jan. 29, 2021, no pet.).

- The Court noted a parent's inconsistent visitation may be considered as part of the endangerment analysis.
- The Department argued Mother 's failure to visit Child from March to August 2020, either in-person or through virtual means, bolstered the trial court's endangerment finding.
- Taking judicial notice as a matter of public record, the Court pointed out that the caseworker's statement that Mother could use public transit to access technology at the library was factually inaccurate and did not match with the historical record of events in El Paso beginning in March 2020.
- March 18, 2020: City of El Paso closed all of its libraries, the physical premises of all El Paso libraries remained closed through May 2020, and still remained closed to the general public as of the date of the opinion's release—January 2021.
- Thus, the Department caseworker's statement that Mother could have gone to the library to participate in virtual visits is readily contradicted by irrefutable evidence in the public record, and therefore constitutes no evidence in support of termination.

In re J.A.V., No. 08-20-00181-CV, --- S.W.3d --- (Tex. App.—El Paso Jan. 29, 2021, no pet.).

- The Court held that, "on this record, Mother 's inability to participate in visits during March and April due to social distancing restrictions and lack of access to technology that would allow virtual visits constitutes no evidence in support of termination."
- However, the evidence was sufficient to support termination on Subsection (E) endangerment grounds as to Mother based on other factors—her use of drugs during pregnancy caused Child direct harm at birth; her continued use of drugs called into question her fitness to parent a newborn; her housing arrangements remained unstable; and she did not make any consistent efforts to comply with the court-ordered service plan even prior to COVID-19 restrictions.

Trial Issues

In re E.F., No. 02-20-00228-CV (Tex. App.—Fort Worth Nov. 12, 2020, no pet.) (mem. op.)

- An associate judge presided over the contested final hearing, and terminated parents' rights. Instead of providing a court reporter to make a record of the trial, the court made an electronic recording.
- The parents requested a *de novo* hearing.
- On *de novo* review, the referring court admitted the electronic recording from the associate judge's hearing as an exhibit then heard some brief questioning of the caseworker by the defense. The parties rested and the referring court subsequently terminated the parents' rights.

- Father challenged the legal and factual sufficiency of the evidence on appeal, asserting that it was evident there was additional evidence introduced at the trial before the associate judge, but the recording was of such poor quality that its "evidentiary value . . . [was] nil."
- The Appellate Court noted that the recording of the *de novo* hearing was often barely audible or completely inaudible, and during the parts of the recording that were audible, it was unclear who was speaking when objections were made.

- TFC § 201.009(a) states that "A court reporter is required to be provided when the associate judge presides over a jury trial or a contested final termination hearing."
- The Court of Appeals held that there was error because the final termination hearing before the associate judge was not recorded as required by TFC § 201.009(a), thus depriving Father of a proper record, as the inaudible recordings were the key exhibits admitted at the de novo hearing. This error, therefore, "probably prevent[ed] the appellant from properly presenting the case to the court of appeals."

Termination Grounds

In re J.A.J., L.F.S., and R.M.G., No. 04-20-00156-CV (Tex. App.—San Antonio, July 29, 2020, no pet.) (mem. op.)

- Mother challenged the termination of her parental rights under TFC § 161.001(b)(1)(D).
- The caseworker testified at trial that the trailer in which Mother, Father, and the children resided had holes in the ceiling and the roof was incomplete. A tarp was covering the holes in the roof.
- Further, "The trailer had one main electrical line, but it had extension cords throughout to power lights in the living room, bedrooms, and other areas."
- It was also undisputed that the children had untreated, infected bedbug bites when they came into care.

- In affirming termination under subsection (D), the Court of Appeals stated, "the trial court could have concluded that the electrical extension cords exposed the children to fire, electrical shock, and trip hazards . . . The children's untreated, infected insect bites were evidence of medical neglect, which likewise endangered the children's physical well-being."

In re J.F.-G., No. 20-0378, __ S.W.3d __ (Tex. 2021)

- TFC § 161.001(b)(1)(E) provides for termination where the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child."
- In the Texas Supreme Court, Father argued that the evidence supporting the termination of his parental rights under subsection (E) was legally insufficient because his "incarceration alone" cannot support this finding.

- The evidence demonstrated that Father:
  - Had been convicted of drug offenses and was a fugitive at the time of the child's birth.
  - Reported to prison when the child was an infant, served eighteen months, then "almost immediately" committed robbery and was incarcerated for another seven and a half years.
  - Made "almost no contact" with the child while he was incarcerated and was unaware of the endangering circumstances the Department removed the child from.
- Father was released toward the end of the case while the child was a pre-teen and happily situated with a foster family and her half-sisters.

- The Supreme Court noted that Texas cases "have held that mere imprisonment will not, standing alone, constitute engaging in conduct which endangers the emotional or physical well-being of a child"; but the Court has "nevertheless held that incarceration does support an endangerment finding 'if the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child.'"
- The Court elaborated that "[a] parent's criminal history—taking into account the nature of the crimes, the duration of incarceration, and whether a pattern of escalating, repeated convictions exists—can support a finding of endangerment." Thus, a parent's imprisonment "is certainly a factor" the trial court may weigh under (E).

- The Court noted that the trial court could have fairly considered Father's convictions and corresponding periods of imprisonment for "increasingly serious crimes—among them, possession of a controlled substance, sale of marijuana, and robbery."
- The record showed a "pattern of escalating conduct" that did not end after the child was born "when he would (or should) have been aware that criminal conduct, like committing robbery, risked separating him from [the child] for years, as, in fact, it did."
- The child had turned eleven at the time of trial and Father was imprisoned for more than eight years of the child's life—last seeing her when she was four.

- The Court stated that, "[n]ot all incarceration means that a parent will be absent from a child's life for a lengthy duration." But here, the child's "life was placed at risk while her father was completely absent from her life for more than eight years" and that this "disruption" was not normal.
- The Court concluded that it is "imperative that courts recognize the constitutional underpinnings of the parent–child relationship, but courts must not sacrifice a child's emotional and physical well-being to preserve those rights when their corresponding obligations go unfulfilled for years."
- Thus, the Court declined "to draw a bright-line rule that incarceration cannot support an endangerment finding under subsection (E)."

J.B., Jr. and Y.R., v. Tex. Dep't of Family and Protective Servs., No. 03-19-00881-CV (Tex. App.—Austin May 6, 2020, pet. denied) (mem. op.)

- In challenging subsections (D) and (E), Father did not argue that there was no evidence at trial to support a finding that he engaged in conduct that endangered the children. Instead, he argued that his inability to participate in the recommended services prevented him from negating the trial court's endangerment findings.
- In overruling Father's argument, the Court held that Father's participation in services is "unrelated to whether he engaged in conduct constituting child endangerment; i.e. conduct that exposed the children to loss or injury or jeopardized their emotional or physical well-being."

In re Z.N., 616 S.W.3d 133 (Tex. App.—Amarillo 2020, no pet.)

- 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)".

- This case was on remand from the Supreme Court, which had granted a Petition for Review reinstating the trial court's (L) finding against Father.
- The trial record reflects that Father was convicted of three acts of sexual indecency with a child for touching the genitals of child victims who were four, ten and eleven years old on the date of the offenses. TEX. PENAL CODE § 21.11.
- Father was ultimately sentenced to concurrent ten-year terms for each offense. The evidence that Father was convicted of committing these acts was undisputed, though the Department caseworker testified she did not know the details or circumstances of Father's offenses.

- Despite that there was no evidence regarding the details or circumstances of the criminal offenses, the Supreme Court had concluded that Father's convictions for indecency with a child permitted the finder of fact to make the "reasonable and logical inference" that the children suffered serious injury.
- Notably, the Father did not present evidence to refute the factfinder's reasonable inference.
- Therefore the Appellate Court affirmed the trial court's (L) finding.

(O) Affirmative Defense

A court may not order termination under Subsection (b)(1)(O) based on the failure by the parent to comply with a specific provision of a court order if a parent proves by a preponderance of evidence that:

(1) the parent was unable to comply with specific provisions of the court order; and

(2) the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent.

In re G.A., No. 10-21-00001-CV (Tex. App.—Waco Apr. 28, 2021, no pet. h.) (mem. op.)

- On appeal, Mother argued that the trial court erred in terminating her parental rights pursuant to TFC § 161.001(b)(1)(O) by finding that she did not establish the affirmative defense to failing to complete her court-ordered service plan by a preponderance of the evidence.
- Mother was ordered to successfully complete individual counseling, family counseling, and protective parenting.

- Mother conceded she was unsuccessfully discharged from services.
- She conceded that two therapists discharged her for her minimization of domestic violence and mental health issues.
- While Mother argued that the Department failed to provide her a counselor qualified to meet her therapeutic needs, the Appellate Court noted that Mother denied having mental health issues and this was the basis for her therapists terminating services with her.

- The Court concluded that Mother did not meet her burden to show that her failure to comply with the court's order was not attributable to any fault of her own.

In re T.A.G., No. 04-20-00565-CV (Tex. App.—San Antonio May 19, 2021, no pet.) (mem. op.)

- Father challenged the sufficiency of the evidence supporting the trial court's subsection (O) finding.
- Father argued that he could not complete his services because of the requirements for virtual participation that were imposed during the COVID-19 pandemic.
- The children came into the Department's care based on allegations that Mother was using illegal substances, had been arrested for methamphetamine possession, did not have the children in school, and had them stealing. Father was rarely in contact with the children and did not have a home for the children.

- The Department created a service plan for Father, the caseworker reviewed the plan with him, and he signed it.
- Father did not complete any services.
  - No required drug tests. He testified he did not attend because he was out of town on the first scheduled appointment and arrived too late, and tried to attend two more times but was unable to do so.
  - No parenting classes. Father testified that he attempted to begin the parenting classes via Zoom, but could only call in and video participation was required.
  - Did not maintain stable housing or show proof of income. Father did not have a home when the case began, nor at the time of trial, and failed to provide any proof of his income as a self-employed contractor.

- Father contended he did not have a computer and his phone only allowed him to participate on Zoom conferences with audio and not with video.
- The Court reasoned that while Father's testimony, if credited, could excuse his failure to complete parenting classes, the testimony does not explain or excuse Father's failure to complete his mandated drug assessment or the requirement of his service plan that he maintain stable housing and income.
- The Court held that the evidence of Father's failure to complete his drug assessment and show proof of stable housing and employment, as ordered by the trial court, is legally and factually sufficient evidence to support the subsection O finding.

In re C.L.E.E.G., No. 21-0245 (Tex. 2022)

- TEX. FAM. CODE § 161.001(b)(1)(Q) allows for termination if a parent has "knowingly engaged in criminal conduct," was convicted of an offense, and will be confined or imprisoned and "unable to care for the child for not less than two years."
- Child was removed at birth from the hospital after testing positive for methamphetamines at birth and mother's history of drug addiction and mental illness.
- Six months into the case, Father was incarcerated after pleading guilty to two counts of possession of a controlled substance with intent to deliver, possession of a controlled substance, and felon in possession of a firearm.

In re C.L.E.E.G., No. 21-0245 (Tex. 2022)

- Father received concurrent seven year sentences and the Department subsequently modified its pleadings to seek termination of father's parental rights.
- Ultimately, the trial court terminated Father's parental rights, finding clear and convincing evidence that he would remain incarcerated and unable to care for the Child for at least two years from the date the petition was filed.
- Father appealed, claiming that his own testimony at trial about his chances of being paroled within four months made the evidence insufficient to support the trial court's (Q) finding.

In re C.L.E.E.G., No. 21-0245 (Tex. 2022)

- The Corpus Christi Court of Appeals agreed with father, finding that the Department did not present evidence to refute the father's claim that he would be paroled soon.
- This opinion from the Court of Appeals strayed from established case law, so the Department appealed to the Texas Supreme Court.
- The Supreme Court cited that "[b]y allowing termination based on an extended prison sentence, subsection (Q) 'allows the State to act in **anticipation** of a parent's abandonment of the child and not just in response to it.'"

In re C.L.E.E.G., No. 21-0245 (Tex. 2022)

- The Court also stated that because parole decisions "are entirely speculative," the parent's "introduction of parole-related evidence" establishing "the mere possibility of parole" does not "prevent a factfinder from forming a firm conviction or belief that the parent will remain incarcerated for at least two years."
- The father here testified that he knew "for a fact" that he would not serve his full sentence, claiming that the "system is packed", that people with drug charges are being paroled, and that COVID-19 could increase his likelihood of being released. But he also acknowledged that it was up to the parole board, who would consider his criminal history, convictions, and gang affiliation. He also admitted he was previously denied parole after having community supervision revoked.

In re C.L.E.E.G., No. 21-0245 (Tex. 2022)

- However, father also acknowledged that it was up to the parole board, who would consider his criminal history, convictions, and gang affiliation. He also admitted he was previously denied parole after having community supervision revoked.
- The Supreme Court noted that a trial court is the "sole arbiter when assessing the credibility and demeanor of witnesses" and is "free to disregard" a parent's parole-related testimony and conjecture.
- Therefore, the Supreme Court held that the Court of Appeals "impermissibly substituted its judgment for that of the trial court and further erred by failing to defer to the trial court's assessment of the witnesses' credibility."

In re C.L.E.E.G., No. 21-0245 (Tex. 2022)

- The Court held that by essentially requiring the Department to show Father had "zero chance of early release," the court of appeals erred by "impermissibly elevat[ing] the burden of proof from clear and convincing to beyond a reasonable doubt."
- The Supreme Court held that the Court of Appeals misinterpreted (Q) and reinstated the order terminating father's parental rights under (Q).

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.

Desires of the Child

When a child is too young to express his desires, the trial court may infer those desires from the evidence presented at the hearing. *In re K.M.*, No. 07-16-00120-CV, 2016 WL 3660076, at *4 (Tex. App.—Amarillo June 29, 2016, pet. denied) (mem. op.).

The judge or jury may consider that the child has bonded with the current placement, is well cared for by them, and has spent minimal time with a parent. *In re S.R.*, 452 S.W.3d 351, 369 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

The Current and Future Physical and Emotional Needs of the Child; The Current and Future Emotional and Physical Danger to the Child

Evidence of past misconduct or neglect is permissible as an inference that a parent's future conduct may be measured by their past conduct. *May v. May*, 829 S.W.2d 373, 377 (Tex. App.—Corpus Christi 1992, writ denied).

A parent's inability to provide adequate care for his children, lack of parenting skills, and poor judgment may be considered when looking at the children's best interest. *In re C.A.J.*, 122 S.W.3d 888, 893 (Tex. App.—Fort Worth 2003, no pet.).

A parent's history of endangering and neglecting children, and exposing the children to domestic violence in its review of the evidence supporting the best interest determination. *In re A.M.*, 385 S.W.3d 74, 83 (Tex. App. Waco 2012, pet. denied).

A fact-finder can give "great weight" to the "significant factor" of drug-related conduct. *Dupree*, 907 S.W.2d at 86.

The Parenting Ability of the Individuals Seeking Custody
The Programs Available to Assist the Party Seeking Custody

In reviewing the parental abilities of a parent, a factfinder can consider the parent's past neglect or past inability to meet the physical and emotional needs of the children. *D.O.*, 851 S.W.2d at 356.

The fact that a parent has poor parenting skills and "was not motivated to learn how to improve those skills" is evidence supporting a finding that termination is in the child's best interest. *Wilson v. State*, 116 S.W.3d 923, 925 (Tex. App.—Dallas 2003, no pet.).

Further, the factfinder can infer from a parent's failure to take the initiative to avail herself of the programs offered to her by the Department that the parent "did not have the ability to motivate herself to seek out available resources needed … now or in the future". *In re W.E.C.*, 110 S.W.3d 231, 245 (Tex. App.—Fort Worth 2003, no pet.).

The Plans for the Child by the Individuals or by the Agency Seeking Custody
The Stability of the Home or Proposed Placement

The factfinder can compare the contrasting plans for a child's future and consider whether the plans and expectations of each party are realistic or weak and ill-defined. *D.O.*, 851 S.W.2d at 356.

Stability and permanence are paramount in the upbringing of children. *In re T.D.C.*, 91 S.W.3d 865, 873 (Tex. App.—Fort Worth 2002, pet. denied).

A parent's failure to show that she is stable enough to parent a child for any prolonged period entitles the trial court "to determine that this pattern would likely continue and that permanency could only be achieved through termination and adoption." *In re B.S.W.*, No. 14-04-00496-CV, 2004 Tex. App. LEXIS 11695, at *25-26 (Tex. App.—Houston [14th Dist.] Dec. 23, 2004, no pet.) (mem. op.).

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 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 D.G., E.G., and V.G., No. 01-20-00720-CV (Tex. App.—Houston [1st Dist.] Apr. 6, 2021, no pet. h.) (mem. op.)

- Mother appealed the termination of her parental rights to three children, a five year old and twin sixteen month old children.
- In its best interest analysis, the Houston Court of Appeals considered that the evidence was almost entirely focused on the five year old child.
- This included evidence that the parents repeatedly left the child alone at home, who was found wandering in the area. The oldest child was also nonverbal with significant developmental delays when she entered care, and she was later diagnosed with autism.
- The evidence also focused on the child's need for specialized, ongoing care, and the progress that the child has made in foster care.

- In contrast, the evidence was sparse concerning the twin toddlers. The Court of Appeals found that the evidence regarding their needs was "general or conclusive in nature".
- Thus, while the evidence was sufficient to support that termination of parental rights to the older child is in the child's best interest, the evidence was factually insufficient to support that termination of her parental rights to the twins is in the children's best interest.
- The order was affirmed as to the older child and reversed as to the twins.

Final Orders

In re J.J.R.S. and L.J.R.S., No. 20-0175, ____S.W.3d ____ (Tex. 2021)

- In a DFPS initiated suit, the trial court entered a final order naming the child's Aunt and Uncle as Permanent Managing Conservator and the Mother as the child's Possessory Conservator.
- In the Supreme Court, Mother argued that the Court of Appeals erred in holding that vesting Aunt and Uncle with complete discretion over her access rights to the children was not permissible under the Family Code. Essentially, that the final order effectively denied her the right of access to the children.

- The trial court's final order stated that Mother "shall have possession of the children at times mutually agreed to in advance by the parties."
- In the absence of mutual agreement, the trial court ordered that Mother was ordered to have "supervised visitation with the children under the terms and conditions agreed to in advance by the managing conservator," with forty-eight hours' advance notice.
- In handwriting, the trial court added, "[o]nly if the managing conservator agreed to visitation. Sole discretion."

- TFC § 153.006(c) provides that a court must "specify and expressly state in the order the times and conditions for possession of or access to the child, unless a party shows good cause why specific orders would not be in the best interest of the child."
- TFC § 153.193 states: The terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent's right to possession of or access to a child may not exceed those that are required to protect the best interest of the child.
- Neither party addressed whether there was good cause for the court to deviate from the standard possession order, therefore the Supreme Court looked to whether TFC § 153.006(c) "relaxes" the specificity requirement and allows for an "as agreed" order.

- The Supreme Court found that the final order was not a "denial of access" to the children and "[b]y its terms, Mother can obtain access to her children either (a) when she and the managing conservators agree or, if they cannot reach an agreement, (b) when the managing conservators consent to access."
- Further, "[t]he restriction is undoubtedly a severe one, permissible only if necessary to protect the children's best interest, but it is not an outright denial that forecloses all access."
- Here, the Supreme Court determined that the evidence supported a finding that the severe restrictions were in the child's best interest based on Mother's neglect of the children resulting in their removal, her failure to participate in the case, or to participate in services or visitation.

- The Supreme Court concluded that "Texas Family Code sections 153.006(c) and 153.193, read in conjunction, permit the kind of 'as agreed' order at issue in this case in the narrow circumstance where such a severe restriction is necessary to protect the children's best interest."

In re C.J.C., --- S.W.3d ----, No. 11-20-00260-CV (Tex. App.—Eastland May 13, 2021, no pet.) (mem. op.)

- Father who relinquished his parental rights to teenaged son was ordered by the trial court to pay post-termination child support until the child turns 18 or graduates high school.
- On appeal, Father contended that the trial court abused its discretion in ordering the post-termination child support.
- The Eastland Court of Appeals held that a plain reading of TFC section 154.001(a–1) authorizes a trial court to order child support in a circumstance involving "a child in substitute care for whom the department has been appointed managing conservator."
- As the child was undisputedly in the Department's conservatorship and placed in a residential treatment center, the order was affirmed.