DFPS Case Law Update

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13TH ANNUAL HILL COUNTRY AD LITEM SEMINAR
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Right to Effective *Retained* Counsel

In re D.T., No. 20-0055, 625 S.W.3d 62 (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, such parents have a right to raise ineffective assistance claims on appeal on due process grounds.
- The Supreme Court did not extend this to parents who retained their own counsel, and as a result, 13 of the 14 Courts of Appeals denied ineffective assistance of counsel claims involving *retained* counsel.

Right to Effective *Retained* Counsel

- Legislative change in 2015 required trial court to admonish parent of "right to be represented by an attorney" at the "parent's first appearance in court." Tex. Fam. Code § 107.013(a-1).
- In *D.T.*, the Supreme Court decided to re-examine the 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.

Right to Effective *Retained* Counsel

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- This attorney appeared at permanency hearings and was actively involved throughout the four-day jury trial.
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Right to Effective *Retained* Counsel

- 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 stated that Tex. Fam. Code § 107.013(a–1)(1) "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 Tex. Fam. Code § 107.013(a) which requires the appointment of counsel for indigent parents who appear in opposition.

Right to Effective *Retained* Counsel

- 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."
- Nonetheless, the Supreme Court held that mother received effective assistance of counsel.

Limits on Trial Court Authority in DFPS Cases

Limits on Trial Court Authority

In 2022, the Department was ordered to pay for placement or other services by a Bexar County court.

- These orders included providing (1) sua sponte depositions, (2) foster care at specified rates, (3) foster care with specific providers, (4) travel costs of court-appointed counsel, and (5) costs of ankle monitor services. The trial court also ordered the Department to reassign caseworkers, or to otherwise alter caseloads, and issued arrest warrants for Department staff and a child.
- The Department sought and successfully obtained mandamus relief from the Fourth Court of Appeals in fourteen separate actions on the basis that these types of orders violate the Texas Constitution or are otherwise void.

Limit on Trial Court Authority: Separation of Powers

- Department named PMC and parental rights terminated in May 2018.
- Since that time, Child had been in seventeen different placements, and at the time of the case, her placement status was "Child Without Placement."
- She carried a service level of "Intense." The child manifested behavior problems, including self-harm, extreme aggression, and an inability to follow authoritative direction.
- Over several hearings, Department staff testified to their extensive efforts to find a placement that fulfilled the trial court's specific orders requiring placement.
- On Friday, January 14, 2022, the trial court orally rendered an order that required the Department to (1) offer child-specific contracts in the amount of $2,000/day to up to six child-placing agencies, (2) submit these offers to the agencies no later than 9:00 a.m. on Tuesday, January 18, 2022, and (3) include an additional $500/day subsidy for professional counseling.

Limit on Trial Court Authority: Separation of Powers

- The Department filed a petition for writ of mandamus in the Fourth Court of Appeals, arguing, inter alia, that the order violated the separation of powers clause by interfering with the Department's statutory duties.
- The Fourth Court recognized the trial court's statutory and inherent responsibility to act in the child's best interest but observed that "the authority to act in a child's best interest is not boundless."
- The Texas Constitution provides: "Where one branch of government assumes power more properly attached to another branch or unduly interferes with the powers of another, any resulting order is void."
- The trial court derives its constitutional power from Article V, section 8 of the Texas Constitution and its statutory power from Texas Family Code chapter 263 which "defines the parameters whereby the judicial branch may review the placement status" of a child. The trial court had the statutory duty to review the Department's plans for the child.

Limit on Trial Court Authority: Separation of Powers

The Fourth Court stated that the Department is "legislatively conferred authority...to negotiate and execute contracts necessary to perform any of the [D]epartment's powers or duties." This includes contracts with child placing agencies. The Court held that, accordingly, the Legislature granted the Department the authority and responsibility to enter into child-specific contracts in compliance with specific contracting statutes.

- Holding: Because the Legislature delegated the power to negotiate and execute child-specific contracts to the Department, the Fourth Court declared the trial court's orders void.

Limit on Trial Court Authority: Separation of Powers

- "Under these circumstances, we hold the Legislature has vested in the Department the authority to enter into child-specific contracts at legislatively determined rates. Therefore, we conclude the trial court unduly interfered with the powers of the legislative branch when it ordered the Department to submit a written offer for a child specific contract in the amount of $2,500 per day." The Court, therefore, held those portions of the trial court's order to be void and conditionally granted the Department's petition.''

In re DFPS, No. 04-22-00040-CV, 2022 WL 1751377 (Tex. App.—San Antonio June 1, 2022, orig. proceeding) (mem. op.).

Limit on Trial Court Authority: Separation of Powers *Cont'd*

See also:

- *In re DFPS, No. 04-22-00096-CV, 2022 WL 2135572 (Tex. App.—San Antonio June 15, 2022, orig. proceeding) (mem. op.) (order to reassign caseworker void);*
- *In re DFPS, No. 04-22-00165-CV, 2022 WL 2135534 (Tex. App.—San Antonio June 15, 2022, orig. proceeding) (mem. op.) (order to pay specific rate for foster care void);*
- *In re DFPS, No. 04-22-00166-CV, 2022 WL 3372425 (Tex. App.—San Antonio June 15, 2022, orig. proceeding) (mem. op.) (order to pay specific rate void);*
- *In re DFPS, No. 04-22-00091-CV, 2022 WL 2230720 (Tex. App.—San Antonio June 22, 2022, orig. proceeding) (mem. op.) (order to pay specific rate void);*
- *In re DFPS, No. 04-22-00092-CV, 2022 WL 2230719 (Tex. App.—San Antonio June 22, 2022, orig. proceeding) (mem. op.) (order to pay specific rate void);*

Limit on Trial Court Authority: Separation of Powers *Cont'd*

- *In re DFPS, No. 04-22-00196-CV, 2022 WL 2442169 (Tex. App.—San Antonio July 6, 2022, orig. proceeding) (mem. op.) (order to reassign caseworker void);*
- *In re DFPS, No. 04-22-00085-CV, 2022 WL 2820937 (Tex. App.—San Antonio July 20, 2022, orig. proceeding) (mem. op.) (order to pay specific rate void);*
- *In re DFPS, No. 04-22-00175-CV, 2022 WL 3046944 (Tex. App.—San Antonio Aug. 3, 2022, orig. proceeding) (mem. op.) (order to pay specific rate void);*
- *In re DFPS, No. 04-22-00087-CV, 2022 WL 3219596 (Tex. App.—San Antonio Aug. 10, 2022, orig. proceeding) (mem. op.) (order to pay specific rate void);*
- *In re DFPS, No. 04-22-00094-CV, 2022 WL 3219924 (Tex. App.—San Antonio Aug. 10, 2022, orig. proceeding) (mem. op.) (order to pay specific rate void);*
- *In re DFPS, No. 04-22-00341-CV, 2022 WL 6815172 (Tex. App.—San Antonio Oct. 12, 2022, orig. proceeding) (mem. op.) (order to pay for ankle monitor void).*

Limits on Trial Court Authority: Sua Sponte Deposition

- Department was under an order requiring 24-hour supervision to Child, who was 15 years old.
- Child attended movie theater with "a group of girls, who thereafter joined up with a group of boys."
- According to Child, one of the boys told Child to meet him in the bathroom "to talk."
- While in the bathroom, the boy threatened and sexually assaulted Child.
- Department staff immediately called police.
- "Because the trial court could not obtain satisfactory answers about the incident from [Child's] caseworker, the trial court ordered the Department to secure and pay a court reporter for the depositions of [] four supervisors."

Limits on Trial Court Authority: Sua Sponte Deposition

The Fourth Court held that the trial court lacked *any* power, inherent or otherwise, to "require[] the Department to secure and pay for the depositions." *In re DFPS*, No. 04-22-00163-CV, 2022 WL 2821251, at *2 (Tex. App.—San Antonio July 20, 2022, orig. proceeding) (mem. op.).

- Holding: the deposition order was declared void. *Id*.

Texas Family Code § 263.401

Automatic Dismissal – 263.401

- "Unless the court has **commenced the trial on the merits** or **granted an extension**..., on the **first Monday after the first anniversary of the** date the court...**appoint[ed] the department as temporary managing conservator**, the court's **jurisdiction** over the suit affecting the parent-child relationship filed by the department...**is terminated and** the suit **is automatically dismissed without a court order**. Not later than the 60th day before the day the suit is automatically dismissed, the court shall notify all parties to the suit of the automatic dismissal date." Tex. Fam. Code § 263.401(a).
- "**If the court grants an extension** under Subsection (b) or (b-1) **but does not commence the trial on the merits before the dismissal date**, the court's **jurisdiction** over the suit **is terminated and** the suit **is automatically dismissed without a court order**. The court may not grant an additional extension that extends the suit beyond the required date for dismissal under Subsection (b) or (b-1), as applicable." Tex. Fam. Code § 263.401(c).

Automatic Dismissal – 263.401 – Commencement

- Trial court called the case for trial on April 15, 2019 (five days before dismissal date).
- The Parties made announcements, discussed preliminary matters, including potential objections to exhibits.
- The trial court decided that the admission of exhibits should be addressed when the trial was "continued and we finish it up."
- The Department's investigator was sworn and briefly testified before the court recessed the trial.
- Trial resumed on October 7, 2019, and parental rights were terminated.

In re Z.S., 631 S.W.3d 313, 318 (Tex. App.—Houston [14th Dist.] 2020, no pet.)

Automatic Dismissal – 263.401 – Commencement?

- Holding: Trial commenced before dismissal deadline.

In re Z.S., 631 S.W.3d 313, 318-19 (Tex. App.—Houston [14th Dist.] 2020, no pet.)

- Section 263.401 "requires more than a putative call of the case and an immediate recess in order to comply with the statute. We would suggest that at a minimum the parties should be called upon to make their respective announcements and the trial court should ascertain whether there are any preliminary matters to be taken up."

In re D.S., 455 S.W.3d 750, 753 (Tex. App.—Amarillo 2015, no pet.)

Automatic Dismissal – 263.401 - Extension

- "In extraordinary circumstances defined in [§] 263.401(b), trial courts may extend that one-year deadline, or 'dismissal date' in the parlance of the statute." In re G.X.H., 627 S.W.3d 288, 292 (Tex. 2021). To do so, the **trial court must find** "that **extraordinary circumstances** necessitate the child remaining in the temporary managing conservatorship of the department and that continuing the appointment of the department as temporary managing conservator is in the **best interest** of the child." *Id*.
- Subsection (b) "requires a court to make these findings as a prerequisite to granting an extension." In re G.X.H., 627 S.W.3d at 299.
- "If the court makes those findings, the court may retain the suit on the court's docket for [an additional] **180 days**." *In re L.P.*, No. 13-22-00363-CV, 2023 WL 310469, at *2 (Tex. App.—Corpus Christi–Edinburg Jan. 19, 2023, no pet. h.) (mem. op.).
- "But if the trial court neither commences trial by the dismissal date nor extends it in accordance with [§] 263.401(b), the statute dictates a **dire consequence**: the trial court's jurisdiction over the suit 'is terminated and the suit is automatically dismissed.' " *In re G.X.H.*, 627 S.W.3d at 292.

Automatic Dismissal – 263.401 – Dire Consequence

- "Thus [the automatic dismissal statutes], as currently written, apparently **allow a party to collaterally attack a judgment** terminating a parent's rights in the rare case when the automatic-one-year-dismissal deadline has passed and the trial court failed to state its *extraordinary circumstances* and *good cause* findings on the record even though it granted a party's request to extend the statutory deadline."
- "While a court might question the wisdom of the policy behind creating a claim that a **jurisdictional defect** exists that allows a collateral attack on the order of termination, our responsibility is to decide whether the standard set by the Legislature has been satisfied, it is not our prerogative to impose a policy of our own."

In re F.S., No. 09-22-00114-CV, 2022 WL 4371008, at *5 (Tex. App.—Beaumont Sept. 22, 2022, no pet.)

Automatic Dismissal – 263.401 – Dire Consequence?

The question is whether,

- "the extension order (or its equivalent) was signed or made before the initial dismissal date."
- "[B]oth the Texas Supreme Court and [the Fifth Court] concluded the issuance of extraordinary circumstances and best interest findings were not jurisdictional."

Interest of C.J.P., No. 05-22-00233-CV, 2022 WL 7936574, at *5 (Tex. App.—Dallas Oct. 14, 2022, no pet.) (mem. op.)

Automatic Dismissal – 263.401 – Dire Consequence?

There is a split of opinion as to whether the findings required by subsection (b) are truly jurisdictional. A plurality of courts have held that the findings may be implied if not made expressly.

- The Texas Supreme Court heard oral argument in *In re J.S.*, No. 22-0420 on February 2, 2023.
- The Fifth Court held the trial court failed to make a finding of extraordinary circumstances and thus the final order was void. *In re J.S.*, No. 05-21-00898-CV, 2022 WL 620709 (Tex. App.—Dallas Mar. 3, 2022, pet. granted) (mem. op.).
- The Department brought a petition for review arguing 263.401 does not require the trial court to make express findings, and, in the absence of express findings, the findings may be implied based on the record before the trial court.
- The Department also argued the required findings are not jurisdictional.

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.

COVID Issue: 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.).

- 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.

Termination Grounds

In re J.F.-G., 627 S.W.3d 304 (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."

- 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)."

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."

- 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.

- 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.'"

- 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.

- 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."

- 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).

In re A.M., 643 S.W.3d 226 (Tex. App.—Dallas 2022, no pet.)

- Under subsection (N), a trial court may order termination if it finds by clear and convincing evidence that the parent has constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services or an authorized agency for not less than six months, and: (i) the department or authorized agency has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment.

- The Court of Appeals noted that Father was "aware from the very beginning that he could be [the child's] father."
- The Court noted the Department's extensive efforts to locate Father and that Father knew of these efforts. The Court emphasized that the delay in determining Father's paternity was caused by Father himself who "impeded [the Department's] attempts to timely adjudicate [his] parentage."
- The Court of Appeals held the Department engaged in reasonable efforts to return the child to Father and, accordingly, affirmed the (N) finding.

In re I.D. and A.D., No. 05-21-00244-CV (Tex. App.—Dallas Sept. 17, 2021, pet. denied) (mem. op.)

- Challenging subsection (N), Father primarily argued that his failure to visit or maintain contact should not be held against him because the Department prevented him from visiting the children.

- The Court observed that subsection (N)(ii) says nothing about voluntariness of a parent's failure to regularly visit or maintain significant contact with a child.

- The Court compared this case to a factually similar case in which a like argument had been raised, *In re X.A.S.*, No. 05-19-01082-CV (Tex. App.—Dallas Mar. 3, 2020, no pet.) (mem. op.).
- In that case, the Court of Appeals rejected the parent's argument, concluding that the Department did not unreasonably thwart her visitation because submitting to drug testing to regain visitation was within her control and yet she failed to appear for those drug tests.

In re J.W., 645 S.W.3d 726 (Tex. 2022)

- TEX. FAM. CODE § 161.001(b)(1)(O), applies when a parent allows "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 ... 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."
- Father appealed. The Tenth Court of Appeals held that the evidence was legally sufficient to support the best-interest finding and to support the predicate ground under Section 161.001(b)(1)(O)—failure to comply with a court order that established the actions necessary to obtain J.W.'s return.

- In this case, the trial court issued temporary orders requiring Father to comply with the requirements in the Department's service plan. In addition to other requirements, the service plan required Father to:
  - maintain a safe and stable home environment
  - submit to random drug tests as requested by the Department,
  - contact Department caseworkers at least twice a month,
  - attend supervised visits
  - complete a psychological evaluation and follow recommendations, and
  - attend individual counseling.

- Father's contention to the Supreme Court was that the Department "relied on things that were not actually part of his service plan to show noncompliance."
- The Department argued that Father did not "maintain a safe and stable home environment" or contact the Department at least twice a month.
- The Supreme Court agreed with the Department that a reasonable juror could have formed a firm belief or conviction that Father failed to maintain a safe and stable home environment and thus failed to comply with his service plan.

- Condition of the Home:
  - Father did not dispute the evidence by two caseworkers detailing the condition of his home shortly after the child was removed and several months before trial. This evidence included photographs and testimony by both caseworkers that the house was unsafe for a young child. At trial, Father did not contend his home was suitable or safe for a child.
  - On review, Father argued that the Department was aware of his plans to live elsewhere with the child, rendering the condition of his home "irrelevant". He also argued that because the Department did not indicate disapproval of his plan to move, and no witnesses testified that he was being untruthful, the evidence demonstrated he had a concrete plan for raising the child in a stable environment and that the Department secretly and subjectively determined that the plan was insufficient.

- The Court concluded there was ample evidence regarding the instability of Father's plans for raising the child, which included:
  - Conflicting evidence as to whether Mother's sister withdrew from consideration as a placement earlier in the proceedings.
  - The Department still had not been permitted to inspect Mother's sister's apartment.
  - Father remained in the same home at the time of trial, where he had lived for 40 years, and provided no indication that he could maintain any future residence in a manner safe for a child. The car in he presumably intended to use had a broken back windshield and too much trash inside to allow for a car seat.

- The Court also considered that Father's continued involvement with Mother was concerning because of the uncertainty regarding his ability to parent the child independently:
  - Father and Mother filed for divorce a week before trial; but other evidence "indicated a lack of candor with the Department and the court: that they did not intend to separate, they were still in a relationship, and the divorce was 'in name only'."
  - Father attempted to assist Mother in faking a drug test during the Department's case.
  - Father reported that he believed what Mother told him, and Mother's psychological evaluation indicates Mother underestimated her problems.
  - The Court explained, "if the jury believed the divorce was not genuine, then it both called Father's overall credibility into question and demonstrated that the divorce could not serve its purported purpose."

- The Court's reasoning that father did not maintain a safe and stable home and a concrete plan for the child:
  - The Court agreed that Father's conduct before the child was born cannot demonstrate a failure to comply with a service plan generated after he was born. However, it reasoned that those incidents—most recently the summer before trial—"provide context for a pattern that continued throughout the termination proceedings."
  - The Court opined that evidence of the past events, along with other evidence, are consistent with the COA's opinion that:
    - **"[Father] shows a pattern of behavior of denial about the extent and the issues that [Mother] has even with his knowledge of her addiction issues with her mental health issues, the fact that she refuses to get help, the fact that there's a criminal element that's around who's involved with drugs, the fact that he can't seem to protect himself much less a child from the pattern of behaviors that she brings and he's not willing to address those."**

- Court's Holding:
  - The Court held that the "jury reasonably could have formed a firm belief or conviction that Father failed to maintain a safe and stable home environment, as his service plan required, and thus "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".
- Judge Blacklock's Dissent:
  - opined that the Department's interpretation of Father's service plan "raises serious concerns about the plan's validity."
  - wrote that through its service plan, the Department can require a parent who has not endangered his child to assure a jury that bad influences will not make their way into the child's life in the future.
  - believed that the majority's concern about Father's relationship with Mother and her problematic influence on the child should have nothing to do with Father's service plan.

C.C. V. TDFPS, 653 S.W. 3d 204 (Tex.—Austin 2022, no pet.)

- The Austin Court found that the evidence was insufficient to support the trial court's determination that termination of *Mother's* parental rights was in the child's best interest.

- The following evidence was **legally sufficient** to support best interest:
  - Child's physical and emotional needs - Mother and the Department appear to have some understanding of those needs. At the time of trial, the child was placed in the Hope House, which both the Department and Mother agreed can meet the child's needs if an adoptive home or reunification was not possible.
  - Physical or emotional dangers to the child - Overwhelming evidence of Mother's long history of substance abuse, and she remained in denial as to the risks of drug use.

- Programs available - Mother attended parenting classes. However, the record also reflects that Mother missed most of her drug tests during the pendency of this case, attended Narcotics Anonymous only occasionally, and abandoned psychiatric therapy notwithstanding her conceded struggles with mental health and substance abuse. "On the whole", the evidence establishes that Mother was not taking advantage of the support systems available to her.
- Stability of proposed plans - Caseworker testified that the Department planned to find an adoptive home for the child. The court observed that because the Department had not identified a prospective adoptive home, it was difficult to evaluate its plan with any specificity. Mother planned for the child to remain a long-term patient at the Hope House and planned to continue to monitor her care into adulthood. Mother intended to reunite with the child but did not know when or if that will be possible.

- Improper parent-child relationship - Mother struggled to parent effectively for years. Department's exhibits include evidence that at intake Mother was rarely home, would leave the home to use methamphetamines, and had not served as the child's primary caregiver in some time.
- Excuses – Not disputed that Mother suffered from depressive and anxiety disorders that leave her "tearful" and "nervous." However, the court stated that while compromised mental health may serve as an excuse for certain acts or omissions, the testimony and exhibits demonstrated that Mother "made—at best—inconsistent efforts" to address her mental health, a fact that tends to negate those health issues as any excuse for her conduct. Mom blamed her recent conduct on "very unfortunate luck" that has left her "crippled." The court was unaware of authority indicating that a general appeal to misfortune will excuse choices like the ones that Mother made in this case.

- The following evidence was **factually insufficient** to support best interest:

  - Mother detailed exactly how the child's diagnosis affects everyday life, testifying about the seizures, the specialists, the durable medical equipment, the scoliosis, the low muscle tone, the difficulty walking, and the need for a modified diet. Mother also testified that she had "been to every doctor, every specialist, everything with [the child]." In "sharp contrast", the caseworker revealed "little or no familiarity" with the child's diagnoses or their effects on daily life: "She is diagnosed with—I believe it's an—it's a chromosomal deletion that results in her having, like, intellectual disabilities, seizures on occasion." She offered nothing more on the subject other than that she believed Della would require care well into adulthood. The caseworker had also never met the child.

- With respect to the child's special needs, the court concluded that her health is better served by maintaining Mother's rights to her daughter. The Department produced no evidence that the child had ever sustained physical injury or harm from Mother's acts or omissions.
- It is undisputed that the child suffered injuries while in the Department's care. The required specialized orthopedic care to facilitate rehabilitation; and she was struggling to "resume walking" almost a year later, even with physical therapy at school and the assistance of staff from her new placement at the Hope House.
- And it was Mother that filed a motion to modify the temporary orders that ultimately allowed the child to be transferred to the Hope House due to the injury.
- In addition, Mother testified that the child gained weight since removal and that the weight gain was impeding her mobility due to muscular weakness caused by the chromosomal defect.

- The court noted that the Department's burden is to demonstrate what arrangement best serves the child's interest. The caseworker pointed to evidence that Mother remained in "relapse" and that she does not have "safe, stable housing."
- However the court opined that Mother's substance abuse and unstable housing become less relevant if the Department is named sole managing conservator. The caseworker conceded that the child is closely bonded to Mother, that Mother had attended visitations when permitted, and that Mother regularly sent supplies for the child. Notwithstanding the long pendency of the case, the Department not identified prospective adoptive homes for the child, and the caseworker did not deny that it might be difficult to find such a home and that she could "not say what exactly the chances would be."

- The court concluded that the provisions of the final order allowing Mother continued visitation are not consistent with the finding that termination is in child's best interest. The termination decree required "that [Mother] have supervised virtual or in[-]person visits with [the child] to be supervised by the Department, if she drug test[s] consistently and is negative." And it noted that the trial court's announcement of the visitation provision from the bench: "I'm doing it for the child," was an apparent concession that termination was not in the child's best interest.

In re N.M.R., No. 04-22-00032-CV (Tex.—San Antonio Aug. 24, 2022, pet. denied) (mem. op.)

- The San Antonio Court found that the evidence was insufficient to support the trial court's determination that termination of *Mother's* parental rights was in the child's best interest.

- The best interest evidence weighing in support of termination:
  - Domestic Violence
  - Drug Use

- The best interest evidence weighing against termination:
  - Mother was engaging in a twenty-six-week course addressing both victims and perpetrators of domestic violence in addition to the nine-week course she had already completed, before trial.
  - While Mother also acknowledged the dangers of smoking marijuana, Mother testified she is committed to staying sober and staying on appropriate medication to address her mental illness. The caseworker was aware Mother sought mental health services, but she had not visited Mother at her residence to assure Mother's compliance with taking her prescribed medications. A month before trial, Mother was drug tested and the Department had no concerns as to the results. And Mother voluntarily restarted a Lifetime Recovery program and completed it a month before trial.

- Testimony that before the child was removed, the child was always clean and dressed, and Mother bonded with the child.
- With respect to Mother's visitations, the caseworker testified Mother was very consistent with her visits, the visits were appropriate, and Mother paid attention to and engaged with the child at every visit. Mother brought toys, clothing, and food, and the caseworker expressed no concerns during Mother's visits. The caseworker also explained that the child appears to know Mother and is bonded with her.
- Mother testified she has bonded with the child and that she was prepared for the child to live with her along with the new baby she was expecting. And Mother testified she took parenting classes through Catholic Charities to be more informed, as she was a new mom.

- Mother remedied the Department's concerns regarding lack of housing by the time of trial.
- Mother testified about her ability to meet the child's needs now and in the future by working and utilizing public benefits. Mother also explained the various skills she learned from counseling and domestic violence classes on how to appropriately respond in situations. By the time of trial, Mother had reengaged with a new therapist after her last therapist stopped working with the Department's cases.
- While not formally diagnosed with autism, the child exhibited speech developmental delays and was not potty trained. Mother testified she planned to seek out assistance for the child's needs and development.