Selected Case Law Update

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I. IMMUNIZATION OF FOSTER CHILD OVER PARENTS' OBJECTIONS

Parents' child was born on April 24, 2017. After the child's birth, the Department removed the child and filed a petition for protection, conservatorship, and termination. The Department was appointed temporary managing conservator and parents were appointed temporary possessory conservators after an adversary hearing. As temporary managing conservator, the Department was given "all the rights and duties set forth in section 153.371 of the Family Code (Rights and Duties of Nonparent Appointed as Sole Managing Conservator)." The temporary orders also authorized the Department to consent to the child's medical care in accordance with section 266.004 of the Family Code, "Consent for Medical Care" for children in the Department's conservatorship. The trial court's order allowed the parents, as temporary possessory conservators, limited rights and duties to the child.

At a hearing in July 2017, the Department advised the trial court that it was concerned that the child had not received any vaccinations. Because the child was living in a foster home with other children, he was "exposed to social environments like daycare and church". Accordingly, the Department wanted the child to receive immunizations. However, the parents were both opposed to the child receiving immunizations "at this time". The trial court did not rule on the issue but rather ordered the parents to meet with the child's pediatrician to discuss the need for the vaccinations and the parents' reasons for objecting to them.

In September 2017, the trial court held an evidentiary hearing regarding whether the child should be immunized. The child's doctor testified that she was of the opinion "that the benefits of receiving immunizations outweigh the potential side effects and that it is therefore in [the child's] best interest to be given the vaccinations." Mother testified that, because autism is prevalent in her family, she opposed the child "receiving vaccinations until he is 'past the age of autism.'" Father testified that he did not want the child to be immunized at that time. He stated that he had a notarized affidavit exempting the child from immunization requirements as allowed for in the Health and Safety Code.

In October 2017, the trial court signed an order that:

- Found it is in the child's best interest to have the normal childhood immunizations;
- Concluded that the trial court has the power to order that the immunizations occur notwithstanding the parent's objections;
- Ordered that "the Department shall promptly cause [the child] to receive and continue to receive the normal childhood immunizations as recommended by his pediatrician notwithstanding the parents' objections"; and
- Ordered that "the Department shall delay the execution of this order until further order of this court to allow the parents a reasonable time to seek mandamus relief from the 10th Court of Appeals."

Parents filed their petition for writ of mandamus arguing that the trial court erred in granting the Department's request to immunize the child despite their objections. Parents contended that the trial court's order violated 32.101(c) of the Family Code. The Department, however, responded that: (1) the trial court's order was authorized under section 266.004 of the Family Code; and (2) Family Code section 32.101 was inapplicable. Despite acknowledging that the statute's use of the word "person" includes the Department and that the trial court's June 2017 temporary order authorizes the Department to consent to the child's medical care, the Department argued that section 32.101 did not

apply because the trial court's order did not involve the Department's right to consent to the child's immunization. The Department argued that the trial court itself ordered medical care for the child.

The Waco Court disagreed because the trial court signed the order as a result of the Department's request to have the child receive "normal childhood immunizations". Further, the Court reasoned that the order provided "that the Department shall promptly cause [the child] to receive and continue to receive the normal childhood immunizations as recommended by his pediatrician notwithstanding the parents' objections."

The Court then explained: "The [o]rder therefore authorizes the Department to consent to [the child] receiving 'the normal childhood immunizations as recommended by his pediatrician.' It does not circumvent the applicability of section 32.101. Under subsection 32.101(a), the Department is 'a person authorized under … a court order to consent for [the child]' who may consent to his immunizations." The Court further examined 32.101(c), which states a person authorized under 32.101(a) may not consent for the child "if the person has actual knowledge that a parent, managing conservator, guardian of the child, or other person who under the law of another state or a court order may consent for the child: (1) has expressly refused to give consent to the immunization." The Court explained that the use of the "parent" included the child's parents in this case.

The Department argued that subsection 32.101(c) did not apply because the child's parents had to "be a 'parent . . . who under the law of another state or a court order may consent for the child' and who 'has expressly refused to give consent to the immunization.'" The Department's rationale was based on the fact that the parents in this case were only appointed temporary possessory conservators who had "the limited rights and duties" spelled out in the trial court's temporary order. The Court applied the "rule of the last antecedent" which "provides that 'a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" The Department acknowledged this and agreed that the "who under the law of another state or a court order may consent for the child" language of 32.101(c) "modifies only 'other person,' and not 'a parent.'"

However, despite this acknowledgment, the Department argued that "the rule of the last antecedent 'is not an absolute and can assuredly be overcome by other indicia of meaning.'" To support this argument, the Department continued: "one indicium would be that the interpretation leads to an absurd result." The Department explained that applying the rule of the last antecedent to the text of 32.101(c) leads to "an absurd result" because, under such an interpretation, "the parent expressly denied by court order the right to consent to immunizations would have the absolute right to veto the decision of the person who had been the one solely granted that right." The Court rejected the Department's argument by citing the name of Chapter 32 of the Family Code: "Consent to Treatment of Child by Non-Parent or Child". The Court explained that the chapter "does not apply to a situation involving conflicting preferences of a child's parents." The Court relied on *In re A.J.E.*, 372 S.W.3d 696, 698 (Tex. App.–Eastland 2012, no pet.), which differentiated conflicts between parents on this issue against "a situation where the government is attempting to override the will of both parents or the sole surviving parent of a child." Therefore, the Court held that "under the plain language of subsection 32.101(c), the Department, having actual knowledge that [the child's] parents … have expressly refused to give consent to [the child] being immunized, may not consent to [the child] being immunized."

Because the Department relied on Family Code section 266.004 to further its arguments on appeal, the Court goes on to explain why it does not. The Court reasoned that, as argued by the Department, even though section 266.004 authorized the trial court to allow the Department to consent to medical care for a foster child, Section 266.002 states: "This chapter does not limit the right to consent to medical, dental, psychological, and surgical treatment under Chapter 32." The Court explained: "Even if we construe the plain language of section 266.004 as allowing the [trial court's order], however, such a construction simply causes section 266.004 to be in direct conflict with section 32.101. Section 32.101, the more specific statute entitled "Who May Consent to Immunization of Child" would therefore control over section 266.004, the more general statute."

Although acknowledging that section 264.1076 was not "directly applicable" because it applies to children entering the Department's conservatorship on or after September 1, 2017, the Department nevertheless relied on it to argue that the Department had authority to vaccinate. The Court found that the Department's reliance on section 264.1076, "Medical Examination Required", was misplaced because "nothing in [that] section indicates that the Department had or has the authority to vaccinate a child when the Department 'has actual knowledge that a parent, managing conservator, guardian of the child, or other person who under the law of another state or a court order may consent for the child … has expressly refused to give consent to the immunization.'" The Court stated that "the recent enactment of section 264.1076 is irrelevant here."

The Court concluded that the trial court "clearly abused its discretion in rendering the [o]rder" and conditionally granted parents' petition for writ of mandamus. *In re Womack*, ___ S.W.3d ___, No. 10-17-00336-CV0 (Tex. App.–Waco 2017, orig. proceeding).

On January 1, 2018, the trial court entered an Order Vacating Order to Immunize Foster Child Over Parental Objection and Substituting Amended Order to Immunize Foster Child Over Parental Objection. In that order, the trial court provided "some legal analysis" regarding the trial court's authority to order that the child receive immunizations over his parents' objections. The trial court states that Section 266.004 (g) does not apply to immunizations because the legislature did not specifically reference them. The order states: "If the legislature had intended that a court's authority to issue an order to immunize a foster child could be overcome by a parent's objection, it could have said so, but it did not." The order then stated: "a parent's right to refuse consent to immunization under Family Code Sec. 32.101(c) is only a check on the specified non-parents' general right to consent to immunizations. It is not a check on a trial court's authority to enter an order it has determined to be in a child's best interest." The order concludes that the Court incorrectly concluded that Section 32.101(c) is the more specific statue. The order states: "Sec. 266.004(g) must control because it specifically applies to children in foster care, the situation in this case, whereas Sec. 32.101(c) only has general application to the authority of non-parents to give consent to immunization." The order then states: "The court concludes that it has the authority to order that the immunization be administered notwithstanding a parent's objections." It then ordered the Department to "cause [the child] to receive and continue to receive the childhood immunizations that [his doctor] determines to be medically appropriate, notwithstanding the objection of [the child's] parents. This order is not a mere *authorization* for the Department to consent to these immunizations, but is an order *requiring* the Department to cause those immunizations to be administered to the child [ ]. This order eliminates any discretion the Department may have to give or withhold consent to such immunizations."

The child's attorney ad litem filed a petition for mandamus in the Supreme Court on February 20, 2018. Both the parents and the Department filed responses.

II. MEDIATED SETTLEMENT AGREEMENT CANNOT BE SET ASIDE BY AGREEMENT OF THE PARTIES IN A SAPCR

Mother and Father had a three-year-old child. Father filed an original petition in a suit affecting the parent-child relationship. After Father filed his petition, he, Mother, and their respective attorneys signed a mediated settlement agreement and filed it with the trial court in December 2015. Despite there being multiple hearings regarding the facts of the case, including a hearing on Father's petition to set aside the mediated settlement agreement, transcripts demonstrating Mother's agreement to set aside the mediated settlement agreement, and further temporary orders being made by the trial court, in March 2017 Mother's new attorney filed a motion for entry of judgment based on the mediated settlement agreement and also requested that all subsequent temporary orders, rule 11 agreements, and other court orders be vacated. The trial court ultimately denied Mother's motion in April 2017. Mother filed her petition for writ of mandamus asking the Appellate Court to: (1) set aside the April 2017 order denying her motion for judgment on the mediated settlement agreement; and (2) direct the trial court to render judgment consistent with the terms of the mediated settlement agreement.

Mother's sole issue was whether the trial court abused its discretion and violated the Family Code by refusing to render judgment on the parties' mediated settlement agreement. The Court explained that the mediated settlement agreement met the requirements of section 153.0071(d) and constituted a binding mediated settlement agreement. Relying on subsection (e), the Court explained that: "If a[mediated settlement agreement] meets the requirements of section 153.0071(d), then a party is entitled to judgement on the [mediated settlement agreement] 'notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.'"

Father argued that, even though the mediated settlement agreement met the requirements of 153.0071, the parties could have agreed to set it aside. After a statutory construction analysis, the Court stated: "The Legislature has provided no other circumstances under which the trial court may refuse to enter judgment on the [mediated settlement agreement]. If the Legislature had intended to permit the parties to agree to set aside a[mediated settlement agreement], which meets all requirements that make the [mediated settlement agreement] binding, the Legislature could have included such an exception in section 153.0071, but chose not to do so. The Court continued: "To allow the parties to agree to set aside an irrevocable [mediated settlement agreement] would render meaningless subsection (e), which provides that "a party is entitled to judgment on the mediated settlement agreement not withstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law."

The Court further explained that whether the parties agreed to set aside the medicated settlement agreement or whether the trial court pronounced from the bench that the mediated settlement agreement was set aside, was of no consequence. The Court stated: "the statute does not allow the parties to agree to revoke a[mediated settlement agreement] that satisfies the requirements of section 153.0071(d), nor does it allow a judge to set aside a[mediated settlement agreement] in accordance with the parties' agreement." *In re Minix*, __S.W.3d__, No. 14-17-00417-CV (Tex. App.–Houston [14th Dist.] 2018, orig. proceeding).

Chief Justice Frost dissented, writing that "The doctrines of quasi-estoppel and invited error demand that this court deny the relator's petition for extraordinary relief." The opinion states that the dissent does not cite any "cases applying the doctrine to a ruling other than the ruling complained of by the appellant on appeal." With regards to the dissent's argument, the opinion states: "The invited error doctrine is not applicable to this case."

III. INDIAN CHILD WELFARE ACT – WRITTEN MOTION TO INTERVENE NOT REQUIRED; REQUEST TO INTERVENE ALLOWED ANY TIME

Mother of the child is a member of the Navajo Nation. After receiving an intake from the child's doctor that the five-month old child sustained injuries resulting from non-accidental trauma, the Department filed a petition seeking to terminate the parental rights of both parents. The trial court entered temporary orders removing the child from his parents and appointing the Department the child's temporary managing conservator.

The Department gave notice to the Navajo Nation of the pending suit involving the child. The Department also notified the Navajo Nation of a hearing scheduled for July 2016. In August 2016, the Navajo Nation notified the Department that the child is eligible to be enrolled as a member of the Navajo Nation, and it was subsequently provided the name of the ICWA social worker assigned to the case to coordinate services with the Department. However, the Navajo Nation "did not formally intervene in the case."

In June 2017, the trial court conducted a bench trial, but it did not provide notice to the Navajo Nation of the trial setting. Both parents relinquished their parental rights to the child. The Department's attorney advised the trial court that a representative of the Navajo Nation had requested to be allowed to testify telephonically regarding best interest. The trial court agreed. The Department's attorney also informed the court, prior to the representative's testimony, that the representative had informed him "that the [Navajo] Nation was a party to the proceeding, and as the [Navajo] Nation's representative, she should be allowed to hear all of the proceeding and not be excluded under the Rule of Witnesses." Both parents objected to the representative's request and the trial court ruled that the representative "could testify, but she would not be treated as a party."

During cross-examination of the representative, one of the attorneys stated that the Navajo Nation did not intervene in the case. The representative responded: "I think we are intervening at this moment." The trial court asked the representative to explain how she thought she was intervening and she explained: "In other ICWA cases, the Navajo Nation is considered a party, we're not considered a witness and so in other states the ICWA worker has attended the entire court hearing and so based upon the testimonies that are given, we take that into consideration based on the information that's being provided to us." She relied on Section 1911(c) in support of the Navajo Nation's request to intervene.

The trial court decided that because: (1) the Navajo Nation did not file a written intervention; and (2) the oral request for intervention was made on the day of trial and it was too late, the representative was "excluded from hearing any of the testimony and the [Navajo] Nation was not allowed to participate in the final hearing." The trial court rendered final orders and the Navajo Nation "formally intervened" after the trial and filed a notice of appeal.

Of the three issues raised on appeal, the Navajo Nation's third issue asserted that the order terminating Mother's parental rights and placing the child in a non-Indian foster family "must be

invalidated because the trial court refused to permit the [Navajo] Nation to intervene." The Department conceded that this issue must be sustained.

Because it is undisputed that the child is a member of the Navajo Nation, the requirements of ICWA apply. The Court explained that: "Under Section 1914, the Indian child's tribe may petition any court of competent jurisdiction to invalidate any action for foster care placement or termination of parental rights under state law upon showing that Section 1911, 1912, or 1913 were violated. [ ] Thus, the [Navajo] Nation has standing to bring this appeal challenging the trial court's order."

In discussing the timing of the Navajo Nation's request for intervention, the Court explained that "Section 1911(c) expressly provides: 'In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.'" Accordingly, the Court stated that, "Giving effect to the plain language of the statute, we conclude that a request to intervene is not untimely even if it is made at the final hearing."

The Court also discussed the fact that the trial court denied the request to intervene because it was not in writing as required by Texas Rule of Civil Procedure 60. The Court explained that "Section 1911(c) does not require that the intervention be made in writing." Accordingly, the Court discussed whether Section 1911(c) preempts TRCP 60. The Court explained that Federal law preempts state law in one of three instances. At issue in this case is the third instance, when state law (TRCP 60's written requirement) directly conflicts with the force or purpose of federal law. The Court described the two types of conflict in this instance as: (1) "it is impossible to comply with both the federal and state law, and (2) the state law stands as an obstacle to the accomplishment and execution of congressional objectives."

"The recognized purpose of the ICWA is to protect the Indian family, children, and the tribe from separation." The Court explained that "Section 1911(c) advances this purpose by giving the child's tribe the 'right to intervene at any point in the proceeding.'" The Court reasoned: "A state procedural rule which would deny the right to intervene in a child custody proceeding because the tribe did not file a written pleading prior to the hearing directly conflicts with this purpose." The Court concluded that Section 1911(c) preempts TRCP 60's "requirement of a written pleading because it stands as an obstacle to the accomplishment of congressional objectives." The Court further held that "a request to intervene made pursuant to Section 1911(c) can be made verbally during a hearing as in this case." This termination order in this case was reversed and the case was remanded for a new trial. *In re J.J.T.*, __ S.W.3d. __, No. 08-17-00162-CV (Tex. App.–El Paso Dec. 20, 2017, no pet.) (mem. op.).

IV. SELECT TERMINATION GROUNDS

A. 161.001(b)(1)(E) – Untreated Mental Illness

Under 161.001(b)(1)(E), "the relevant inquiry is whether evidence exists that the endangerment of the child's physical well-being was the direct result of the parent's conduct, including acts, omissions, or failure to act." In this case, there was evidence that Mother had untreated mental illness, which caused her to engage in endangering the lives of all of her children, including the child at issue. A psychological evaluation conducted in the hospital after the child was born confirmed that Mother did not have the cognitive ability to care for the newborn child. Prior to the birth of the child, Mother had reported that she had a history of mood and bipolar disorders for which she had taken psychotropic medications in the past. However, Mother had not taken her medication since 2014. During this case, Mother was diagnosed with bipolar disorder and borderline intellectual functioning. The trial court heard testimony that

Mother does well when she takes her medicine; however, she frequently does not take it. The evidence also showed that when Mother fails to take her medicine, "she behaves erratically and does not care for the children."

The Court stated that "[m]ental illness is not a ground for terminating the parent-child relationship, but untreated mental illness can expose a child to endangerment and is a factor the court may consider." *In re P.H.*, __ S.W.3d. __, No. 08-17-00135-CV (Tex. App.–El Paso Nov. 28, 2017, no pet.) (mem. op.).

B. 161.001(b)(1)(K) – Parents Precluded from Challenging Sufficiency of Best Interest Determination

Department brought a SAPCR suit on behalf of the child requesting appointment of the Department as temporary managing conservator and termination of parents' parental rights. The trial court appointed the Department temporary managing conservator at the adversary hearing. After the permanency hearing, both parents requested a jury trial; however, in December 2015, both parents signed affidavits of voluntary relinquishment of parental rights. The affidavits "recite that the parents have been informed of and understand their parental rights and duties, and that 'termination of the parent-child relationship is in the best interest of the child(ren).'" The relinquishments also show the voluntariness of parents' actions. They state: "I freely, voluntarily, and permanently give and relinquish to the Department all my parental rights and duties." Both parents were represented by counsel throughout the proceedings in the trial court.

The trial court conducted a "brief trial". All parties were represented by counsel. Counsel offered the affidavits and asked the trial court to take judicial notice of them. The trial court did so. The Department's caseworker testified that the relinquishments were in the child's best interest. In open court, the trial court stated that it "will make all necessary findings for termination as required by law, including, but not limited to, best interest." The trial court signed an order of termination that day, finding that both parents signed voluntary irrevocable affidavits of relinquishments and that termination is in the child's best interest.

Despite signing the relinquishments, both parents appealed the termination of their parental rights challenging the legal and factual sufficiency of the evidence supporting the trial court's best interest finding. The Supreme Court noted that a "divided court of appeals reversed the trial-court judgment terminating parental rights, holding, 'the Department did not meet its burden to establish by clear and convincing evidence that termination of [parents'] parental rights to [the child] is in the child's best interest.'"

In its analysis, the Supreme Court stated that "the parents' affidavits complied with all statutory directives" of Section 161.103 of the Family Code. Accordingly, the Court explained that resolution of this issue involves "the interplay" of the termination ground in section 161.001(b)(1)(K) and the direct or collateral attacks on termination orders contained in section 161.211.

Parents argued that under 161.001(b), there must have been separate findings for the termination ground (161.001(b)(1)(K) – statutorily-compliant affidavit) and that termination is in the child's best interest (161.001(b)(2)). The Court agreed; however, it stated that the trial court made the requisite best interest finding by clear and convincing evidence. Parents did not argue that their affidavits were signed as a result of fraud, duress, or coercion as allowed for an attack on the trial court's termination order under 161.211(c). Accordingly, the Court stated that "the parents' appeal is based on a ground not covered by the statute, and we are unpersuaded by [parents'] arguments for interpreting section 161.211(c) to allow their appeal.

Parents argued that section 161.211(c) "should only apply to challenges to the affidavit, rather

than all challenges to the order of termination." The Court stated: "We cannot agree because the plain wording of the statute applies to attacks on any 'order terminating parental rights' and is not limited only to attacks on the affidavit on which the order is based." Parents' reasoning for this argument is that, if 161.211(c) is not limited to attacks on affidavits, "this section would eliminate the dual requirements of an affidavit under section 161.001(b)(1) and a best-interest determination under section 161.001(b)(2)." The Court noted that the appellate court "found this argument persuasive, quoting one of its own decisions." The Court disagreed with the appellate court's analysis and stated: "section 161.211(c) limits appellate review of the termination order to grounds parents did not raise."

The Court also disagreed with the parents' and appellate court's "underlying premise" that "the affidavit cannot by itself support a best-interest determination." The Court reasoned "that the affidavit itself, in the ordinary case, can be ample evidence to support a best-interest determination." It explained: "we think in the ordinary case a sworn, voluntary, and knowing relinquishment of parental rights, where the parent expressly attests that termination is in the child's best interest, would satisfy a requirement that the trial court's best-interest finding be supported under [the clear and convincing] standard of proof." The Court continued: "A parent's willingness to voluntarily give up her child, and to swear affirmatively that this is in her child's best interest, is sufficient, absent unusual or extenuating circumstances, to produce a firm belief or conviction that the child's best interest is served by termination."

Parents also argued that "reading section 161.211(c) to bar them from challenging the factual and legal sufficiency of the best-interest determination would violate their federal due process rights." The Court disagreed. The Court's due process analysis resulted in a determination that: (1) "Section 161.211(c) applies equally to all parents who execute affidavits relinquishing parental rights, allowing appeals on certain, enumerated grounds and disallowing appeals on other grounds"; (2) the parents, in signing the affidavits of relinquishment, voluntarily and knowingly waived their parental rights and therefore procedural due process concerns are addressed and preserved in section 161.211(c), by allowing the parent to appeal on grounds that the affidavit was the product of fraud, duress, or coercion; and (3) under a *Matthews v. Eldridge* analysis, "there are many safeguards included in the statutory elements for an affidavit of relinquishment, and the affidavit is itself strong evidence that termination is in the best interest of the child." The Court reversed the appellate court's judgment to the extent it reversed the trial court's termination orders. *In re K.S.L.*, 538 S.W.3d 107 (Tex. 2017); *see also In re M.M.*, 538 S.W.3d 540 (Tex. 2017) (mother who signed affidavit of relinquishment of parental rights precluded from appealing termination based on insufficiency of evidence).

C. 161.001(b)(1)(N)

1. Inability to Provide Safe Environment

The Department had been involved with Mother since August 2013. The children were placed in a safety placement after the death of their younger half-brother. The autopsy found no signs of foul play and the Department referred the case to family based safety services. Mother participated in services and the children were returned to her in November 2015. However, after two years of progress, Mother "began a downslide in January 2016". The Department found mother in April 2016, after she had disappeared. Mother would no longer allow the Department inside her home, nor would she tell the Department where the children were. The Department "formally removed" the children at the end of April, but were unable to locate the children until January 2017, when they took possession of them.

The record is silent on where Father, father to the older male child, was during this time. On appeal, Father challenges the sufficiency of the evidence supporting the termination of his parental rights under (N), constructive abandonment.

The trial was in August 2017. At trial, the caseworker testified that she encouraged Father to visit his son. Father saw his son for his tenth birthday in April 2017. The caseworker related that the visit raised no issues or concerns. She testified that she and Father discussed the possibility of his son living with him, and "Father 'stated that he would rather his mother take the child and not him.'" After a home study, paternal grandmother was ruled out. Caseworker testified that Father informed her that he had a job; however, he did not provide support for the child during the case. Caseworker also testified, over objections, regarding Father's failed drug test in May 2016 and Father's criminal history. Father has three other children, none of whom live with him. On cross-examination, Caseworker conceded that Father could have been visiting and/or supporting his child during the twelve months from January 2016 through January 2017, when the Department did not know where the children were.

During Mother's testimony, "[n]obody asked her if Father visited or maintained contact with [his child]." Father testified that "the only time I haven't helped my kids only when CPS have them." He continued: "I help the baby and when they were with the [Mother]… I helped the babies.... When they were with my mom, I helped them. I bought diapers, clothes. I'll give money to my mom. When they were with [Mother], I was helping with the money and diapers. And when ... [my son] was with [Mother's] mom, I would help her too." Father also testified that he visited his son "during that time." Father testified that the Department only scheduled two visits with his son. The first was for his tenth birthday, the second he could not attend because he could not get out of work in time. Father said he called the Department but "every time I would call CPS, they never—I never get in contact with them." Father then testified that he did not attend three pretrial hearings because he did not know when they were scheduled to occur. He also testified that his attorney "ain't ever gave me a call."

The trial court terminated Father's parental rights under 161.001(b)(1)(N) and found that termination was in the child's best interest. The Department was appointed managing conservator of Father's son. Father appealed, arguing that the evidence is legally and factually insufficient to support the trial court's finding under (N). The Court agreed with Father finding the evidence legally insufficient to support part (iii) of subsection N—the parent has demonstrated an inability to provide the child with a safe environment.

The Court applied the definition of "environment" from predicate ground (D) in its analysis under part (iii) of (N). The Court explained that "environment" refers to "the acceptability of living conditions, as well as a parent's conduct in the home" and that the record does not contain any information regarding the Father's living conditions. The Court found that no witnesses were asked where Father lived, who lived with him, or how much room there would be for his son. Additionally, there was no evidence of Father's conduct in his home.

The Department argued that "Father's alleged unwillingness to care for [his son] eliminates its burden to prove his inability to do so." The Court disagreed stating: "Given the lack of any evidence about Father's living conditions, we are unwilling to equate Father's supposed preference that [his son] live with Father's mother . . . with proof by clear and convincing evidence that he is unable to provide [his son] a safe environment." Accordingly, the Court held that the Department "failed to meet its burden of proof." The Court reversed the trial court's order "to the extent it terminates the parent-child relationship between

Father and [his son] and we render judgment denying the Department's request for termination." *In re R.I.D. and L.J.M.*, __ S.W.3d __, No. 14-17-00793-CV (Tex. App.–Houston [14th Dist.] Feb. 13, 2018, no pet. h.) (mem. op.).

2. Reasonable Efforts Does Not Require Provision of a Service Plan for Incarcerated Parent

On appeal from the trial court's termination of Father's parental rights under 161.001(b)(1)(N), Father's sole complaint is limited to the sufficiency of the evidence supporting the element regarding the Department's reasonable efforts to return the child to him. Father's argument relies on the sole claim that the Department failed to create a service plan for him.

In its analysis, the Court identifies specific appellate jurisdictions that have held that the reasonable efforts portion of (N) does not, or may not, apply when the parent is incarcerated. The Court assumed "for the sake of analysis" that the reasonable efforts element applies in this case. Although the "Department's implementation of a service plan is generally considered a reasonable effort to return a child", "case law does not hold, however, that such evidence is absolutely required to prove constructive abandonment" under (N). The Court explained: "The Department's efforts to place the child with relatives may constitute legally and factually sufficient evidence to support the trial court's finding that the Department made reasonable efforts."

Despite the Department not creating a service plan for Father, the Department attempted to place the child with both Mother's and Father's relatives. Ultimately, they were successful in placing the child with a paternal aunt and uncle one month before trial. Based on the Department's efforts, the Court held the evidence is both legally and factually sufficient to support the trial court's finding under (N). *In re J.G.S.*, __ S.W.3d. __, No. 08-17-00192-CV (Tex. App.–El Paso Feb. 14, 2018, no pet. h.) (mem. op.).

D. 161.001(b)(1)(O) – No Quantifiable Number of Services

After a jury trial, Mother's parental rights were terminated under 161.001(b)(1)(D), (E), and (O), and the jury found that termination was in the child's best interest. On appeal, one of Mother's arguments was that the evidence was factually insufficient to support termination under (O).

The Department first became involved with Mother and Father in December 2015, while Mother was pregnant with child. The Department received a report alleging domestic violence in the home of Mother and Father. Mother had a son who was ten years old. The son called Father "Dad" although Father was not the father of Mother's son. Mother's son told the Department caseworker that he did not feel safe because Mother and Father fought often and Mother's son found it "scary because [Mother] would get hit." Mother's son also told the caseworker that Father had threatened to kill Mother and her son. Because Mother would not leave Father, the Department obtained temporary managing conservatorship of Mother's son and placed him with a maternal aunt. The maternal aunt was ultimately named permanent managing conservator of Mother's son.

In February 2016, Father filed a petition for divorce from Mother. In his petition, Father requested that both parents be appointed joint managing conservators of the child, who had yet to be born. After the child was born, the Department intervened in the divorce action because of the danger Mother's continued relationship with Father posed to the child. After the Department obtained physical possession of the child, the child was placed with her brother in their maternal aunt's home. The trial court held hearings in this case and appointed the Department temporary managing conservator of the child and ordered Mother to complete a service plan. The Department amended its

petition to seek termination of both parents' parental rights to the child.

At the conclusion of the trial, the jury returned a verdict in favor of terminating both Mother's and Father's parental rights to the child. Mother appealed the trial court's order terminating her parental rights to the child. On appeal, Mother's second issue challenged the factual sufficiency of all three predicate grounds. The Court decided the appeal based on the evidence supporting (O). The Court stated that the record showed that Mother completed some of her court-ordered services; however, Mother "admittedly failed to successful complete individual counseling with any of the therapists she had seen during the case." The Court found that, "[d]espite [Mother's] achievement of some of the plan's goals, the evidence establishes that other requirements of the plan were not met."

In discussing the requirements of (O), the Court explained: "Ground O does not quantify any particular number of provisions of the family service plan that a parent must not achieve in order for the parental rights to be terminated or the degree of a parent's conduct that will be deemed to be a failure to achieve a particular requirement of the plan." The Court continued: "Neither the statute nor the order which was entered prescribes the degree to which the parent must comply with the court order, and neither the order nor the statute 'make[s] a provision for excuses' for the parent's failure to comply with such an order." Accordingly, the Court reasoned that Mother's "inability to successfully complete individual counseling and provide stable housing and employment are significant deficiencies." The Court found that Mother "failed to comply with the requirements of the family service plan is supported by factually sufficient evidence." *In re B.H.R.*, 535 S.W.3d 114, (Tex. App.–Texarkana 2017, no. pet.).

E. 161.001(b)(1)(Q) – Shifting Burdens

Father's parental rights were terminated under 161.001(b)(1)(E) and (Q). On appeal, and in the Court's analysis, the Court noted that Father did not challenge the legal sufficiency of the evidence supporting the finding under (Q). Father conceded that the Department presented sufficient evidence that he knowingly engaged in criminal conduct that resulted in his conviction. However, Father argued that the evidence is factually insufficient to support the trial court's finding that his criminal conduct resulted in confinement for not less than two years from the date the Department filed its termination petition because he would be eligible for parole. In finding Father's argument to be without merit, the Court, relying on well-established precedent, reiterated that parole decisions are inherently speculative, and that Father acknowledged that there was no guarantee that he would be granted parole. The Court also relied on evidence that Father would remain incarcerated two years from the date that the Department filed its original petition.

Father's next argument was that the evidence is factually insufficient to support the finding that he is unable to care for the child for at least two years from the date the Department filed its termination petition. In explaining the burdens associated with this element of 161.001(b)(1)(Q), the Court explained: "Once [the Department] has established that a parent's knowing criminal conduct has resulted in their incarceration for more than two years, the burden of production shifts to the parent to 'produce some evidence as to how they would provide or arrange to provide care for the child during that period.'" The Court found that "Father presented no such evidence." The Court found that Father agreed that he was not in a position to care for the child while he was incarcerated. Accordingly, the Court explained: "Father bears the burden of production to present evidence concerning how he would provide or arrange to provide care for [the child] during his incarceration. . . . He did not satisfy this burden of production. Thus, [the Department] had no burden to prove that the arrangement proffered by Father would not satisfy his duty to [the

child]." *In re H.O.*, ___ S.W.3d ___, No. 01-17-00633-CV (Tex. App.–Houston [1st Dist.] Feb. 6, 2018, no pet. h.) (mem. op.).

F. 161.002(b)(1) – Best Interest Finding Not Required

In May 2017, the trial court held a termination trial that resulted in the termination of Father's parental rights to the child based on the following: (1) after being served with citation, Father failed to file an admission of paternity or counterclaim for paternity under Chapter 160 of the Texas Family Code; (2) 161.001(b)(1)(N); (3) 161.001(b)(1)(P); and (4) a finding that termination was in the child's best interest.

At trial, Father appeared and testified that he was the child's father. Based on Father's appearance and testimony, he triggered his right to have the Department prove one of the grounds for termination listed in 161.001(b)(1). In its termination order, the trial court found the predicate grounds (N) and (P), determined that termination of the Father's parental rights was in the child's best interest, and found that Father failed to timely file an admission of paternity or counterclaim for paternity under Chapter 160 of the Family Code.

However, on appeal Father's sole challenge pertains to the trial court's best interest finding. He does not challenge the trial court's finding that he failed to file an admission of paternity. The Court explained: "An appellant must challenge all independent bases or grounds that fully support a judgment or appealable order." The Court held: "Because termination under Texas Family Code section 161.002(b)(1) does not require proof that termination is in the best interest of the child, we overrule Father's sole issue on appeal and affirm the trial court's order." *In re M.J.M.G.*, ___ S.W.3d ___, No. 04-17-00349-CV (Tex. App.–San Antonio Dec. 20, 2017, no pet.) (mem. op.).