

## Termination Case Law Update

Trevor A. Woodruff  
Michael Shulman  
Appellate Unit, TDFPS

22nd Annual Juvenile Law Conference  
February 20, 2009

---

---

---

---

---

---

---

---

## Usage of Paper/Set-Up

- Annotated Table of Contents
  - Attempted to provide sampling of issues
  - Determine Issue – *i.e.* Admission of drug tests
    - Look under evidence
      - Admission of drug tests
        - *In re C.R.* listed
    - Cases are in alphabetical order, split into Supreme Court cases and courts of appeals cases
    - Each case has a brief synopsis of the facts and holdings – the issues in each case are listed at the top of the abstract

---

---

---

---

---

---

---

---

## Texas Supreme Court Cases

- *In re DFPS*
- *In re K.C.B.*
- *In re TDFPS*

---

---

---

---

---

---

---

---

*In re DFPS, \_\_\_ S.W.3d \_\_\_ (Tex. 2009)*

- 263.401 Issue: How does the granting of a motion for new trial affect the dismissal deadline?
- The trial court entered a timely order under TFC 263.401, terminating mother's parental rights
- It then granted mother a new trial
- When the trial court failed to render a new order prior to the dismissal deadline, mother moved for dismissal of the case which was denied

---

---

---

---

---

---

---

---

- The specific issue was whether the granting of the new trial vacated the trial court's prior order, thus running afoul of the dismissal deadline under 263.401
- The Houston 14<sup>th</sup> Court of Appeals held that mother's motion for dismissal was proper, that the granting of the new trial did vacate the prior order, and that the Department was in violation of 263.401 – It reversed and rendered the termination
- The Texas Supreme Court agreed

---

---

---

---

---

---

---

---

- The Court reasoned that the language of 263.401 is plain, that its deadlines are procedural, and that mandamus was a proper remedy
  - The granting of a new trial vacates the prior order
  - As a new trial was granted, and a new order not entered prior to the dismissal deadline, the consequence was clear under 263.401
- Dissent: The majority's opinion subverted the intent of 263.401 in expediting termination cases; further, the opinion fails to consider the best interest of the children and punishes them by returning them to dangerous circumstances

---

---

---

---

---

---

---

---

➤ What does this mean?

- Judges: If granting a motion for new trial, be sure to set the new trial prior to the original dismissal date or, if possible, extend the dismissal deadline
- Although lessened, the danger here still exists under the 2007 version of 263.401 – now, instead of having to render a final order prior to the dismissal deadline, it is only necessary to have commenced the new trial prior to the dismissal deadline

---

---

---

---

---

---

---

---

***In re K.C.B.*, 251 S.W.3d 514 (Tex. 2008)**

- Amarillo COA found that it was precluded from considering any of the appellant’s issues on appeal as appellant failed to file a statement of points after the *de novo* hearing in the case – no second statement of points appeared in the record
- After the opinion was issued the appellant produced a statement of points that was filed after the *de novo* hearing and asked that the record be supplemented in a Motion for Rehearing which was denied
- Amarillo Court of Appeals denied supplementation and rehearing

---

---

---

---

---

---

---

---

- Supreme Court reversed and remanded for consideration on the merits
  - Mother’s counsel could have believed that the second statement of points had been filed
  - Mother’s omission was based on “confusion and misunderstanding” not purposeful omission
  - Appears that record may be supplemented liberally, including after oral argument and issuance of an opinion

---

---

---

---

---

---

---

---

*In re TDFPS*, 255 S.W.3d 613 (Tex. 2008)

- Case arises from the removal of over four hundred children from the YFZ Ranch in Eldorado, Texas
- The trial court granted the Department TMC of the children after the adversary hearing
- Several appellant mothers sought, and received, a mandamus from the Third Court of Appeals directing the trial court to vacate its temporary order granting the Department TMC of the children
- The Department filed a mandamus seeking relief from the Third Court's ruling

---

---

---

---

---

---

---

---

- The Texas Supreme Court denied the Department's request for mandamus relief, concluding it was "not inclined to disturb the court of appeal's decision finding that the Department's removal of the children was not warranted"
- The Court was not convinced that the decision of the COA left the Department "unable to protect the children's safety"

---

---

---

---

---

---

---

---

- The Supreme Court enunciated several provisions of the Family Code which give the Department "broad authority to protect children short of separating them from their parents and placing them in foster care", including:
  - Making and modifying temporary orders for the safety and welfare of the child;
  - Entering orders restraining a party from removing a child from a geographical area identified by the court;
  - Entering orders removing an alleged perpetrator from the child's home;
  - Entering orders prohibiting interference with an investigation; and
  - Granting sanctions against a person who relocates a residence or conceals a child with the intent to interfere with an investigation.

---

---

---

---

---

---

---

---

➤ While the Court denied the Department’s requested relief, it explicitly held that the COA’s decision did not conclude the SAPCR proceedings

➤ Justices O’Neill, Willett, and Johnson dissented in part, reasoning that the trial court did not abuse its discretion “as to the demonstrably endangered population of pubescent girls”

---

---

---

---

---

---

---

---

What does this mean?

➤ Before the Supreme Court’s decision, most CPS cases ended if TMC was denied after the adversary hearing

➤ Not the case anymore

➤ Judges have increased discretion and a range of alternatives to protect children’s welfare

➤ Is this good or bad? Only time will tell.

---

---

---

---

---

---

---

---

GROUNDS CASES

➤ *In re B.L.R.P.*

➤ *In re A.A.A.*

➤ *In re C.R.*

---

---

---

---

---

---

---

---

*In re B.L.R.P.*, 269 S.W.3d 707 (Tex. App.—  
Amarillo 2008, no pet.)

➤ **161.001(1)(O) Ground Case**

- **Father's parental rights were terminated solely under (O) ground and best interest**
- **It was undisputed that father did not complete his plan of service**

---

---

---

---

---

---

---

---

- The Amarillo Court, however, reversed father's termination, concluding that because there were no court orders specifically establishing what acts were necessary for father to obtain a return of the child, the Department failed to establish (O)
  - No court order for services in clerk's record
  - No court order for services admitted into evidence
  - No testimony of court order to complete services
  - No court order for services in the permanency plan

---

---

---

---

---

---

---

---

- In this case, father was brought in late – after the adversary and status hearings
- Important to ensure that a court order is in place ordering each parent to comply with his or her plan of service
- The mere language that the “court adopts the service plan” is insufficient – order needs to be specific in requiring completion of services
- Suggest that you enter the service plans into evidence, question the witness whether he or she was ordered to complete services; if a bench trial, ask the court to take judicial notice of the orders and the service plans

---

---

---

---

---

---

---

---

*In re* A.A.A., No. 01-07-00160-CV, 2008 Tex. App. LEXIS 4842 (Tex. App.—Houston [1<sup>st</sup> Dist.] June 26, 2008, pet. filed) (mem. op.)

- **161.001(1)(O)**
  - **Mother left the child at a homeless shelter while she went to shoplift cough medicine for the child**
  - **When mother did not return for the child, the Department was contacted, resulting in the child's removal**

---

---

---

---

---

---

---

---

- **The trial court terminated mother's parental rights under (O) ground and best interest**
- **The issue before the court of appeals was the plain language of 161.001(1)(O)**
- **(O) requires that the child be removed from the parent for abuse or neglect**

---

---

---

---

---

---

---

---

- **Mother argued that she could not return to the shelter because of her arrest – she argued that her arrest was not abuse or neglect**
- **In its original opinion, the court agreed and reversed mother's termination**
- **However, on rehearing, the court changed its opinion and affirmed the trial court**

---

---

---

---

---

---

---

---

➤ The court rejected the Department's argument that mother's leaving the child at a shelter while going to commit a crime was neglect – the court stated that there was no evidence that mother knew or reasonably should have known that the child would not be taken care of when she left; mother also provided contact information for emergencies

➤ Mother's problem, however, was that she was released from jail for over a day before she bothered to contact the Department seeking the child – the court found that this omission met the neglect test

---

---

---

---

---

---

---

---

➤ Mother's neglect, coupled with her failure to complete services, was sufficient to meet the statutory termination ground 161.001(1)(O)

➤ The evidence supporting best interest was also sufficient as the child had little interaction at visits, the child was bonded to relatives and doing well in their care, mother was not stable in her job or residence, and mother attended only 6 out of 24 possible visits with the child

---

---

---

---

---

---

---

---

*In re C.R.*, 263 S.W.3d 368 (Tex. App.—Dallas 2008, no pet.)

➤ Typical Grounds and Best Interest Case

➤ Of note because mother argued that the trial court erred in admitting the results of a drug test only for the purpose of establishing mother's and the Department's state of mind

➤ Court affirmed

➤ Record did not establish that the trial court erred in considering the drug tests for anything other than state of mind

➤ Harmless error anyway as mother admitted to extensive drug use and admitted to missing seven out of nine drug tests

---

---

---

---

---

---

---

---

**PROCEDURAL CASE**  
➤ *In re S.L.M.*

---

---

---

---

---

---

---

---

*In re S.L.M.*, No. 04-07-00566-CV, 2008 Tex. App. LEXIS 4488 (Tex. App.—San Antonio June 18, 2008, pet. denied) (mem. op.)

- Appellant Intervenor were the adoptive parents of S.L.M.’s biological sibling
- The trial court struck their petition in intervention
- On appeal, appellants argued three things:
  - They had a justiciable interest which allowed them to intervene;
  - They had equitable standing to intervene because the foster parents sought a TRO blocking placement of S.L.M. with them; and
  - The court erred in not ordering visitation between S.L.M. and her biological sister.

---

---

---

---

---

---

---

---

- The Court affirmed
  - Regarding the appellants’ first argument, the court held that it could not conclude that the appellants had a justiciable interest in the controversy sufficient to override the statutory text
  - In responding to the second issue, the Court stated “equity cannot confer jurisdiction where none exists” and concluded that “whether a party has standing under the Texas Family Code must be determined under the Texas Family Code”
  - Finally, the Court rejected the appellants’ third argument, noting that under Family Code § 102.0045 a sibling requesting access must be eighteen years of age - there is no provision for a friendly suit. As such, S.L.M.’s biological sister did not have standing to seek access. The Court noted that in any event the trial court’s decision not to order visitation was not an abuse of discretion given the contention between the parties

---

---

---

---

---

---

---

---

**263.405**  
*(or how to lose your appeal in 15 days)*

---

---

---

---

---

---

---

---

- > 263.405
  - > Requires specific statement of points within fifteen days of order being signed
  - > 2007 amendment requires MNT within fifteen days of order being signed
  - > Requires (d) hearing to determine frivolousness, indigency, and whether MNT should be granted
  - > 263.405(g) says that determination of frivolousness shall be made on the record of the 263.405(d) hearing alone – court may decide frivolousness without briefs and oral argument may not be granted
  - > 263.405(i) – court is precluded from considering any issue not included in a timely filed statement of points on appeal

---

---

---

---

---

---

---

---

*In re M.N.*, 262 S.W.3d 799 (Tex. 2008)

- > Does 263.405 allow for an extension of the time to file a statement of points on appeal?
- > In this case, Mother filed a late statement of points, however, she asked the trial court for an extension of time to file them which was granted
- > The court of appeals affirmed Mother’s termination, finding that 263.405(b) did not allow for an extension of time to file the statement of points

---

---

---

---

---

---

---

---

➤ The Texas Supreme Court reversed and remanded

➤ Although the statute was intended to expedite the final disposition of termination cases, it does not address whether an extension of time to file a statement of points is permitted

➤ The Court is required to promulgate rules of procedure in civil cases – these rules are intended to create fair, just, and equitable resolution of cases

---

---

---

---

---

---

---

---

➤ Section 263.405 does not indicate legislative intent to unfairly preclude parents from appealing final orders

➤ The section was adopted in light of the rules of civil and appellate procedure providing for extensions of deadlines under certain conditions

➤ Further, there is nothing in the statute specifically exempting an extension

---

---

---

---

---

---

---

---

➤ The Court held: “the provisions of Texas Rule of Civil Procedure 5 apply to the question of whether the trial court may extend the time for filing a statement of points for appeal under section 263.405. Accordingly, the trial court could grant [mother’s] motion to enlarge the time for filing her statement of points if [mother] showed good cause for her failure to timely file it.”

---

---

---

---

---

---

---

---

➤ Good cause is established where: 1) the failure to file the statement of points was not intentional or due to conscious indifference; and 2) allowing a late filing will not occasion undue delay or otherwise injure the other party

➤ Here, mother's counsel filed a written motion, and also presented to the court orally that she had mis-calendared the dates accidentally (she calculated from the date of filing rather than signing), that mother always intended to prosecute her appeal, and that the Department did not contest mother's counsel's assertions

➤ The case was reversed and remanded for a consideration of the merits

---

---

---

---

---

---

---

---

➤ Justice Willett dissented

➤ The Legislature created a firm fifteen-day deadline

➤ The Court should have found the deadline immutable, and then considered the issue of whether the statute interfered with mother's due process rights

➤ Bottom line: You now have a fifteen-day extension of time to file the statement of points **if** you have good cause and **if** you request it from the trial court

---

---

---

---

---

---

---

---

Is a notice of appeal sufficient to meet the requirement of a statement of points?

---

---

---

---

---

---

---

---

*In re M.A.C.*, No. 09-07-405-CV, 2008 Tex. App. LEXIS 5325 (Tex. App.—Beaumont July 17, 2008, no pet.) (mem. op.)

➤ “Neither Nicole or Mark filed statements of the points for appeal or motions for new trial. While the Texas Rules of Civil Procedure allow some pleadings to be filed together in one instrument, Nicole and Mark cite no authority that has considered whether a statement of points filed as a part of a notice of appeal is sufficient. [Citation omitted]. Based on the language of the version of the Family Code applicable here, it appears the legislature contemplated that a party would file a separate statement of points of appeal or combine a statement of points with a motion for new trial.”

---

---

---

---

---

---

---

---

What happens when a frivolous finding is affirmed?

---

---

---

---

---

---

---

---

*In re S.T.*, 263 S.W.3d 394 (Tex. App.—Waco 2008, pet. denied)

➤ Court was required to review the trial court’s frivolous finding

➤ Court noted that “section 263.405 does not, on its face, prohibit an appellant from paying for the preparation of the appellate record himself and pursuing an appeal on the merits, even when the trial court has determined that the appeal is frivolous”

---

---

---

---

---

---

---

---

➤ Nevertheless, the court found that a second appeal on the merits is not permitted after a frivolous finding

- Majority of courts contemporaneously affirm the underlying order of termination when affirming a frivolous finding
- 263.405 provides a framework for appellate review, specifically providing a procedure for the initial screening of the merits
- Thus, “the [trial] court’s determination that these points are frivolous stands, and [the parent] may not circumvent the procedures established by section 263.405 to obtain appellate review on the merits of these points, even if he does so at his own expense”

---

---

---

---

---

---

---

---

*But See Vallejo v. TDFPS*, No. 03-07-00003-CV, 2008 Tex. App. LEXIS 5619 (Tex. App.—Austin Apr. 18, 2008, pet. denied)

- Order of the Third Court of Appeals
- Court affirmed the trial court’s finding of frivolousness, but allowed an appeal on the merits to be conducted anyway
  - “This decision [frivolousness] is not a final determination on the merits and does not foreclose Vallejo from presenting this argument on appeal. This order only affirms the trial court’s finding that the appeal is frivolous, which denies him the right to a free record on appeal.”

---

---

---

---

---

---

---

---

Challenges to the constitutionality of  
263.405

---

---

---

---

---

---

---

---

*In re M.D.*, No. 07-07-0126-CV, 2008 Tex. App. LEXIS 2252 (Tex. App.—Amarillo Mar. 28, 2008, no pet.) (mem. op.)

➤ “[Father’s] appointed counsel maintains that the arbitrary designation of a date certain to file specific issues for appeal is unnecessary when the Legislature has granted the right to appeal. He argues that the statute promotes a system of unreasonably restricting an indigent parent’s right to appeal a termination order thereby violating a parent’s due process rights. Section 263.405 operates equally to indigent as well as non-indigent parents. Therefore, it does not, in and of itself, operate to restrict an indigent parent’s right to appeal a termination order.”

---

---

---

---

---

---

---

---

*In re D.L.G.*, No. 05-07-00787-CV (Tex. App.—Dallas Dec. 17, 2007, pet. denied) (mem. op.); *In re F.C.G.*, No. 11-07-00068-CV (Tex. App.—Eastland Sept. 27, 2007, pet. denied) (mem. op.)

➤ Appellate counsel appointed timely within the fifteen-day period of 263.405(b)

➤ On appeal, both appellants complained that 263.405(i) was unconstitutional – in *F.C.G.* the appellant also complained that the statute was unconstitutional as he was required to prepare a statement of points prior to the production of the record

➤ The Supreme Court denied review without comment

---

---

---

---

---

---

---

---

*In re D.W., T.W., and S.G.*, 249 S.W.3d 625 (Tex. App.—Fort Worth 2008, pet. denied)

➤ 263.405 case out of the Fort Worth Court of Appeals – *en banc* consideration ending in a 4-3 decision

➤ Although the majority ultimately affirmed the termination, the majority found 263.405 unconstitutional in that it violated the separation of powers doctrine, reasoning:

“It forecloses our power to review issues properly preserved for appeal because the statute unduly interferes with our substantive power as an appellate court to rehear and determine issues on the merits”

---

---

---

---

---

---

---

---

▸ Concur and Dissent by Justice McCoy wherein he wrote that the majority should never have reached the issue of the constitutionality of 263.405 – he did not side with either the majority or Chief Justice Cayce’s analysis

▸ Strong concur and dissent by Chief Justice Cayce and Justice Holman

▸ 263.405 does not violate the separation of powers doctrine

▸ “Section 263.405 does not tell us how to perform our judicial function or how we must rule on issues before us. It simply limits appellate review of termination orders to issues that are preserved in accordance with the procedures provided by statute. This limitation is well within the Legislature’s constitutional power to regulate and restrict the right to appeal a termination order.”

---

---

---

---

---

---

---

---

Procedural Issues in 263.405

---

---

---

---

---

---

---

---

▸ *In re J.L.W.M.*, No. 07-07-0043-CV, 2007 Tex. App. LEXIS 8130 (Tex. App.—Amarillo Oct. 11, 2007, no pet.) (mem. op.)

▸ Requirement to timely file a statement of points applied to *pro se* appellant

▸ *In re K.R.*, No. 09-06-056-CV, 2007 Tex. App. LEXIS 300 (Tex. App.—Beaumont Jan. 18, 2007, pet. denied) (mem. op.)

▸ Trial counsel presumed to continue representation, and thus responsible for filing statement of points, where record did not show motion to withdraw, and record was devoid of communications between the parent and trial counsel

▸ *In re A.C.*, No. 07-07-0354-CV, 2008 Tex. App. LEXIS 2718 (Tex. App.—Amarillo Apr. 16, 2008, no pet.) (mem. op.)

▸ Mailbox rule applies to filing statement of points

---

---

---

---

---

---

---

---

**Ineffective Assistance of Counsel**

---

---

---

---

---

---

---

---

*In re J.O.A., T.J.A.M., T.J.M., C.T.M.*, 262 S.W.3d 7 (Tex. App.—Amarillo 2008, pet. granted)

- Both mother and father failed to timely file a statement of points
- On appeal, they argued that they were denied due process under 263.405(i) because their respective counsel did not file a statement of points
- The Amarillo COA considered their claims of ineffective assistance of counsel, finding that filing the statement of points “is a straightforward procedure”
- The COA ultimately affirmed the trial court’s termination as to mother, but reversed and remanded the father’s termination, finding the evidence as to the statutory termination grounds to be legally and factually insufficient

---

---

---

---

---

---

---

---

- The Supreme Court granted the Department’s petition for review; oral argument was held on October 14, 2008:
  - Department’s arguments on appeal:
  - The Court of Appeals erred in considering ineffective assistance of counsel in contravention of 263.405(i); and
  - The Court of Appeals erred in finding the termination ground evidence insufficient as to father
- *See also In re Bermea v. TDFPS*, No. 01-07-00699-CV, 2008 Tex. App. LEXIS 2444 (Tex. App.—Houston [1<sup>st</sup> Dist.] Apr. 3, 2008, pet. denied) (mem. op.) (ineffective assistance can be considered for the first time on appeal)

---

---

---

---

---

---

---

---

## Contact Information

Duke Hooten  
(512) 929-6532  
duke.hooten@dfps.state.tx.us

Trevor Woodruff  
(512) 929-6830  
trevor.woodruff@dfps.state.tx.us

Michael Shulman  
(512) 929-6816  
michael.shulman@dfps.state.tx.us

Luisa Marrero  
(512) 929-6831  
luisa.marrero@dfps.state.tx.us

---

---

---

---

---

---

---

---

# **TERMINATION CASE LAW UPDATE**

**Prepared By:**

**Michael Shulman, Luisa P. Marrero, and Trevor A. Woodruff  
Texas Department of Family and Protective Services  
Office of General Counsel  
Appellate Section**

**Presented by Trevor A. Woodruff & Michael Shulman  
22<sup>nd</sup> Annual Juvenile Law Conference  
February 20, 2009  
Houston, Texas**

## TABLE OF CONTENTS

<i>In re A.A.</i> .....	16
<i>In re A.A.A.</i> .....	16
<i>In re A.C.</i> .....	17
<i>In re A.R.</i> .....	18
<i>In re A.S.</i> .....	18
<i>Banta v. TDFPS.</i> .....	19
<i>Bermea v. TDFPS.</i> .....	20
<i>In re B.G., C.W., E.W., B.B.W., and J.W.</i> .....	20
<i>In re B.G.S.</i> .....	21
<i>In re B.L.H.</i> .....	22
<i>In re B.L.R.P.</i> .....	23
<i>In re B.P., Jr.</i> .....	24
<i>In re C.J. and C.M.J.</i> .....	25
<i>In re C.R.</i> .....	26
<i>C.Y. Fletcher v. TDFPS.</i> .....	27
<i>In re DFPS.</i> .....	11
<i>In re D.L.F. and A.L.F.</i> .....	28
<i>In re D.L.G.</i> .....	28
<i>In re D.M. and W.M.</i> .....	29
<i>In re D.N.C.; In re T.L.J. and T.B.J.; In re T.J.C. and T.D.C.; In re E.D.C.; In re J.D.M.</i> .....	12
<i>Dowell v. Dowell.</i> .....	29
<i>In re D.R.D.</i> .....	30
<i>In re D.S.A. and P.J.A.</i> .....	31
<i>Duenas v. Duenas.</i> .....	31
<i>In re D.W., T.W., and S.G.</i> .....	32

<i>In re E.A., et. al.</i> .....	33
<i>In re G.A.G., III.</i> .....	33
<i>Gonzalez v. TDFPS</i> .....	34
<i>In re H.G., K.G., J.G., and T.G.</i> .....	34
<i>In re H.H. and H.H.</i> .....	35
<i>In re J.A.B.</i> .....	36
<i>In re J.B.</i> ..	37
<i>In re J.A.J.</i> .....	12
<i>In re J.C.</i> .....	38
<i>In re J.C.C.</i> .....	39
<i>In re J.D.B. and G.N.B.</i> ..	39
<i>In re J.E.H.</i> .....	39
<i>In re Jessie Vernon Jochims v. State.</i> .....	40
<i>In re J.F., J.J., and J.J.</i> .....	40
<i>In re J.J., and J.G.</i> .....	40
<i>In re J.K.H.</i> .....	41
<i>In re J.L.W.M.</i> .....	41
<i>In re J.M., J.J., J.J., and J.J.</i> .....	41
<i>In re J.M., L.M., and K.M.</i> .....	42
<i>In re J.O.</i> .....	42
<i>In re J.O.A., T.J.A.M., T.J.M., and C.T.M.</i> .....	42
<i>In re J.P.</i> .....	43
<i>In re J.S., M.N.S.C., and T.S.</i> .....	44
<i>In re K.B.R.</i> .....	44
<i>In re K.C. and W.C.</i> .....	45
<i>In re K.C.B.</i> .....	13
<i>Kerst v. TDFPS.</i> .....	46

<i>In re K.J.R. and T.R.B.</i> .....	46
<i>In re K.M.B.</i> .....	47
<i>In re L.K.M.</i> .....	47
<i>Lopez v. Kushner.</i> .....	48
<i>Lumpkin v. TDFPS.</i> .....	50
<i>In re M.A.C.</i> .....	51
<i>In re M.C. and D.K.</i> .....	52
<i>In re M.D.</i> .....	53
<i>Mikowski v. TDFPS.</i> .....	53
<i>In re M.N.</i> .....	14
<i>In re M.R. and W.M.</i> .....	54
<i>In re N.L.G.</i> .....	55
<i>In re R.M., W.L., and C.L.</i> .....	55
<i>In re S.K.A., M.A., and S.A.</i> .....	55
<i>In re S.L.M.</i> .....	58
<i>Smith v. TDFPS.</i> .....	58
<i>In re S.R., J.R., and B.R.</i> .....	60
<i>In re TDFPS.</i> .....	15
<i>In re TDFPS.</i> .....	16
<i>In re X.P.</i> .....	60

# ANNOTATED TABLE OF CONTENTS

## PRE-TRIAL

### TEX. FAM. CODE § 102.004

#### Standing

No Equitable Right of Intervention

*In re S.L.M.* (4<sup>th</sup> COA)

Foster Parent Intervention

*In re N.L.G.* (2<sup>nd</sup> COA)

Grandparents

*In re H.G., K.G., J.G., and T.G.* (4<sup>th</sup> COA)

Substantial Past Contact Required for Intervention

*In re S.L.M.* (4<sup>th</sup> COA)

*In re N.L.G.* (2<sup>nd</sup> COA)

### TEX. FAM. CODE § 107.013

#### Appointment of Counsel

*In re J.C.* (2<sup>nd</sup> COA)

*In re L.K.M.* (2<sup>nd</sup> COA)

*In re S.K.A., M.A., and S.A.* (6<sup>th</sup> COA)

### TEX. FAM. CODE § 155.201

Foster Parents and Motion to Transfer Venue

*Kerst v. TDFPS* (6<sup>th</sup> COA)

### TEX. FAM. CODE § 262.114

Failure to Conduct Home Study (No Death Penalty)

*In re J.F., J.J., J.J., and J.J.* (2<sup>nd</sup> COA)

### TEX. FAM. CODE § 263.401

Denial of Extension

*In re D.M. and W.M.* (10<sup>th</sup> COA)

Dismissal of Case After New Trial Granted

*In re DFPS* (S. Court)

### Answer

Mailbox Rule Does Not Apply To Pre-Default Judgment Answers

*In re S.K.A., M.A., and S.A.* (6<sup>th</sup> COA)

### Default Judgment

*In re S.K.A., M.A., and S.A.* (6<sup>th</sup> COA)

### Plea to the Jurisdiction

Inclusion of a Party

*Banta v. TDFPS* (13<sup>th</sup> COA)

### Disqualification of Attorney

*In re B.L.H.* (1<sup>st</sup> COA)

### Recusal of Judge

*In re K.M.B.* (3<sup>rd</sup> COA)

*Lopez v. Kushner* (3<sup>rd</sup> COA)

## **Request for Jury Trial**

### Denial of

*Duenas v. Duenas* (13<sup>th</sup> COA)

*Lopez v. Kushner* (3<sup>rd</sup> COA)

## **TRIAL**

### **Best Interest**

#### Evidence Sufficient

*In re A.C.* (7<sup>th</sup> COA)

*In re B.L.H.* (1<sup>st</sup> COA)

*In re C.J. and C.M.J.* (14<sup>th</sup> COA)

*In re D.L.F. and A.L.F.* (10<sup>th</sup> COA)

*Dowell v. Dowell* (8<sup>th</sup> COA)

*In re E.A., et al.* (13<sup>th</sup> COA)

*Gonzalez v. TDFPS* (3<sup>rd</sup> COA)

*In re H.H. and H.H.* (2<sup>nd</sup> COA)

*In re J.A.B.* (2<sup>nd</sup> COA)

*In re J.D.B. and G.N.B.* (2<sup>nd</sup> COA)

*In re J.E.H.* (2<sup>nd</sup> COA)

*In re J.J. and J.G.* (5<sup>th</sup> COA)

*In re J.O.A., T.J.A.M., T.J.M., and C.T.M.* (7<sup>th</sup> COA)

*In re J.S., M.N.S.C., and T.S.* (2<sup>nd</sup> COA)

*In re M.C. and D.K.* (2<sup>nd</sup> COA)

*Mikowski v. TDFPS* (1<sup>st</sup> COA)

*In re M.R. and W.M.* (2<sup>nd</sup> COA)

*Smith v. TDFPS* (1<sup>st</sup> COA)

*In re S.R., J.R., and B.R.* (2<sup>nd</sup> COA)

#### Summary Judgment Denied

*Dowell v. Dowell* (8<sup>th</sup> COA)

### **Evidence**

#### Admission of Evidence Generally

*In re B.L.H.* (1<sup>st</sup> COA)

#### Admission of Child Hearsay Statement - TEX. FAM. CODE § 104.006

*In re M.R. and W.M.* (2<sup>nd</sup> COA)

#### Admission of Drug Tests

*In re C.R.* (5<sup>th</sup> COA) (State of Mind Exception)

#### Appointment of Psychologist

*Lopez v. Kushner* (3<sup>rd</sup> COA)

#### Managing and Possessory Conservatorship – TEX. FAM. CODE § 153.131

*In re B.P., Jr.* (2<sup>nd</sup> COA)

#### Judicial Admission of Paternity

*In re G.A.G., III* (4<sup>th</sup> COA)

#### Parental Presumption Not Rebutted

*In re J.O.* (4<sup>th</sup> COA)

#### Preservation of Error - TEX. R. APP. P. 33.1

*In re K.M.B.* (3<sup>rd</sup> COA)

Recantation of Outcry

*In re Jesse Vernon Jochims v. State* (13<sup>th</sup> COA)

Telephonic Appearance

*Lopez v. Kushner* (3<sup>rd</sup> COA)

Trial Court's Interview of Child

*Lopez v. Kushner* (3<sup>rd</sup> COA)

#### **Grandparent Access**

*Banta v. TDFPS* (13<sup>th</sup> COA)

*In re B.G.S.* (4<sup>th</sup> COA)

#### **Jury**

Broad Form Question Submission

*In re D.S.A. and P.J.A.* (11<sup>th</sup> COA)

#### **Requirement to Make Record in Default Hearing – TEX. FAM. CODE § 105.003**

*In re K.B.R.* (7<sup>th</sup> COA)

#### **Right of Inmate to Participate in Hearing**

*Lopez v. Kushner* (3<sup>rd</sup> COA)

*S.K.A., M.A., and S.A.* (6<sup>th</sup> COA)

#### **Sibling Access**

*In re S.L.M.* (4<sup>th</sup> COA)

#### **Termination Grounds**

TEX. FAM. CODE § 161.001(1)(D)

*In re H.H. and H.H.* (2<sup>nd</sup> COA)

*In re J.D.B. and G.N.B.* (2<sup>nd</sup> COA)

*In re J.E.H.* (2<sup>nd</sup> COA)

*In re J.J. and J.G.* (5<sup>th</sup> COA)

*In re J.K.H.* (2<sup>nd</sup> COA)

*In re J.M., L.M., and K.M.* (10<sup>th</sup> COA)

*In re J.O.A., T.J.A.M., T.J.M., and C.T.M.* (7<sup>th</sup> COA) (Insufficient in Part)

*In re J.P.* (2<sup>nd</sup> COA) (Evidence Insufficient)

*In re K.J.R. and T.R.B.* (11<sup>th</sup> COA)

*In re M.C. and D.K.* (2<sup>nd</sup> COA)

*In re M.R. and W.M.* (2<sup>nd</sup> COA)

*In re S.K.A., M.A., and S.A.* (6<sup>th</sup> COA)

TEX. FAM. CODE § 161.001(1)(E)

*In re C.R.* (5<sup>th</sup> COA)

*In re H.H. and H.H.* (2<sup>nd</sup> COA)

*In re J.A.B.* (2<sup>nd</sup> COA)

*In re J.D.B. and G.N.B.* (2<sup>nd</sup> COA)

*In re J.E.H.* (2<sup>nd</sup> COA)

*In re J.M., L.M., and K.M.* (10<sup>th</sup> COA)

*In re J.O.A., T.J.A.M., T.J.M., and C.T.M.* (7<sup>th</sup> COA) (Insufficient in Part)

*In re J.P.* (2<sup>nd</sup> COA) (Evidence Insufficient)

*In re K.J.R. and T.R.B.* (11<sup>th</sup> COA)

*In re M.C. and D.K.* (2<sup>nd</sup> COA)

*In re M.R. and W.M.* (2<sup>nd</sup> COA)

*In re S.K.A., M.A., and S.A.* (6<sup>th</sup> COA)  
 TEX. FAM. CODE § 161.001(1)(K)  
 Evidence Sufficient  
*In re L.K.M.* (2<sup>nd</sup> COA)  
 Trial Court Not Required to Accept Relinquishment  
*Duenas v. Duenas* (13<sup>th</sup> COA)  
 TEX. FAM. CODE § 161.001(1)(N)  
*In re B.G.S.* (4<sup>th</sup> COA)  
*Gonzalez v. TDFPS* (3<sup>rd</sup> COA)  
*In re S.K.A., M.A., and S.A.* (6<sup>th</sup> COA)  
 TEX. FAM. CODE § 161.001(1)(O)  
*In re A.A.* (5<sup>th</sup> COA)  
*In re A.A.A.* (1<sup>st</sup> COA)  
*In re B.L.R.P.* (7<sup>th</sup> COA) (Evidence Insufficient)  
*In re C.R.* (5<sup>th</sup> COA)  
*In re D.L.F. and A.L.F.* (10<sup>th</sup> COA)  
*In re J.E.H.* (2<sup>nd</sup> COA)  
*Mikowski v. TDFPS* (1<sup>st</sup> COA)  
 TEX. FAM. CODE § 161.001(1)(Q)  
*Dowell v. Dowell* (8<sup>th</sup> COA)  
*In re D.S.A. and P.J.A.* (11<sup>th</sup> COA)  
*In re J.K.H.* (2<sup>nd</sup> COA)  
*Smith v. TDFPS* (1<sup>st</sup> COA)  
 TEX. FAM. CODE § 161.002  
*In re G.A.G., III* (4<sup>th</sup> COA)  
 TEX. FAM. CODE § 161.003  
*In re B.G.S.* (4<sup>th</sup> COA)  
*In re C.J. and C.M.J.* (14<sup>th</sup> COA)  
 TEX. FAM. CODE § 161.004  
 Material Change in Circumstances  
*In re B.L.H.* (1<sup>st</sup> COA)

## POST-TRIAL

### 263.405

#### **Constitutionality of**

*In re A.S.* (9<sup>th</sup> COA) (263.405(d))  
*In re D.M. and W.M.* (10<sup>th</sup> COA) (263.405(i))  
*In re D.W., T.W., and S.G.* (2<sup>nd</sup> COA) (263.405(i))  
*In re K.C. and W.C.* (2<sup>nd</sup> COA) (263.405(g))  
*In re M.D.* (7<sup>th</sup> COA) (263.405(b) and (i))  
*In re S.K.A., M.A., and S.A.* (6<sup>th</sup> COA) (263.405(i))

#### **Denial of Free Record** – TEX. CIV. PRAC. & REM. CODE § 13.003

*In re B.G., C.W., E.W., B.B.W., and J.W.* (12<sup>th</sup> COA)

#### **Fifteen-Day Deadline for Statement of Points Not Arbitrary**

*In re M.D.* (7<sup>th</sup> COA)

**Frivolous Finding**

*In re A.R.* (4<sup>th</sup> COA)  
*In re A.S.* (9<sup>th</sup> COA)  
*In re J.B.* (9<sup>th</sup> COA)  
*In re J.K.H.* (2<sup>nd</sup> COA)  
*In re J.M., L.M., and K.M.* (10<sup>th</sup> COA)  
*In re K.C. and W.C.* (2<sup>nd</sup> COA)  
*Lumpkin v. TDFPS* (14<sup>th</sup> COA)  
*In re X.P.* (2<sup>nd</sup> COA)

**Indigence Determination**

*In re J.B.* (9<sup>th</sup> COA)  
*In re L.K.M.* (2<sup>nd</sup> COA)

**Issues Reviewed Though Not in Statement of Points**

Ineffective Assistance of Counsel  
*Bermea v. TDFPS* (1<sup>st</sup> COA)  
*In re J.O.A., T.J.A.M., T.J.M., and C.T.M.* (7<sup>th</sup> COA)

**Issues Precluded From Review**

*In re A.R.* (4<sup>th</sup> COA) (Ineffective Assistance of Counsel)  
*In re D.L.G.* (5<sup>th</sup> COA)  
*In re J.L.W.M.* (7<sup>th</sup> COA)  
*In re J.M., J.J., J.J., and J.J.* (12<sup>th</sup> COA)  
*In re K.J.R. and T.R.B.* (11<sup>th</sup> COA)  
*Mikowski v. TDFPS* (1<sup>st</sup> COA) (Ineffective Assistance of Counsel)  
*In re R.M.* (4<sup>th</sup> COA) (Ineffective Assistance of Counsel)

**Motion for New Trial Satisfies Statement of Points**

*C.Y. Fletcher v. TDFPS* (14<sup>th</sup> COA)

**Statement of Points**

Extension of Time to File  
*In re M.N.* (S. Court)  
Mailbox Rule Applies to Filing  
*In re A.C.* (7<sup>th</sup> COA)  
Presentment Not Required  
*In re J.A.B.* (2<sup>nd</sup> COA) (*but see In re R.J.S.*)  
*Pro Se* Requirement to File  
*In re J.L.W.M.* (7<sup>th</sup> COA)  
Specificity of  
*In re A.R.* (4<sup>th</sup> COA) (not specific enough)  
*In re J.A.B.* (2<sup>nd</sup> COA) (specific enough)  
*In re M.A.C.* (9<sup>th</sup> COA)

**Bill of Review**

*In re J.C.C.* (5<sup>th</sup> COA)

**APPEAL**

Abuse of Discretion Standard in Legal and Factual Sufficiency Reviews

*In re B.P., Jr.* (2<sup>nd</sup> COA)

Appeal of Conservatorship Appointment

*In re D.N.C.; In re T.L.J. and T.B.J.; In re T.J.C. and T.D.C.; In re E.D.C.; In re J.D.M.* (S. Court)

*In re J.A.J.* (S. Court)

Harmless Error

*Bermea v. TDFPS* (1<sup>st</sup> COA)

Lack of a Reporter's Record

*In re L.K.M.* (2<sup>nd</sup> COA)

Mandamus v. Traditional Appellate Relief

*In re DFPS* (S. Court)

Supplementation of Record

*In re K.C.B.* (S. Court)

Waiver of Issues – TEX. R. APP. P. 33.1

*In re B.G., C.W., E.W., B.B.W., and J.W.* (12<sup>th</sup> COA)

## **INEFFECTIVE ASSISTANCE OF COUNSEL**

Counsel Not Ineffective

*In re A.A.* (5<sup>th</sup> COA)

*In re D.R.D.* (2<sup>nd</sup> COA)

*In re X.P.* (2<sup>nd</sup> COA)

## SUPREME COURT CASES

*In re Dep't of Family & Protective Servs.*,  
\_\_\_\_ S.W.3d \_\_\_\_, No. 08-0524, 2009 Tex. LEXIS 3 (Tex. Jan. 9, 2009)

TEX FAM. CODE § 263.401 - Granting of new trial, dismissal deadline, waiver

On July 18, 2006, the trial court appointed the Department as the temporary managing conservator of the mother's, "Walker", two children. On July 10, 2007, the trial court orally terminated Walker's parental rights. On August 28, 2007, the trial court granted Walker's motion for new trial. On March 6, 2008, Walker filed a "Motion to Dismiss and for Immediate Return of Children", arguing that because the trial court had granted her motion for new trial and had set aside its termination order, the trial court did not timely render a final order within the statutory one-year dismissal deadline. The trial court reset the trial date from December to April 22, 2008. Walker argued that because the statutory deadline had expired and there was no timely final order and the trial court had never extended the statutory dismissal deadline, the trial court was required to dismiss the case under former Family Code section 263.401 (amended in 2007). The trial court denied Walker's motion to dismiss on March 20, 2008, and Walker thereafter filed her petition for writ of mandamus in the Houston Fourteenth District Court of Appeals seeking to compel the trial court to dismiss the case. The Fourteenth Court of Appeals, in granting Walker conditional relief, concluded that the trial court's decision to grant a new trial had the result of vacating the termination order. This meant that the requirement of rendering a final order within one year, pursuant to the former Family Code section 263.401, was not met. The Fourteenth Court further found that the trial court did not make the requisite finding of extraordinary circumstances or render the type of order necessary to retain the suit on its docket for an additional 180 days. Since the effect of granting a new trial was to reinstate the case on the trial docket, as if there had been no previous trial or hearing, the Fourteenth Court reasoned that Walker's motion to dismiss was timely filed under former Family Code section 263.401 (amended 2007).

The Department filed a petition for writ of mandamus with the Texas Supreme Court seeking relief from the Fourteenth Court's order compelling the trial court to dismiss the suit. The Supreme Court denied the Department's petition which allowed the Fourteenth Court's order to stand. Although the Supreme Court agreed that the trial court rendered a final order on July 10, 2007, when it orally pronounced the termination of Walker's parental rights, the Supreme Court found that when a trial court grants a motion for new trial, the case is reinstated on the trial court's docket as though no trial had occurred, and the slate is essentially wiped clean as to orders such as an oral pronouncement of judgment and written judgment based on the trial. The Supreme Court concluded that because the first judgment was vacated, Walker would not have had an opportunity to move for dismissal until the Department had put on evidence in the second trial and therefore did not waive her right to move for dismissal. In rejecting the argument that Walker's dismissal should be precluded by the invited error doctrine, the Supreme Court noted that the trial court could have addressed the issues of timeliness of trial settings and extension orders on its own, or, the trial court could have denied the parties' agreed motion for continuance as to the December trial date. The Supreme Court further stated that the one person who did *not* have a legal burden to tell the trial court the means by which to terminate her parental rights and

who should not be penalized by the doctrines of invited error or estoppel for not doing so, is Walker.

***Dissent by Justices Hecht, Brister, O'Neill and Medina:***

In his dissent, Justice Hecht expressed concern that the majority's opinion has subverted the intent of Family Code section 263.401 in expediting termination cases and is not in the best interest of children. Justice Hecht stated, "The ostensible purpose of *section 263.401* is to expedite termination cases. Threatening the Department with dismissal may not be the best means to that end. It makes no sense to punish children by returning them to dangerous circumstances because the Department or the court did not move swiftly enough to protect them. A better way might have been to set deadlines enforceable by mandamus along with procedures to monitor the status of termination cases throughout the State and ensure compliance. The Court shrugs: "it is not for courts to decide if legislative enactments are wise or if particular provisions of statutes could be better-worded to reach what courts or litigants might believe to be better or more equitable results.""

***In re D.N.C.; In re T.L.J. and T.B.J.; In re T.J.C. and T.D.C.; In re E.D.C.; In re J.D.M.,***  
**252 S.W.3d 317 (Tex. 2008)**

TEX FAM. CODE § 153.131  
TEX FAM. CODE § 161.001(D)

In five separate cases, the Department requested termination of mother's seven children. The trial court found that mother endangered her children. It granted termination under 161.001(1)(D) and appointed the Department as sole managing conservator of all the subject children. On appeal, the Houston First District Court of Appeals reversed the trial court's termination order on factual insufficiency grounds. It also reversed the appointment of the Department as sole managing conservator of the children as no independent finding was made under Family Code section 153.131, namely that the appointment of a parent as managing conservator would not be in the best interest of the children because the appointment would significantly impair the children's physical health or emotional development. The Texas Supreme Court distinguished this case from *In re J.A.J.* 243 S.W.3d 611 (Tex. 2007), where such finding was included. The Supreme Court denied the Department's petitions for review.

***In re J.A.J.,***  
**243 S.W.3d 611 (Tex. 2007)**

TEX FAM. CODE § 153.105  
TEX FAM. CODE § 153.131  
TEX FAM. CODE § 263.404  
TEX FAM. CODE § 161.001(D)  
TEX FAM. CODE § 161.001(E)

The trial court terminated mother's rights to her child and appointed the Department as sole managing conservator. The trial court specifically found that the appointment of mother as

managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development. On appeal, the Houston Fourteenth District Court of Appeals reversed the trial court's termination order, finding the evidence insufficient under grounds (D) and (E), and reversed the appointment of the Department as sole managing conservator. The Supreme Court reversed the court of appeals' reversal of the appointment of the Department as sole managing conservator. Texas Family Code section 263.404 allows the court to render a final order without terminating parental rights. Mother argued that 263.404 only applies where the Department **does not seek** termination, not in cases where termination is sought but reversed on appeal. Mother argued that the Department's appointment was solely a consequence of the termination proceeding. The Supreme Court disagreed with mother's contention. Recognizing that the Department's request for conservatorship was based upon independent grounds (TEX. FAM. CODE §§ 153.105 and 153.131), that the standard of proof is by a preponderance of the evidence in conservatorship decisions, and that other appeals courts require a separate challenge to conservatorship decisions, the Supreme Court concluded that the conservatorship appointment was not subsumed by 263.404 (a)(2).

***In re K.C.B.,***  
**251 S.W. 3d 514 (Tex. 2008)**

TEX. FAM. CODE § 263.405(b)

TEX. FAM. CODE § 263.405(i)

TEX .R. APP. P. 34.5(a)(13)

Supplementation of Record

Mother's parental rights were terminated at trial before an associate judge. Mother filed a *de novo* appeal and timely filed a statement of points. After the referring court signed a termination order in the *de novo* hearing, mother filed a second statement of points which was not included in the appellate record. At oral argument, when mother's attorney was questioned about a second statement of points, he indicated that a second statement of points **had not** been filed. The Amarillo Court of Appeals concluded that mother had failed to file a statement of points after the final order (*de novo* order) and affirmed the trial court's judgment without addressing the merits. After the court of appeals issued its decision, mother's attorney produced a second statement of points which had been filed in the trial court but was not included in the appellate record. Mother's attorney filed for rehearing and for leave to supplement record. Both requests were denied. The Supreme Court reversed and remanded for further consideration. Although the Department argued against two separate omissions in mother's first statement of points, the Supreme Court reasoned that because the Department failed to argue against **all** assigned error, it could have led mother's counsel to reasonably believe that the second statement of points was filed. The court held that mother's omission was based upon "confusion and misunderstanding", not purposeful omission.

*In re M.N.,*  
**262 S.W.3d 799 (Tex. 2008)**

The trial court terminated mother's parental rights and appointed the Department as the child's managing conservator. Mother filed a late statement of points, but requested an extension of time from the trial court which was granted. The court of appeals affirmed the trial court's termination of mother's parental rights, finding that Family Code section 263.405(b) did not permit an extension of time for filing a statement of points.

On appeal to the Texas Supreme Court, mother argued that Texas Rule of Appellate Procedure 26.3 permitted an extension of time for filing a statement of points. Although the intended effect of section 263.405 was to expedite the final disposition of termination cases, it does not address whether an extension of time for filing the statement of points is permitted. The Court is obligated to promulgate rules of practice and procedure in civil cases. These rules are intended to promote fair, just, and equitable resolution of cases. Section 263.405 does not indicate legislative intent to unfairly or unreasonably preclude parents from appealing final orders. The Legislature adopted section 263.405 in light of the rules of civil and appellate procedure providing for extensions of deadlines under certain circumstances. In fact, subsection 263.405(h) provides that an appellate court may not extend certain deadlines except for good cause. Considering the foregoing, and there being no language in the statute specifically preventing an extension, the Court held: "the provisions of Texas Rule of Civil Procedure 5 apply to the question of whether the trial court may extend the time for filing a statement of points for appeal under section 263.405. Accordingly, the trial court could grant [mother's] motion to enlarge the time for filing her statement of points if [mother] showed good cause for her failure to timely file it."

Good cause under Rule 5 is established when the party failing to timely file shows: 1) the failure was not intentional or the result of conscious indifference; and 2) allowing a late filing will not occasion undue delay or otherwise injure the other party. The grant or denial of an extension is reviewed for an abuse of discretion. Here, mother's motion for extension stated that her counsel mis-calendared the time for filing post-trial documents. At the motion to extend, mother's counsel advised the court, without objection, that she mistakenly used the date of receipt of the judgment for the filing date calculation rather than the date the judgment was signed. Mother desired to appeal the judgment at all times and the Department did not contest the allegations in mother's motion or her counsel's explanation. The appellate court did not consider whether mother showed good cause for her late filing. On these facts, the Supreme Court reversed the court of appeals' opinion, finding that mother established good cause for her late filing. The matter was reversed and remanded for consideration of the merits.

*Dissent:* Justice Willett dissented. The Legislature established a firm fifteen-day deadline in section 263.405(b). "I would take lawmakers at their word: fifteen days means fifteen days." He continued, however, "Squeezing out delay, however, does not permit squeezing out due process... [T]erminating parental rights cannot warrant terminating constitutional rights." Justice Willett believed that the Court should have held that court-made rules of procedure do not trump the Family Code's fifteen-day deadline, and then specifically considered whether the deadline in 263.405 violated mother's due process rights or any other constitutional provision.

*In re Tex. Dep't of Family & Protective Servs.,*  
**255 S.W.3d 613 (Tex. 2008)**

TEX FAM. CODE § 262.201(b)(1)  
TEX FAM. CODE §§ 105.001(a), 262.205  
TEX FAM. CODE § 105.001(a) (4)  
TEX FAM. CODE § 262.1015  
TEX FAM. CODE §§ 161.303(a)-(c); 261.3032

The Department filed a petition for writ of mandamus seeking relief from a conditional mandamus granted by the Austin Court of Appeals. The mandamus directed the trial court judge to vacate the temporary orders entered following an adversary hearing in which the Department was appointed as temporary managing conservator of approximately 117 of the 468 children brought into the Department's care from the YFZ Ranch in Eldorado, Texas. *See In re Steed \_\_\_S.W.3d\_\_\_*, 2008, Tex. App. LEXIS 3652 (Tex. App.–Austin 2008, pet. denied). The Supreme Court denied the Department's request for mandamus relief. After reviewing both the evidence at the adversary hearing and other additional evidence, the Supreme Court concluded that it was “not inclined to disturb the court of appeals’ decision finding that the Department’s removal of the children was ‘not warranted’”. (The Austin Court of Appeals found that the Department did not meet its burden under TEX FAM. CODE § 262.201(b)(1)). Further, the Supreme Court was not convinced by the Department’s argument that the decision of the court of appeals left the Department “unable to protect the children’s safety.” In reaching its conclusion, the Supreme Court illuminated several provisions of the Family Code that give the Department “broad authority to protect children short of separating them from their parents and placing them in foster care.” Those provisions include:

- The court (trial court) may make and modify temporary orders for the safety and welfare of the child. TEX. FAM. CODE §§ 105.001(a), 262.205;
- The court may enter an order restraining a party from removing the child beyond a geographical area identified by the court. TEX. FAM. CODE § 105.001(a)(4);
- The court may enter an order removing an alleged perpetrator from the child’s home. TEX. FAM. CODE § 262.1015; and
- Other provisions of the Family Code that afford the Department with authority to protect children such as the provisions prohibiting interference with an investigation and the punitive sanctions for a person who relocates a residence or conceals a child with the intent to interfere with an investigation. TEX. FAM. CODE §§ 161.303(a)-(c), 261.3032.

While denying mandamus relief, the Supreme Court held that the court of appeals’ decision **did not** conclude the SAPCR proceedings.

Justices O’Neill, Johnson, and Willett dissented in part and concurred in part. They reasoned that although the trial court abused its discretion by awarding custody of the male and pre-

pubescent children, the trial court **did not** abuse its discretion “as to the demonstrably endangered population of pubescent girls.”

***In re Tex. Dep’t of Family & Protective Servs.,  
255 S.W.3d 618 (Tex. 2008)***

This is a companion case to *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008). The Texas Supreme Court issued the same opinion as in 255 S.W.3d 613.

**COURT OF APPEALS CASES**

***In re A.A., No. 05-07-01698-CV, 2008 Tex. App. LEXIS 4643 (Tex. App.–Dallas June 25, 2008, no pet.) (mem. op.)***

TEX. FAM. CODE § 161.001(1)(O)  
Ineffective Assistance of Counsel

Trial court terminated mother’s parental rights under 161.001(1)(O). Mother did not appear for trial. At trial, mother’s counsel informed the court that she had not filed a written continuance because counsel expected mother to appear for trial. Mother had not informed counsel that she would not appear. Mother had a history of non-attendance at previous hearings. New counsel for mother filed a motion for new trial, claiming that prior counsel was ineffective as mother was too ill to attend the hearing. On appeal, mother argued that her counsel was ineffective for failing to file a written motion for continuance and supporting affidavit. To prove ineffective assistance of counsel, appellant must show: 1) that trial counsel’s performance was deficient and fell below an objective standard of reasonableness; and 2) a reasonable probability that, but for counsel’s errors, the result of the proceeding would be different. Mother did not meet the first prong of ineffective assistance because her counsel did not file a written motion for continuance because counsel had no personal knowledge that mother would not appear. Further, an affidavit could not be used because there was no personal knowledge of where mother was. The court went on to state that the second prong of ineffective assistance was not met either, as the granting of a continuance is within the discretion of the court. The statutory dismissal deadline was close and had already been extended once. Further, the statutory termination ground was met by two witnesses who testified regarding mother’s failure to complete services. There is nothing to indicate that had mother testified, the outcome would have been different.

***In re A.A.A., No. 01-07-00160-CV, 2008 Tex. App. LEXIS 4842 (Tex. App.–Houston [1<sup>st</sup> Dist.] June 26, 2008, pet. filed) (mem. op.)***

TEX. FAM. CODE § 161.001(1)(O)

The court of appeals withdrew its prior judgment of reversal, affirming the trial court’s order of termination on rehearing. On appeal, mother challenged the sufficiency of the evidence supporting the statutory termination grounds and best interest. The child and mother were living in a shelter. Mother was arrested after shoplifting cough medicine for the child. After mother did not return to the shelter, the Department was contacted. After the Department could not find

mother, or reach anyone on her contacts card at the shelter, it removed the child. Mother was released from jail a day later. Among other grounds, the trial court found that mother failed to comply with court-ordered services. Mother argued that the Department did not meet (O) ground, because it did not establish that the child had been removed from mother as a result of abuse or neglect. Mother argued that she was arrested and unable to return to the shelter. The issue is one of statutory interpretation, which a court reviews *de novo*. The plain language of 161.001(1)(O) requires that the court consider whether the Department proved by clear and convincing evidence that the child was removed from mother for abuse or neglect. The court rejected the Department's contention that mother's leaving the child at a shelter while she went to commit a crime was sufficient to show neglect. There was no evidence that mother knew or reasonably should have known that the child would not be taken care of when she left the shelter. In addition, the Department did not prove whom the child was left with and whether any instructions were given. Mother actually provided contact information for emergencies. However, the evidence was sufficient as the Department proved that upon mother's release from jail, she did not make any efforts to find or locate the child for over a day. Regarding best interest, evidence showed that mother and the child had little interaction at visits, because the child did not know her mother. The child was bonded to relatives and was thriving in their home. The goal of establishing a stable, permanent home for a child is a compelling state interest. Despite mother's testimony of stability, competing evidence weighed against her ability to provide a safe and stable home. Mother moved and changed jobs frequently. Mother failed to complete her services and only attended six out of a possible twenty-four visits with the child. The evidence supporting best interest was sufficient as the trial court could have formed a firm belief or conviction that termination of the parent-child relationship was in the child's best interest.

***In re A.C.*, No. 07-07-0354-CV, 2008 Tex. App. LEXIS 2718 (Tex. App.–Amarillo Apr. 16, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 263.405(b) – Mailbox Rule Applies  
Best Interest

The trial court terminated mother's and father's parental rights. The court was precluded from considering father's issues because he failed to timely file a statement of points. Mother's statement of points, though filed late, was found to be timely as the court applied the mailbox rule, finding that the statement of points was timely filed as counsel complied with the requirements of timely filing under the rules of civil procedure. Only one predicate statutory termination ground and a finding of best interest are necessary to support termination. Here, mother failed to challenge all the termination grounds found by the trial court. The evidence was sufficient to support the best interest finding as mother: 1) was mentally retarded and had been raised in a home where she was abused and neglected; 2) lived with the child's father while he physically abused her; 3) continued to see the child's father when she was not supposed to; 4) could not care for the child who had meningitis and RSV; 5) had to be reminded to care for the child; 6) ran away from placements; 7) drove while drunk with a different child in the vehicle; 8) failed to complete services; 9) lacked the ability to parent and place the child's needs above her own; 10) was jailed for truancy at the time of trial; and 11) had another child by another man whom she planned to live with. The child was doing well in his placement. Neither mother's

nor father's family passed a home study. Evidence that a mother cannot provide a stable, safe, and secure environment supports a finding that it is in the child's best interest to terminate a mother's parental rights. "The litany of evidence itemized above established [mother's] inability to provide such an environment." The order of the trial court was affirmed.

*In re A.R., et. al*, No. 04-07-00292-CV, 2007 Tex. App. LEXIS 9229 (Tex. App.–San Antonio Nov. 28, 2007, no pet.) (mem. op.)

TEX. FAM. CODE § 161.001(1)(O)

TEX. FAM. CODE § 263.405(b) – Specificity of Statement of Points

TEX. FAM. CODE § 263.405(d) Frivolous Finding

On appeal, mother challenged the trial court's finding that her appeal was frivolous. The court may only consider issues brought in a timely filed statement of points on appeal. Mother raised two issues that were not included in her statement of points: 1) issues of ineffective assistance of counsel and 2) the trial court's failure to grant her request for a continuance. Because they were not included in her statement of points, the court could not consider them. The trial court terminated mother's parental rights, finding that mother had failed to comply with court-ordered services. The statute requires that the child has been in the Department's conservatorship for not less than nine months. The child was only six months old at the time of trial. However, mother's statement of points read: "The evidence is factually insufficient to support the trial court's finding that Respondent 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 children who have been in the temporary or managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the children's removal from the parent under Chapter 262 for the abuse or neglect of the children. **Namely that Respondent failed to complete her Plan of Service set forth by the Department of Family and Protective Services.**" Although the issue tracked the statutory language of 161.001(1)(O), it failed to specifically challenge the time the children had been in the conservatorship of the Department. Therefore, the court was barred from considering the issue. The court considered mother's challenge to the frivolous finding. Mother did not complete her parenting classes, was late to visits with the children, failed to take sign language to communicate with the child who was deaf, did not pay any court-ordered child support, failed to complete recommended counseling, failed to complete court-ordered homemaking and family violence courses, and failed to obtain stable and consistent housing. The trial court did not abuse its discretion in finding mother's appeal frivolous.

*In re A.S.*,  
239 S.W.3d 390 (Tex. App.–Beaumont 2007, no pet.)

Constitutionality of TEX. FAM. CODE § 263.405(d)

TEX. FAM. CODE § 263.405(d) - Frivolous Finding

In *A.S.*, father alleged that due process required that a full reporter's record be prepared before the appellate court considered the issue of frivolousness. The Department argued that father had waived the issue as same was not included in his statement of points for appeal. The *A.S.* court

disagreed, finding that: “the statement of points for appeal required by Section 263.405(b) refers to the merits of the appeal, not to issues relating to the hearing required by Section 263.405(d).” As father challenged the constitutionality of 263.405(g), rather than the merits, the court considered his complaint. Father’s counsel argued that 263.405(d) was unfair, because she did not attend the trial. The court disagreed, holding: “The Legislature created a process in which the terminated parent, with benefit of counsel, may identify the issues for appellate review and identify the evidence supporting the issues.” The court looked to the *Mathews v. Eldridge* test in framing the issue as “whether limiting the scope of our review to the record of the hearing held under Family Code § 263.405(d), as clearly contemplated by the legislature, deprives the parent of due process, particularly when new counsel has been appointed since trial.” The court found that father’s due process rights were not violated. It looked to the fact that father’s counsel acknowledged that she had spoken with trial counsel, who advised her on the issues for appeal, and with father, who testified at the post-trial hearing. The court reasoned: “Thus, [father’s] counsel was not compelled to blindly guess what issues to include in the statement of points and what evidence had been developed at trial, but could determine the potential issues and describe for the record the evidence germane to the stated issues.” The court went on to affirm the trial court’s finding of frivolousness as “From the record on the hearing on the statement of points, we can discern both the State’s allegations and evidence supporting the grounds for termination and the evidence supporting [father’s] arguments on his appellate issues.”

***Banta v. Tex. Dep’t of Family and Protective Servs.*, No. 13-06-548-CV, 2007 Tex. App. LEXIS 5888 (Tex. App.–Corpus Christi July 26, 2007, no pet.) (mem. op.)**

TEX. FAM. CODE § 153.433 - Grandparent Access  
Plea to the Jurisdiction – Inclusion of Party

On appeal, grandfather challenged the trial court’s denial of grandparent access to the child. The child’s mother executed a voluntary affidavit of relinquishment. In a supplemental pleading after intervening, grandfather sought grandparent access to the child. At the termination trial, grandfather abandoned his pleadings for custody and proceeded only on his request for access. The trial court denied grandfather’s request for access. The child’s *ad litem* argued that because the adoptive parents were not a party to the appeal, the court was without jurisdiction to proceed. She did not raise this issue before the trial court. The failure to join parties, even those who are necessary and indispensable, is not jurisdictional. As the issue was not jurisdictional, the court did not need to address it. Further, the issue was waived as counsel failed to object to the non-joinder at the trial level. The court disposed with the first requirement of *Troxel v. Granbury*, namely the “fit” parent presumption, because both parents were terminated. The court thus considered grandfather’s second issue, which was that the trial court abused its discretion in denying him access. Access to the child pursuant to Family Code section 153.433 is subject to the trial court’s determination of the best interest of the child. A trial judge has wide latitude in determining the best interest of the child. The judge’s decision on access is reviewed for an abuse of discretion. Grandfather presented evidence that the child lived with him for a year, that they spent time together, that he was a competent caregiver, and that they had a loving relationship. The court noted that despite grandfather’s testimony of the relationship, he failed to present any evidence of how discontinuing the relationship would harm the child. At trial, however, grandfather admitted that the child was removed while in his home, that the child

received a burn while in his home, that the house was dirty when the child was removed, and that he had weapons “all over the house”. The child’s foster mother testified that the child was scared of grandfather and did not want to see him. Due to the visitations, the child was acting out and was taking Zantac for stress. Considering the evidence, the CASA reports, and the therapist reports, the trial court did not abuse its discretion in denying grandfather access to the child. Grandfather also argued that the trial court’s ruling was contingent as it left open the possibility of visitation to the child’s caretakers. The trial court’s order specifically denied grandfather’s requested relief in its order. The trial judge’s “note” was akin to a suggestion that the parties act in the child’s best interest in the future.

***Bermea v. Tex. Dep’t of Family and Protective Servs.*, No. 01-07-00699-CV, 2008 Tex. App. LEXIS 2444 (Tex. App.–Houston [1<sup>st</sup> Dist.] Apr. 3, 2008, pet. denied) (mem. op.)**

TEX. FAM. CODE § 263.405 – Ineffective Assistance of Counsel  
Only One Statutory Termination Ground Necessary to Support Termination

On appeal, mother argued several issues, including the sufficiency of the evidence supporting termination, the court’s refusal to consider her statement of points violated her right to due process, and her counsel was ineffective for failing to file a statement of points. The court stated that it was barred from considering mother’s issues because she failed to file a statement of points. However, the court considered mother’s claim that her counsel was ineffective for failing to file a statement of points, writing: “We hold that a person whose parental rights have been terminated may raise for the first time on appeal a claim for ineffective assistance of counsel for counsel’s failure to file a statement of points for appeal.” To prevail on an ineffective assistance of counsel claim, the claimant must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. Mother satisfied the first prong, because her counsel’s failure to file a statement of points constitutes deficient conduct. However, counsel’s failure to file a statement of points did not harm mother. Only one predicate statutory termination ground and a finding of best interest are necessary to support termination. Here, mother failed to challenge all the termination grounds found by the trial court and did not challenge the best interest determination. “Because [mother] could not have prevailed on her legal and factual sufficiency arguments, we cannot say that the result of the proceeding would have been any different if she had effective counsel.” As no harm resulted from counsel’s deficient conduct, the judgment was affirmed.

***In re B.G., C.W., E.W., B.B.W., and J.W.*, No. 12-06-00295-CV, 2007 Tex. App. LEXIS 7614 (Tex. App.–Tyler Sept. 19, 2007, pet. filed) (mem. op.)**

TEX. CIV. PRAC. REM. CODE 13.003 - Denial of Free Record  
TEX. R. APP. P. 33.1 - Waiver of Issues

This opinion was substituted for the original. Father appealed the trial court’s order denying him a free record in a termination suit. He complains that the trial court violated his due process rights under the U.S. and Texas Constitutions when it denied him a free record. Through appointed appellate counsel, father sought a free record based on his indigent status. Under Civil Practice and Remedies Code section 13.003 and Family Code section 263.405(d), the trial court

denied his request for a free record. Father did not assert his constitutional complaints in the trial court at the hearing regarding his request for a free record. Therefore, he did not properly preserve the issue for appellate review. Further, such error, if any, was not fundamental. Father argued that his raising the issue in his motion for reconsideration before the trial court complied with Texas Rule of Appellate Procedure 33.1. Father filed his motion sixty-four days after the final judgment was signed. Therefore, when the motion for reconsideration was filed, the trial court had no power to reconsider its ruling. Further, there is no evidence that the Department either consented to or requested that the trial court reconsider its ruling. Finally, simply because the section 263.405(d) hearing occurred does not provide the trial court with the necessary additional jurisdiction for a subsequent reconsideration upon motion.

***In re B.G.S.*, No. 04-06-00562-CV, 2007 Tex. App. LEXIS 6859 (Tex. App.–San Antonio May 9, 2007, pet. denied) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(N)

TEX. FAM. CODE § 161.003

Best Interest

Trial court terminated mother's parental rights in accordance with the jury verdict, finding she had constructively abandoned the child, she has a mental disability that renders her incapable of caring for the child, and termination is in the child's best interest. To terminate under subsection 161.001(1)(N), the Department must prove that it has made reasonable efforts to return the child to the parent; the parent has not regularly visited or maintained contact with the child; and the parent has demonstrated an inability to provide the child with a safe and secure environment. At trial, Department witnesses testified that mother: 1) was provided a service plan and told that her parental rights could be terminated if she did not comply; 2) failed to complete most of her services; 3) loved her child but missed half her visits with him; 4) admitted to abuse of multiple drugs; 5) had been evicted from her home, had no money, and had no job; and 6) the child's grandmother was in the process of adopting his sibling. This evidence was sufficient to meet (N) ground. The evidence was also sufficient to support the mental disability finding. Mother suffered from bipolar disorder with antisocial and narcissistic tendencies. Although mother's condition was highly treatable with medication, she refused to take it. Mother did not complete assignments given to her by her psychologist, often arrived late to sessions, and became angry when her psychologist questioned her as to why she would not take her medication. A mental health therapist testified that mother appeared to have a mental illness marked by paranoia and delusions. Mother told the caseworker that she would take medication but never did. She also told the caseworker that taking medication was against her civil rights. The evidence "overwhelmingly" showed that mother had a mental illness. However, a mental illness is not enough. The Department must also prove that mother cannot care for the child until his eighteenth birthday. Even though mother's condition could be controlled by medication, she steadfastly refused to take it. Given this refusal, and failure to show a willingness to control her condition in the years since the child's birth, the evidence was sufficient to support the trial court's findings of termination under 161.003. Regarding best interest, the child has special emotional and physical needs that mother cannot meet while unmedicated. At the time of trial, mother had not seen the child in two months. She had moved to Las Vegas and had no plans to return to San Antonio. She had been evicted from her apartment and did not have a place to live.

Considering the entire record, the evidence is sufficient to support the trial court's finding that termination is in the child's best interest.

***In re B.L.H.*, No. 01-06-00817-CV, 2008 Tex. App. LEXIS 2212 (Tex. App.–Houston [1<sup>st</sup> Dist.] Mar. 27, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.004 – Material and Substantial Change in Circumstances  
Disqualification of Attorney  
Best Interest

The trial court terminated mother's parental rights to the child. Through a mediated settlement agreement, Amy M. was appointed the child's managing conservator and has cared for the child most of his life. On appeal, mother argues that the trial court erred in: 1) denying her request to call Amy's adoptive mother, Sharon, who was also Amy's attorney, as a witness; 2) denying mother's motion to disqualify Sharon from acting as Amy's attorney; and 3) terminating mother's parental rights based on evidence that was factually insufficient to support the trial court's finding that circumstances had materially and substantially changed; and 4) granting termination, as the evidence was factually insufficient to support the best interest finding. The admission and exclusion of evidence is committed to the trial court's sound discretion. Evidentiary rulings usually do not cause reversible error unless an appellant can demonstrate that the judgment turns on the particular evidence that was admitted or excluded. Mother presented no evidence that the exclusion of Sharon's testimony was harmful. In her brief, mother claims that she would have asked Sharon about day-to-day activities and about a domestic violence incident that occurred between Sharon and her mother-in-law. However, mother did not include these in her bill of exception. No questions asked of Sharon in mother's bill of exception presented issues that could not be answered by another witness or were essential to mother's case. The exclusion of the evidence, if error, did not in, reasonable probability, cause the rendition of an improper judgment.

Mother's next claim regards disqualification of Sharon as Amy's attorney. The standard of review for the denial of a motion to disqualify an attorney is abuse of discretion. Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct has been recognized by courts as providing relevant guidelines for disqualification determinations. Attorney disqualification is a severe remedy. It is only appropriate to disqualify an attorney when the attorney's "testimony" is "necessary to establish an essential fact." Simply because a lawyer acts as a witness and advocate, does not necessarily mandate disqualification. Even if a lawyer violates disciplinary rules, the party moving for disqualification must show actual prejudice due to the lawyer's dual role of advocate and witness. A motion to disqualify cannot be used as a tactical maneuver. Despite Sharon's relationship to the facts of the case – lawyer, mother, grandmother, *etc.* – mother failed to show that Sharon's testimony was "necessary to establish an essential fact." Various other sources could have provided the same information mother sought from Sharon. The trial court could have disregarded Sharon's statements that may have suggested personal knowledge rather than a comment on the evidence in the case. Finally, mother's late filing of the motion to disqualify (the night before trial) suggests that the motion was a tactical maneuver. Courts have a strong desire to discourage parties from using motions as tactical maneuvers.

Under 161.004, a court may not terminate unless it finds that: 1) the instant petition is filed after the date the order denying termination was rendered; 2) the circumstances of the child, or another party affected by the order of termination have materially and substantially changed; 3) the parent committed an act under section 161.001 before the date the order denying termination was rendered; and 4) termination is in the child's best interest. Mother first challenges the factual sufficiency of the evidence concerning the trial court's finding that circumstances have materially and substantially changed. Mother claimed that she was not sent to prison on new charges after the termination was denied, had stopped using drugs, had attempted to set up visitation with the child, and caught up her child support payments. Amy responds that mother returned to prison after being released because she violated the terms of her probation, that mother continued to use drugs, and that mother made no effort to contact the child. No definite guidelines exist as to what constitutes a material and substantial change in circumstances. However, here, the facts in the record supporting the trial court's determination include: 1) the trial court could have concluded that mother's return to jail due to a probation violation was a material and substantial change in circumstances; and 2) the trial court could have reached the conclusion that mother abused illegal drugs after her release from prison, and after the prior termination denial, because evidence was produced that mother arrived at a funeral smelling of marijuana, admitted to being "all messed up", and admitted that she was under the influence of drugs to a relative.

Finally, the evidence is sufficient to support the trial court's finding that termination is in the child's best interest. Although mother seemed to understand the child's needs, there was no evidence that she has provided for those needs for most of the child's life. Mother did not have steady employment. Although she claimed to have employment, she did not produce any documentation to support it. The trial court could have disregarded her testimony as not credible. The child needed glasses and regular vision exams, but mother did not know what steps to take to get the child enrolled in Medicaid. Mother placed the child in danger for most of his life through her drug use, beginning while pregnant with the child, causing him to be born with cocaine and Xanax in his blood. She also admitted to using marijuana everyday for nine years. Although mother "purports to love B.L.H., her conduct throughout his life, with few exceptions, demonstrates that she does not have the parental ability to care for B.L.H." Amy has demonstrated an ability to care for the child. Mother testified that she did not have a car, did not pay rent, and relies on the financial assistance of family, friends, and the government. There was evidence of mother's transient living. The record showed that mother had an inadequate relationship with the child due to her commission of crimes and violations that resulted in repeat incarcerations, continued drug use even after receiving treatment, failure to pay child support consistently, and failure to interact with the child consistently.

***In re B.L.R.P.,***  
**269 S.W.3d 707 (Tex. App.—Amarillo 2008, no pet.)**

TEX FAM. CODE § 161.001(1)(O)

W.B.'s parental rights were terminated solely under Family Code section 161.001(1)(O) and best interest. The record established that W.B. signed the Department's service plan on January 5, 2007. The record did not, however, contain a written order requiring W.B. to comply with that

service plan. The Amarillo Court of Appeals concluded that because there were no court orders specifically establishing the actions necessary for W.B. to obtain the return of the child, written or otherwise, the Department failed to establish by clear and convincing evidence any grounds enumerated under subsection (1) of § 161.001 to support termination of W.B.'s parental rights to B.L.R.P. In its post submission brief, the Department argued that W.B. failed to preserve his complaint about the absence of a court order, because appellant failed to raise the issue in his brief. The Amarillo Court rejected that argument concluding that, "Points of error are to be construed liberally in order to adjudicate justly." The court found that the issue of no court order was subsumed in appellant's complaint about the factually and legal sufficiency underlying the termination of his parental right under Family Code section 161.001(1)(O). It is interesting to note that appellant never raised the issue on appeal. It wasn't until oral argument when Justice Pirtle raised the issue by inquiring of appellant's counsel, "Wouldn't the lack of a court order be a fatal defect?" This case was reversed and remanded.

***In re B.P., Jr., No. 2-07-251-CV, 2008 Tex. App. LEXIS 5061 (Tex. App.–Fort Worth July 3, 2008, no pet.) (mem. op.)***

TEX. FAM. CODE § 153.131 – Evidence for Managing and Possessory Conservatorship  
Abuse of Discretion Standard in Legal and Factual Sufficiency Reviews

The child was diagnosed with several mental and behavioral illnesses and disorders. The Department had received six referrals regarding mother and her care of the child. All were disposed of as "ruled out" or "unable to determine."

After an incident regarding an argument over a toy, the Department removed the child because mother told the investigator that it would be best if the child received treatment and was placed in a foster home. Upon completion of the final hearing, the trial court appointed the Department as managing conservator, dismissed the Department's petition to terminate, and made clear that the goal was to return the child to mother.

On appeal, mother challenged the sufficiency of the evidence supporting the trial court's refusal to appoint her as managing or possessory conservator of the child.

A trial court is given wide latitude in decisions regarding custody, control, possession, and visitation matters. A trial court's decision regarding the foregoing is reviewed for an abuse of discretion. An abuse of discretion test regarding legal and factual sufficiency is a two-pronged test, consisting of: 1) whether the trial court had enough information upon which to exercise its discretion; and 2) whether the trial court erred in applying its discretion. The second prong is resolved by whether the trial court made a reasonable decision.

For the court to award possession to a non-parent under Family Code section 153.131, the non-parent must prove a significant impairment to the child's physical or emotional welfare by a preponderance of the evidence. There must be evidence to support the logical inference that some specific, identifiable behavior or conduct of the parent will probably cause harm. The non-parent must offer evidence of specific acts or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child. An adult's

future conduct may be somewhat determined by recent past conduct. However, evidence of past misconduct, in and of itself, may not be sufficient to show present unfitness. The link between the parent's conduct and harm to the child can be inferred from evidence, but may not be based on evidence which merely raises a surmise or speculation of possible harm.

The record supported the Department's primary concern that mother was unable to provide a stable environment for the child. Mother did not have stability in her residence or her employment. Further, mother missed visits with the child, did not attend telephone therapy, and did not complete her services. The Texas Supreme Court has noted "the act of a parent in placing a child in an unstable environment is the very type of conduct that the Legislature contemplated would significantly impair the physical or emotional development of a child." The court held: "Given [mother's] inconsistent behavior, her inability to do what was asked of her to regain custody of [the child], and [the child's] extreme need for structure and stability, it was within the trial court's discretion to conclude that appointing [mother] as managing conservator of [the child] would significantly impair [the child's] physical and emotional development."

Mother also argued that the trial court abused its discretion in not appointing her as possessory conservator of the child. The appellate court agreed. The Department conceded this issue because the trial court seemed to grant mother rights as a possessory conservator without any of the attendant obligations. The court shall appoint a parent who is not named managing conservator as a possessory conservator, unless it finds that the appointment is not in the best interest of the child and that parental access would endanger the physical or emotional welfare of the child. The trial court ordered that mother have reasonable access and visitation as agreed to by mother and the Department, but made no express findings as to possessory conservatorship. The court differentiated between possession and access. Access might not endanger a child, whereas possession may. The trial court has the power to restrict and modify the terms of a possessory conservatorship. Here, the evidence showed that unrestricted possession might cause the child harm. However, the trial court made it clear that its goal was to return the child to mother. In addition, the Department's ultimate plan was reunification. Mother could work toward possession. Thus, possession, albeit restricted, would not endanger the child. Mother's final issue was sustained and the case partially reversed and remanded.

***In re C.J. and C.M.J.*, No. 14-07-00838-CV and 14-07-00839-CV (Tex. App.–Houston [14<sup>th</sup> Dist.] July 10, 2008, no pet.) (mem. op.) (slip. op.)**

TEX. FAM. CODE § 161.003  
Best Interest

After a jury trial, the trial court terminated mother's parental rights to the children under 161.001(1)(D), (E), (O), best interest, and 161.003. Mother only appealed the legal and factual sufficiency of the evidence pertaining to section 161.003 and best interest.

Mother admitted to using marijuana and Xanax while pregnant with one of the children. She told a caseworker that she did not want the child. Mother also admitted to being involved in domestic violence and claimed to suffer from bipolar disorder. A safety plan was created which mother violated.

The Department removed the children. A service plan was created which was explained to mother. Mother understood that completion of the service plan was a prerequisite to reunification. Mother failed to comply with services and became more aggressive and psychotic throughout the case. On one occasion, mother arrived at an appointment covered in vaseline and attempted to persuade other children to leave the facility with her. Evidence at trial consisted of mother's: 1) failure to comply with her service plan; 2) engaging in physical altercations, including while pregnant; 3) hospitalization for mental illness; and 4) drug use.

Mother argued that the evidence was insufficient to support termination under section 161.003 because the evidence did not establish that the child was in the Department's TMC or PMC for at least six months prior to the filing of its petition. This is an incorrect interpretation of 161.003. Section 161.003 requires only that the Department have TMC or PMC of the children for six months preceding the termination hearing. Here, the Department was appointed TMC of the children in March of 2006, and trial was held in July of 2007. The issue was overruled.

The court found the evidence sufficient to support the trial court's best interest finding. The emotional and physical danger to the children was "well-evidenced" by mother's history of domestic violence and aggressive behavior. In addition, she was required to be hospitalized at least four times within a year for mental illnesses. She failed to comply with psychiatric treatment and the record reflected that she used drugs while pregnant with one of the children. Mother failed to participate in family visits and psychiatric treatment resulting in their cancellation. Mother moved frequently and admitted that she was not ready for the children to be returned to her. The children had developmental disabilities when removed, but were improving in the Department's care. The trial court's judgment was affirmed.

*\*Note:* Interestingly, the court unnecessarily addressed mother's 161.003 argument. Mother failed to challenge the 161.001(1) grounds for termination found by the trial court. Under A.V., only one ground for termination, combined with a finding of best interest, supports termination.

***In re C.R., 263 S.W.3d 368***  
**(Tex. App.—Dallas 2008, no pet.)**

TEX. FAM. CODE § 161.001(1)(E)  
TEX. FAM. CODE § 161.001(1)(O)  
Admission of Drug Tests

Mother testified to using "pseudophedrine", a drug she admitted was illegal. She had been incarcerated for drugs, refused to take seven of nine drug tests, admitted to the caseworker that one test would be positive, admitted extensive drug abuse history in a drug assessment, and invoked her Fifth Amendment right against self-incrimination when questioned about a friend who purchased drugs for her. The child was removed due to mother testing positive for methamphetamines. On appeal, mother challenged the sufficiency of the evidence supporting termination and argued that the trial court erred in admitting a drug test. The admission of evidence is reviewed for an abuse of discretion. A complainant must show that the admission was error and that it probably caused the rendition of an improper judgment. The trial court

admitted the drug tests only for the purpose of establishing the Department's and mother's state of mind. The record did not establish that the trial court relied on the test results to establish that mother failed the test or was using drugs. Further, there was extensive evidence of mother's drug use. Even if the test results were considered for anything other than state of mind, they were cumulative and the effect was harmless. Mother did not complete any drug rehabilitation. The court held: "A reasonable fact finder could have formed a firm belief or conviction that [mother's] long history of using illegal drugs, minimal motivation to quit using drugs, continued use of drugs after C.R. was removed, and allowing C.R. to be around [father] when [father] was under the influence of drugs was a course of conduct that endangered the physical and emotional well-being of C.R." Mother argued that she substantially complied with court-ordered services and that transportation issues and scheduling difficulties hindered her ability to participate. Section 161.001(1)(O) does not make any provision for excuses. The evidence was legally and factually sufficient to support termination under 161.001(1)(O). The evidence was sufficient to support the best interest finding because: 1) the fact finder could give "great weight" to mother's extensive drug use; 2) mother never expressed an interest in obtaining full time employment; 3) she failed to complete parenting classes; 4) the child did not want to visit his mother; 5) the child had improved educationally; and 6) the foster parents wanted to adopt the child.

*C.Y. Fletcher v. Dep't of Family & Protective Servs.,*

**No. 01-08-00052-CV, 2009 Tex. App. LEXIS 93 (Tex. App.–Houston [1<sup>st</sup> Dist.] January 8, 2009, no pet. h.) (mem. op.)**

TEX FAM. CODE § 161.001(1)(D)

TEX FAM. CODE § 161.001(1)(E)

TEX FAM. CODE § 263.405

Best Interest

The father appeal from an order terminating his parental rights pursuant to Family Code sections 161.001(1)(D), (E), (F), (N), (O), and best interest. Although the father failed to file a statement of points on appeal as required by Family Code section 263.405(b)(2), he did file a motion for new trial. However, in his motion for new trial, Fletcher only challenged the legal and factual sufficiency of the evidence supporting the termination of his parental rights under grounds (D) and (E). He did not challenge termination grounds (F), (N), (O), or the finding that termination was in the child's best interest under Family Code section 161.001(2). The First Court of Appeals found that the father satisfied the requirements of Family Code section 263.405(b) by asserting his challenges to grounds (D) and (E) in his motion for a new trial. However, the First Court held that it was barred from addressing Fletcher's challenges to the trial court's determinations under Family Code sections 161.001(1)(F), (N), (O) and best interests, because Fletcher failed to preserve his challenges in a motion for new trial or statement of points. The court held that it was also barred from addressing appellant's challenges to the trial court's determinations premised on grounds (D) and (E), but for a different reason. The record did not establish that the trial court terminated appellant's right based upon either ground (D) or (E). Inasmuch as only one predicate ground and best interest is required to terminate Fletcher's parental rights, the First Court affirmed the trial court.

***In re D.L.F. and A.L.F.*, No. 10-08-00036-CV, 2008 Tex. App. LEXIS 5037 (Tex. App.–  
Waco July 2, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(O)

Best Interest

The trial court terminated father’s parental rights to the children under §161.001(1)(D), (E), (O), and best interest. The trial court ordered father to comply with the Department’s family service plan which required father to: (1) complete required parenting classes; (2) complete a psychological evaluation; (3) complete a required alcohol assessment; (4) attend individual therapy; and (5) obtain appropriate housing. Father attended three of the five required parenting classes. His employer testified that, although father lived in a one room efficiency apartment at the time of trial, “a two bedroom apartment was being remodeled ... and would be ready soon”. Father “blamed” his failure to comply with the family service plan on his work schedule, his hernia surgery, his incarceration in jail for 41 days, and his search for work. Consequently, father argued that he was “in substantial compliance” with the family service plan. The court stated: “... substantial completion or substantial compliance is not enough to avoid a termination finding under *subsection (1)(O)*.” (Citations omitted). The court found the evidence legally and factually sufficient to support termination under § 161.001(1)(O).

In applying the *Holley* factors, the court found the evidence legally and factually sufficient to support the best interest finding, because: (1) both children expressed a desire to stay in the placement and one child conditioned the return to her father “on a safe place to live”; (2) the children were in therapy due to suffering from PTSD; (3) the therapist who performed father’s parental assessment stated that father “had minimally adequate parenting skills”, and due to the fact that he could not read or write, would have tremendous difficulty in raising the children; (4) father only completed the parenting assessment and some of the parenting classes; (5) the Department planned to have the children adopted together; (6) the children’s housing situation had not been stable or healthy; (7) father tested positive for cocaine once while the children were in the Department’s care and visited the children only twice due to a drug test being required prior to each visit; and (8) father’s excuses for failure to comply with the family service plan. The trial court’s judgment was affirmed.

***In re D.L.G.*, No. 05-07-00787-CV, 2007 Tex. App. LEXIS 9779 (Tex. App.–Dallas Dec. 17,  
2007, pet. denied) (mem. op.)**

TEX. FAM. CODE § 263.405

The trial court terminated mother’s parental rights to the child. On appeal, mother raised three issues: 1) she had the right to appointed counsel prior to signing her affidavit of relinquishment; 2) the evidence was factually insufficient to support the trial court’s finding that termination was in the child’s best interest; and 3) the evidence was legally and factually insufficient to support the trial court’s statutory termination ground findings. An appellate court may not consider any issue that is not raised in a timely filed statement of points on appeal. Mother failed to file a statement of points. “Therefore, we are precluded from considering any of her issues on appeal.”

***In re D.M. and W.M.,***  
**244 S.W.3d 397 (Tex. App.–Waco 2007, no pet.)**

TEX. FAM. CODE § 263.401 – Denial of Dismissal Deadline Extension  
TEX. FAM. CODE § 263.405(i)

Opinion on rehearing. Mother was not appointed appellate counsel within the fifteen-day period of 263.405(b). On appeal, she argued that subsections 263.405(b) and (i) violated her right to due process. After engaging in a *Mathews v. Eldridge* balancing test, the court of appeals found section 263.405(i) unconstitutional as applied. The court listed several possible procedural safeguards, including: 1) section 109 of the Family Code could be amended to point parents to section 263.405; (2) the appellant was without appellate counsel within the fifteen-day window; (3) the statute could be amended to provide notice in the judgment to the parents of the statutory requirements; (4) the recent enactment of 263.405 causes a risk that parents will be denied meaningful appeals; and (5) the Legislature could permit a fifteen-day extension of the time to file a statement of points. The court considered mother’s claim that the trial court erred in not granting her request for a 180-day extension under Family Code section 263.401(b). The trial court’s decision whether to grant an extension is reviewed for an abuse of discretion. Mother argued that the trial court’s use of a “good cause” standard in deciding whether to grant her extension request was improper. However, she offered no explanation as to how the trial court’s ruling would have been any different if the trial court had made a finding regarding the “extraordinary circumstances” as required by the statute. A court does not abuse its discretion if it makes a correct ruling for the wrong reasons. The court overruled mother’s issue.

*Dissent:* Chief Justice Gray dissented. Mother’s notice of appeal was late. Her explanation for an extension, that the late filing was due to the date the client communicated her desire to appeal, was not reasonable as it did not explain why the decision to appeal was not made earlier. An extension is not simply to allow more time to make a decision about whether to appeal. To accept this reason allows any party an extension of time in which to file their notice of appeal because they are tardy in communicating their desire to appeal to their attorney. The appeal should be dismissed. The dissent also noted that mother’s due process claim should not have been sustained.

***Dowell v. Dowell*, No. 08-06-00180-CV, 2008 Tex. App. LEXIS 903 (Tex. App.–El Paso Feb. 7, 2008, no pet.) (mem. op.)**

Summary Judgment on Best Interest

Private termination case. In a sole issue, father complained that the trial court erred in terminating his parental rights because the summary judgment evidence did not establish that termination is in the best interest of the child. A summary judgment is reviewed *de novo*. The movant carries the burden of showing that there is no genuine issue of material fact. All evidence favorable to the non-movant must be taken as true and all reasonable inferences, including any doubts, must be resolved in the non-movant’s favor. Father concedes that the evidence is sufficient to support termination under subsection 161.001(1)(Q). The summary judgment evidence included: 1) father was serving time in the federal penitentiary for drugs; 2)

he is in arrears in child support; 3) his projected release date is 2012; 4) he has failed to support his children in accordance with court orders; 5) he has failed to provide the children with medical support; and 6) he engaged in conduct under subsection 161.001(1)(Q). Mother also presented an affidavit wherein she stated that father used drugs while her son was in the home, broke her arm and threatened to kill her, and his failure to exercise visitation harmed the child emotionally. The court of appeals reversed the trial court. Here “the summary judgment evidence of [father’s] non-support, incarceration, and limited visitation with the children is inadequate to establish as a matter of law that termination is in the best interest of the child.” First, mother’s affidavit was largely conclusory with little factual specificity. Second, “and more troublesome”, is her failure to segregate pre-divorce and post-divorce conduct. The court rejected mother’s argument that the record showed a clear pattern of violence. The pre-divorce conduct could not be considered. Evidence of pre-divorce is admissible to show a continuing course of conduct. However, the final decree is *res judicata* as to the best interest of the children at the time of divorce. “If, as [mother] contends, [father] attacked her and threatened to kill her during the marriage, she nevertheless agreed to a joint managing conservatorship and a standard possession order.”

***In re D.R.D.*, No. 2-07-238-CV, 2008 Tex. App. LEXIS 2404 (Tex. App.–Fort Worth Apr. 3, 2008, no pet.) (mem. op.)**

#### Ineffective Assistance of Counsel

At trial, mother admitted that she was addicted to methamphetamine, that she had been dealing and using drugs for the past four years, that she uses methamphetamine almost every day, that she stays high for long periods of time, that she only associates with drug users, and that she does not work. Her parental rights had been terminated to two other children and one of her children (one year old) died when he choked on a screw. The jury found that termination of mother’s parental rights was in the children’s best interest and that she had engaged in conduct under subsections 161.001(1)(D) and (M). Mother’s sole complaint was that her trial counsel was ineffective because he “failed to contest any assertions of [the Department] or provide a legal defense by engaging in a trial strategy that was impossible.” Trial counsel’s strategy was to argue that mother’s brother should receive custody of the child. Mother believed that this was impossible as her brother had not intervened and was not included in the jury charge. The court affirmed because trial counsel contested the best interest prong. To prove ineffective assistance of counsel, appellant must show: 1) that trial counsel’s performance was deficient and fell below an objective standard of reasonableness; and 2) a reasonable probability that but for counsel’s errors, the result of the proceeding would be different. The issue is whether counsel’s assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error. Review of counsel’s representation is highly deferential. In this case, “the record unequivocally demonstrates that counsel’s trial strategy was to convince the jury that it was not in D.R.D.’s best interest to have her parent-child relationship with [mother] terminated.” Considering mother’s self-admitted extensive drug history, trial counsel could have believed it to be “disingenuous” to contest the statutory termination grounds. The failure of mother’s brother to intervene did not render ineffective assistance, because the jury was still required to find that termination was in the child’s best interest. Trial counsel’s strategy was “sound”.

***In re D.S.A. and P.J.A.*, No. 11-06-00219-CV, 2008 Tex. App. LEXIS 1836 (Tex. App.–Eastland Mar. 13, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(Q)  
Broad Form Jury Questions

In his sole issue on appeal, father argued that the trial court erred in submitting a broad form question to the jury, because one of the grounds for termination was not supported by the legal and factual sufficiency of the evidence. Specifically, father asserted that the evidence was not sufficient to support termination under 161.001(1)(Q), namely that he had engaged in criminal conduct that resulted in the conviction of an offense and confinement or imprisonment and inability to care for the children for not less than two years from the date of the filing of the petition. The court of appeals affirmed. The Department filed its petition to terminate on July 22, 2005. Subsection 161.001(1)(Q) is applied prospectively. Father’s projected release date was September of 2009. Thus, he is sentenced to serve at least two years from the date the Department filed its petition.

***Duenas v. Duenas*, No. 13-07-089-CV, 2007 Tex. App. LEXIS 5622 (Tex. App.–Corpus Christi July 12, 2007, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(K)

This was a private termination case. On appeal, father raised issues concerning the trial court’s refusal to accept his relinquishment of parental rights, denial of his right to a jury trial, and awarding of more of the community estate to mother. At trial, father agreed that he was the presumed father through DNA testing, but sought to relinquish his parental rights “for the love that was lost and the abuse of the kids...” Father and the children do not have a good relationship. Father stated that termination was best as the children did not want to see him and had physically abused him. Mother stated that father does not participate in decision making for the children and does not see them, but that the children love him and want a relationship with him. Father paid the jury fee and made a timely request, but did not object at trial to proceeding without a jury. Father argued that the trial court erred in not accepting his relinquishment, because he had the right to determine the best interest of his children under *Roe v. Wade*. A trial court may grant the termination of parental rights if it is in the best interest of the child. A parent may not “blithely walk away” from his/her parental responsibilities. The court of appeals affirmed the trial court, writing: “Hurt, anger, and disappointment, however, should not be enough to legally destroy a parent-child relationship. To reverse the trial court’s ruling would be ‘condoning [father’s] abandonment of his personal responsibility to support his biological offspring and opening the door for other angry and disappointed parents to do the same.’” The court also affirmed the trial court’s award of martial property and denial of jury trial. (A party waives its request for a jury trial if there is no objection when the trial court begins a nonjury trial. *In re D.R.*, 177 S.W.3d 574, 580 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2005, pet. denied)).

***In re D.W., T.W., and S.G.,***  
**249 S.W.3d 625 (Tex. App.–Fort Worth 2008, pet. denied)**

Constitutionality of TEX. FAM. CODE § 263.401  
Constitutionality of TEX. FAM. CODE § 263.405(i)  
Separation of Powers

Mother challenged the constitutionality of sections 263.401 and 263.405, claiming that they violate the separation of powers clause and violate her due process. Mother’s trial counsel filed a timely notice of appeal and statement of points. The statement of points alleged insufficiency of the evidence grounds only. Six days later, outside the fifteen-day deadline for filing a statement of points, appellate counsel filed a motion for new trial and a supplemental statement of points which raised her constitutional claims. The court found that mother’s challenge to the constitutionality of 263.401 was waived, as it was not raised in the trial court. The court found 263.405 unconstitutional under the separation of powers doctrine, because it “forecloses our power to review issues properly preserved for appeal because the statute unduly interferes with our substantive power as an appellate court to rehear and determine issues on the merits that were decided in the court below.” The court considered mother’s claim that the trial court erred in not granting her a 180-day extension, “because section 263.405(i) is void, we are not barred by that statute from considering points that were not listed in a statement of points so long as they were properly preserved for appellate review.” An extension of the dismissal date is reviewed for an abuse of discretion. There was no record of the initial hearing regarding mother’s extension request. As such, the court was required to presume that the evidence supported the trial court’s ruling. Mother presented no evidence supporting her request for an extension the second time she urged it. Thus, the trial court’s denial of her motion was not arbitrary or unreasonable. The trial court’s judgment was affirmed.

*Concurring Opinion:* Justice McCoy concurred. “I concur only with the majority’s affirmance of the trial court’s final order terminating parental rights. Because I would hold that it was not necessary to reach the constitutional question concerning section 263.405(i) of the Texas Family Code, I do not join with either opinion’s analysis of the constitutionality of that statute.”

*Dissenting and Concurring Opinion:* Chief Justice Cayce and Justice Holman concurred and dissented. The majority’s opinion regarding the constitutionality of 263.405(i) is dicta. Mother failed to produce a record about which she complained. Consequently, the majority affirmed the trial court’s ruling without reaching the merits. It was therefore unnecessary to pass on the constitutionality of 263.405(i). The statute does not violate the separation of power clause, because “unlike the statutes in three inapposite criminal law cases in which the majority misplaces its reliance, section 263.405(i) does not tell us how to perform our judicial function or ‘how we must rule on issues brought before us.’ It simply limits appellate review of termination orders to issues that are preserved in accordance with the procedures provided by statute. This limitation is well within the Legislature’s constitutional power to regulate and restrict the right to appeal a termination order.”

***In re E.A., et al.*, No. 13-06-503-CV, 2007 Tex. App. LEXIS 7159 (Tex. App.–Corpus Christi Aug. 31, 2007, no pet.) (mem. op.)**

Best Interest

The Department removed E.A. after mother attempted to commit suicide. The child was returned to mother, but removed again because of drug use history and mother's boyfriend running over the child's leg with a vehicle while mother was present. Mother completed some services and E.A. was returned. However, E.A. was again removed after mother became homeless and tested positive for drugs. Mother was pregnant at the time. Mother failed to complete any of her court-ordered services. Mother admitted to the caseworker that she had used drugs in the past and used drugs while pregnant with K.A. Mother failed drug tests, did not visit the children regularly, and had been convicted of theft after the children's removal. The Department's caseworker testified that termination was in the children's best interest and that the possibility for adoption was high. At trial, mother claimed the child being run over was an accident. She also denied taking drugs while pregnant with K.A. Mother began to use methamphetamine because she was severely depressed after E.A.'s removal. Mother testified that she ceased taking drug tests because the results were false. Mother's employment was sporadic and she had been in a home for only three weeks at the time of trial. Mother admitted that she had a second theft charge pending, but claimed she was not using drugs, she was taking her medication regularly, and was not depressed. The trial court terminated mother's parental rights under 161.001(1)(D), (E), (N), (O), (P), and best interest. On appeal, mother challenged only the factual sufficiency of the evidence supporting the best interest determination. The Department presented evidence establishing mother's history of unstable housing, unstable employment, unstable relationships, mental health issues, and drug abuse. The evidence was factually sufficient. Mother's argument that the conduct and circumstances that prompted the children's removal did not exist at the time of trial did not overcome the Department's evidence.

***In re G.A.G., III*, No. 04-07-00243-CV, 2007 Tex. App. LEXIS 8960 (Tex. App.–San Antonio, November 14, 2007, no pet.) (mem. op.)**

TEX FAM. CODE § 161.002(b)(1)

Alleged father was never served. Due to incarceration, he failed to appear at trial. Father's counsel, however, filed an answer on his behalf with a "judicial admission" that he was the father of the child. Nevertheless, the trial court terminated father under TEX FAM. CODE § 161.002(b)(1), based upon a perceived distinction between a judicial admission signed by counsel and a verified pleading signed by father himself admitting paternity. The San Antonio Court of Appeals reversed and remanded. The court held that the pleading, which was signed only by counsel, but contained a judicial admission of paternity, was sufficient to preclude termination under TEX FAM. CODE § 161.002(b)(1). The appeals court found that the Department would have to seek termination under 161.001.

***Gonzalez v. Tex. Dep't of Family and Protective Servs.*, No. 03-06-00004-CV, 2008 Tex. App. LEXIS 4114 (Tex. App.–Austin June 5, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(N)  
TEX. FAM. CODE § 263.405(b)

Trial court terminated father's parental rights under 161.001(1)(N) and best interest. The statement of points was file-stamped on the sixteenth day after the trial court signed its order. However, the attorney's signed certificate of service indicated that the statement of points was served on all counsel and filed with his notice of appeal on the fifteenth day. The Department offered no evidence contesting service on the fifteenth day. Thus, the appellate court considered the statement of points timely filed.

Father was incarcerated for approximately two of the five years at issue. Father was deported after his release from jail. The Department presented father with family service plans designed to reunify him with the children. "Reasonable efforts to reunite parent and child can be satisfied through the preparation and administration of service plans." Father had minimal contact with the children for over five years and the children had very little attachment to him. After being deported, father contacted a friend several times by telephone. He did not make the same effort to communicate with his children. Father did not maintain significant contact with the children. "While imprisonment of a parent, standing alone, should not constitute abandonment of a child as a matter of law, neither should it preclude a finding of abandonment." Evidence father continued his involvement in criminal activity, had not supported his children in over two years, had speculative housing plans, was unemployed, and had a questionable ability to stay in the U.S. supports the finding that father did not demonstrate an ability to provide a safe environment for the children. The appellate court affirmed father's termination.

***In re H.G., K.G., J.G., and T.G.*,  
267 S.W.3d 120 (Tex. App.–San Antonio 2008, pet. denied)**

TEX. FAM. CODE § 102.004  
Standing to Participate in/Initiate a SAPCR Suit – Quasi-Estoppel does not apply

The parental rights of the biological parents of the children were terminated. The maternal grandparents were named managing conservators of the children. After the termination, the children were adopted by the Gibbenses with the grandparents' consent based on the Gibbenses' promise that the grandparents could continue visitation with the children after the adoption. Two years after the final adoption Lori Gibbens filed for divorce.

Eight months after the final divorce decree was entered and after the promised visitations were discontinued, the grandparents filed an "Intervenor's [sic] Petition for Modification of Parent-Child Relationship to Provide Grandparent Access" requesting an order permitting them possession of or access to the children.

The grandparents argued under a quasi-estoppel theory that the trial court had the equitable authority to estop the Gibbenses from asserting an absence of standing because they made

misrepresentations to the grandparents to secure the consent to the adoption and without the grandparents' consent the adoption might not have occurred. Lori Gibbens filed a motion to strike the intervention, contending that the grandparents lacked standing and there was no basis in law for their argument regarding quasi-estoppel.

The court states:

[W]hile equity may estop a party from relying on a mere statutory bar to recovery, it cannot confer jurisdiction where none exists. (Citation omitted). ... If the Texas Legislature has not conferred subject matter jurisdiction on a trial court, the courts cannot mindlessly produce that result based on equity.

The court holds “[b]ecause they [grandparents] do not have standing and because estoppel cannot be used to confer jurisdiction, the trial court did not err in dismissing the [grandparents’] petition in intervention.”

The Supreme Court has granted mother and father an extension of time in which to file their petition for review.

The dissent relies upon the principal of quasi-estoppel to suggest the grandparents have standing in this matter. The dissent further “declares” that “this court’s equity jurisdiction can be used to estop a party from arguing that another party lacks standing.” Furthermore, the dissent suggests that equity mandates a continuation of the grandparents’ pre-adoption standing because the grandparents did not use the remedies available to them under § 153.433.

***In re H.H. and H.H.*, No. 2-07-345-CV, 2008 Tex. App. LEXIS 5580 (Tex. App.–Fort Worth July 24, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(D)

TEX. FAM. CODE § 161.001(1)(E)

Best Interest

Mother was asked to enter into a safety plan for the protection of her older child. Mother was using cocaine while pregnant and had no running water in the residence where she and the child lived. A service plan was developed for mother which she failed to complete. Mother admitted to using cocaine throughout her pregnancy with the younger child despite repeated requests from the caseworker to seek drug treatment. After the child was born testing positive for cocaine, the children were removed.

At trial, mother was pregnant again. She had not completed any of her services, and testified to using marijuana since she was thirteen years old and had been kicked out of school in the ninth grade. Her plan was to move in with the father of her child, who had a history of assault, if the children were returned to her. Mother admitted that she was not ready for the children’s immediate return. The trial court terminated her parental rights under subsections 161.001(1)(D), (E), and best interest.

A pattern of continued drug use, including drug use during the pregnancy of another child and a parent's failure to remain drug-free while under the Department's supervision, will support a finding of endangering conduct under (D) even if there is not direct evidence that the parent's drug use actually harmed the child. Mother used drugs throughout the Department's involvement, even after she was informed that using drugs could harm her unborn child. She failed to complete her services, which included drug treatment. The condition of the home where mother lived with the child was endangering as it was dirty, cluttered, had minimal food, no functional toilet or sink in the bathroom, and no hot water. Mother also admitted to using multiple drugs and both failed and refused to take drug tests. The evidence was legally and factually sufficient to support the trial court's finding of conduct under subsections (D) and (E).

Regarding best interest, the CASA worker testified that the children were bonded with their foster mother and called her "mom". Mother testified that the children interacted with her at visits and that the older child told her she wanted to live with her. Mother had substantial drug-use history and did not have an alternative plan besides moving in with her third child's father who had a history of drug use, crime, and violence. Mother did not complete parenting classes, did not show stability in her employment or residence, and did not establish a pattern of remaining drug free. The children's foster parents were considering adoption. There were three other families interested in adoption of the children if the foster parents did not. The Department planned to have the children adopted together. Mother missed a visit with the children without calling, appeared to be under the influence of drugs during some of the visits with the children, and failed to complete her services. The evidence was legally and factually sufficient to support the trial court's best interest finding.

***In re J.A.B.*, No. 2-06-404-CV, 2007 Tex. App. LEXIS 8294 (Tex. App.–Fort Worth Oct. 18, 2007, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(E) – Drug Use

TEX. FAM. CODE § 263.405 – Presentment of Statement of Points

Best Interest

The court declined to follow the rationale of the *R.J.S.* case out of the Dallas Court of Appeals which held that "presentment" of the statement of points under 263.405(b) meant an actual presentment to the trial court through a hearing. "We decline to follow *R.J.S.* because we can find no evidence in section 263.405 that the legislature intended that a hearing be conducted to present the statement of points, and the State directs us to none." Termination cases are civil cases. In civil cases, the mere filing of a timely motion for new trial preserves legal and factual sufficiency points. The court also found that although mother's statement of points "were not models of specificity", they were sufficient to inform the trial court of the nature of the complaint so that it may correct its findings, if appropriate. *But see In re S.J.G.*, 124 S.W.3d 237 (Tex. App.–Fort Worth 2003, pet. denied) ("The obvious purpose of subsection (b)'s statement of points is to enable the trial court to determine whether under subsection (d) an appeal from a judgment terminating an individual's parental rights is frivolous"; "A trial court would have no way of complying with subsection (d)'s requirement to 'hold a hearing not later than the 30<sup>th</sup> day after the date the final order is signed to determine whether...the appeal is frivolous' except by reviewing the statement of points filed by the appellant"; "Thus, viewing section 263.405 as a

whole, the apparent legislative intent behind the statutory statement of points requirement is to give the trial court some way to determine whether an appeal is frivolous and thereby eliminate unmeritorious parental–termination appeals.”).

The evidence supporting termination under 161.001(1)(E) is sufficient. There was substantial testimony of mother’s drug abuse. She tested positive five times for methamphetamines during her pregnancy with the child and the child required hospitalization after birth to stabilize from the drugs. The child had medical problems. Mother also refused drug tests, did not complete drug rehabilitation, and had previously hid and secreted another child from the Department who was later found “extremely” dirty, starved, and infested with lice. Regarding best interest, the child required daily physical therapy and would likely encounter additional medical problems in the future. Mother endangered the child through her drug use. Mother was a poor parent to the instant child and to her other children. Mother did not have a steady home or steady job. The foster family wanted to adopt the child. Although mother complained that transportation issues hindered her ability to complete services, the trial court could have believed the caseworkers who testified that they offered her transportation. Mother argued that “she is not as bad as some parents who have had their parental rights terminated for drug use. While this may be true, it does not excuse [mother’s] acts and omissions as detailed above.” The evidence was sufficient to support the best interest finding.

***In re J.B.,***  
**259 S.W.3d 383 (Tex. App.–Beaumont 2008, no pet.)**

TEX. FAM. CODE § 263.405(d)

TEX. FAM. CODE § 263.405(g)

The trial court terminated mother’s parental rights under subsections 161.001(1)(N), (O), and best interest. Father’s parental rights were terminated on the same grounds as well as (Q) ground. Mother filed a document entitled “Motion for New Trial[,] Statement of Appellate Points [, and] Request for Indigency Hearing” where she argued that the trial court abused its discretion in failing to grant her motion for continuance, which was based on her failure to attend the hearing, and that the evidence was legally and factually insufficient to support the trial court’s determination that she constructively abandoned the child to the State. Mother’s statement of appellate points did not challenge the trial court’s O ground finding.

At the (d) hearing, mother did not appear nor did she file an affidavit of indigence. Both parents’ attorneys appeared at the hearing. Father argued that the evidence was legally and factually insufficient to show (1) that termination was in the child’s best interest; (2) that there was no evidence that father had impaired child’s physical or emotional development; (3) that father was a danger to the child; (4) that father had abused the child; or (5) that father would impair or endanger the child when he was released from prison.

Father testified by telephone at the (d) hearing stating that: (1) he was currently incarcerated; (2) he had been incarcerated for more than two years since the Department became involved with the child; (3) he had not done anything to harm the child; (4) because of his incarceration, he was

unable to participate in the service plan; and (5) he did not have any family members willing to care for the child.

After conducting the (d) hearing, the trial court found: (1) mother was not indigent because she was not present at the hearing, and she produced no evidence of indigence; (2) father did not provide sufficient evidence of his claim of indigence and was therefore found to be not indigent; and (3) both mother and father's statements of appellate points lacked merit.

Nineteen days after the (d) hearing, father filed an affidavit of inability to pay costs of appeal, where he claimed that he had no income from any source, was incarcerated, owned no real or personal property, had no cash or other money on deposit, had no other assets, and had no knowledge of any other source from which he could obtain funds to pay for counsel. Mother and father appealed the trial court's findings in accordance with subsection 263.405(g).

The court, by letter, informed the parties of the date the appellants' briefs were due. Mother did not file a response. Father's response stated that he was indigent but it did not state the grounds for his appeal nor did it provide any authorities or record references. After reviewing the (d) hearing record, the court found the evidence presented at the (d) hearing supported the grounds for termination and the best interest determination as to both mother and father.

Justice Gaultney dissented stating:

The appellant-father is imprisoned. His testimony by telephone at the post-trial hearing and his late-filed subsequent affidavit indicate he is indigent. By statute, an indigent parent has a right to counsel in these proceedings. (Citations omitted). ... By letter, this Court notified counsel of the due date for appellant's brief, and informed counsel that if the Court did not receive a brief or other response, the Court would presume the trial court's post-trial findings were not contested. We received from counsel a letter forwarding an affidavit of indigency, and stating that the appellant "would like" to appeal the order on the *section 263.405* hearing. I believe under the circumstances this Court should require briefing -- by some counsel representing appellant -- on the trial court's findings under *section 263.405*. (Citations omitted).

***In re J.C.,***  
**250 S.W.3d 486 (Tex. App.–Fort Worth 2008, pet. filed)**

TEX FAM. CODE § 107.013(a)(1)

The child tested positive for phencyclidine (PCP) at birth and was removed by the Department. The foster parents attempted to intervene in the termination suit, but their intervention was stricken. Contemporaneous with the Department's non-suit, the foster parents independently filed an original petition for termination. Mother proceeded *pro se* at trial and her parental rights were terminated under grounds (D), (E), (F), and (R). Mother appealed, but failed to file a reporter's record and claimed she was entitled to court-appointed counsel due to indigence. The Fort Worth Court held that because the suit was not brought by a governmental entity, she was

not entitled to court-appointed counsel. TEX FAM. CODE § 107.013(a)(1). Mother's failure to file reporter's record precluded the court's review of other substantive grounds.

***In re J.C.C., No. 05-07-00401-CV, 2008 Tex. App. LEXIS 3119 (Tex. App.–Dallas April 30, 2008, no pet.) (mem. op.)***

#### Bill of Review

In a private termination action, mother terminated father's parental rights under 161.001(1)(C). Father's attorney had withdrawn and father defaulted at trial. Father complained that mother had deliberately caused notice of the termination order to be sent to the wrong address and had resumed a relationship with him and allowed him to see the child post-termination. Father claimed the foregoing satisfied the three grounds for granting bill of review: 1) a meritorious defense; 2) which he was prevented from making by official mistake or fraud, accident or wrongful act of opposing party; and 3) unmixed with any fault or negligence of his own. The Dallas Court of Appeals affirmed the trial court's judgment, holding that father failed to satisfy the elements of proof for a bill of review. *See also* TEX. CIV. R. P. 360a and 329b.

***In re J.D.B., and G.N.B., No. 2-06-451-CV, 2007 Tex. App. LEXIS 6193 (Tex. App.–Fort Worth August 2, 2007, no pet.) (mem. op.)***

TEX FAM. CODE § 161.001(1)(D)

TEX FAM. CODE § 161.001(1)(E)

TEX FAM. CODE § 161.001(1)(O)

Best Interest

Children were removed due to unsanitary conditions and mother's arrest for methamphetamine possession. Mother had a history of mental illness. The children were exposed to unsanitary conditions and domestic violence. Mother failed to do services. At trial, she offered "difficult life events" as her excuse for not completing them. Mother's parental rights were terminated on grounds (D), (E), and (O) and best interest. On appeal, mother complained that the evidence was legally and factually insufficient to support termination on best interest and (O) ground. The Fort Worth Court affirmed.

***In re J.E.H., No. 2-07-137-CV, 2008 Tex. App. LEXIS 1349 (Tex. App.–Fort Worth Feb. 21, 2008, no pet.) (mem. op.)***

TEX FAM. CODE § 161.001(1)(D)

TEX FAM. CODE § 161.001(1)(E)

TEX FAM. CODE § 161.001(1)(O)

Best Interest

Mother had a history of illegal drug use: marijuana, methamphetamine, LSD, and cocaine. When J.E.H. was almost five, mother became romantically involved with a boyfriend who broke her collarbone and used illegal drugs with her. They committed a burglary together. Mother received eight years probation. Mother made considerable progress with her service plan and the

Department was considering a monitored return when mother was involved in a pedestrian hit and run accident and was arrested for DWI. She entered and left a drug treatment program. She used marijuana, mushrooms, and methadone. Her probation was revoked, and she was sentenced to two years in TDCJ. The Fort Worth Court affirmed on (E) ground and best interest, holding mother's past criminal conduct and illegal drug use supported an endangerment finding under (E) ground. Further, continuous drug use poses an emotional and physical danger to a child now and in the future which supports the best interest finding.

***In re Jessie Vernon Jochims v. State*, No. 13-06-285-CR, 2007 Tex. App. LEXIS 5905 (Tex. App.–Corpus Christi July 26, 2007, pet. refused) (mem. op.)**

#### Recantation of Outcry

The Department received a referral based upon sexual abuse. The child made an outcry to the Department investigator and then to a SANE nurse. At the SANE exam, the child accurately identified the male and female private parts and indicated that her “dad” touched her “butt”, her “private part”, and he touched her with his “private part.” However, in the criminal trial, the child recanted by responding “no” when asked if daddy ever touched her on her private part. Appellant complained that the evidence was factually insufficient to support his conviction for indecency of a child based upon the child's recantation at trial. The Corpus Christi Court disagreed, affirming the conviction. The court held that outcry testimony is considered substantive evidence of guilt in an indecency case, and contradictory testimony does not render the evidence insufficient. In cases involving recantation, as the trier of facts and credibility of the witnesses, the jury is entitled to accept or reject all or any portions of a witness's testimony.

***In re J.F., J.J. and J.J.*, No. 2-07-007-CV, 2007 Tex. App. LEXIS 8108 (Tex. App.–Fort Worth October 11, 2007, pet. denied) (mem. op.)**

TEX FAM. CODE § 262.114(a)

Mother entered into a safety plan due to sexual abuse of the child by the maternal grandfather and mother's positive drugs tests. Father had criminal history and periodic incarceration throughout the relationship. Mother admitted violating the safety plan “every single day.” The children were removed. While in foster care, the children related witnessing domestic violence between the parents. A home study was requested on paternal grandmother but was never conducted by the Department. The trial court sanctioned the Department by denying termination but appointed the Department as sole managing conservator of the children. The Department appealed. The Fort Worth Court held that statute was silent on sanctions. A death penalty sanction was disproportionate and did not consider that the safety of the child is paramount. The appeals court reversed the trial court's order and remanded for further proceedings on termination.

***In re J.J. and J.G.*, No. 05-06-01472-CV, 2008 Tex. App. LEXIS 602 (Tex. App.–Dallas Jan. 29, 2008, no pet.) (mem. op.)**

TEX FAM. CODE § 161.001(1)(D)

Best Interest

Mother, who was three months pregnant, heard from “people” that the father tested positive for AIDS. Fearing that she would test positive as well, mother ingested cocaine and phencyclidine (PCP) in an effort to commit suicide. Evidence showed that mother had also used cocaine three times during her pregnancy. Mother had a history of neglecting her first child, who was born deaf and later diagnosed as bipolar. Mother demonstrated a history of inadequate parenting ability. Mother’s parental rights were terminated under (D) ground and best interest. The Dallas Court of Appeals affirmed.

***In re J.K.H.*, No. 2-07-165-CV, 2007 Tex. App. LEXIS 9747 (Tex. App.–Fort Worth Dec. 13, 2007, no pet.) (mem. op.)**

TEX FAM. CODE § 161.001(1)(D)

TEX FAM. CODE § 161.001(1)(Q)

TEX FAM. CODE § 263.405(d) – Frivolous Finding

Best Interest

Mother had an extensive history of methamphetamine abuse. Although she stopped use during pregnancy, she began using bi-monthly when the child was seven months old. Mother and husband were arrested for possession of over 400 grams of methamphetamine. Mother pled guilty to child endangerment and was sentenced to two years in TDCJ on the endangerment charge and ten years on the possession charge. Upon release from prison, and while on parole, she relapsed and failed to report. No services were offered due to incarceration. At trial in January of 2006, mother’s parole officer testified that she would likely be released in 2009. Mother was not able to care for child and could not offer any viable placement options. The trial court terminated her parental rights under ground (D) and best interest and found her appeal to be frivolous. The Fort Worth Court of Appeals affirmed upon review of the record.

***In re J.L.W.M.*, No. 07-07-0043-CV, 2007 Tex. App. LEXIS 8130 (Tex. App.–Amarillo Oct. 11, 2007, no pet.) (mem. op.)**

TEX FAM. CODE § 263.405

Father filed statement of points two days late arguing that the mail box rule applied. However, father mailed his statement of points to the wrong clerk. The Amarillo Court, while acknowledging that 263.405 can have harsh consequences, held that it is obligated to follow 263.405 and affirmed the trial court’s order.

***In re J.M, J.J., J.J. and J.J.*, No. 12-07-00371-CV, 2008 Tex. App. LEXIS 4871 (Tex. App.–Tyler June 30, 2008, pet. filed) (mem. op.)**

TEX FAM. CODE § 263.405

Appellant failed to file a statement of points on appeal. The Tyler Court could not consider the issues raised on appeal pursuant to 263.405. The trial court’s order was affirmed.

***In re J.M., L.M., and K.M.*, No. 10-08-00108-CV, 2008 Tex. App. LEXIS 4237 (Tex. App.–Waco June 11, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 263.405(d) and (g)  
Review of Full Record After Frivolous Finding

The trial court terminated parents' parental rights to their three children under § 161.001(1)(D), (E), and best interest. Each parent filed a timely statement of points. Both parents raised exactly the same issues for consideration in their respective statement of points. In accordance with the hearing requirements in § 263.405(d), the trial court determined that an appeal on the statements of points that had been filed was frivolous. Parents appealed the trial court's frivolous determination pursuant to § 263.405(g). The standard of review for an appeal of a frivolous determination by a trial court is abuse of discretion. The court expanded its review beyond the § 263.405(d) hearing record alone, reasoning:

Because the trial court was asked to recall the testimony of the trial on the merits in making its frivolousness determination, this review included a review of the record of the trial on the merits.

After reviewing the records, the court affirmed the trial court's determination.

***In re J.O.*, No. 04-07-00752-CV, 2008 Tex. App. LEXIS 3465 (Tex. App.–San Antonio May 14, 2008, no pet.) (mem. op.)**

TEX FAM. CODE § 153.373  
TEX FAM. CODE § 153.423

Mother's aunt and uncle filed a SAPCR case seeking appointment as J.O.'s managing conservator. Although aunt and uncle prevailed at the temporary orders hearing, at final trial, mother was appointed sole managing conservator and father possessory conservator. The trial court found that the parental presumption had not been rebutted. The trial court further declined appointment of aunt and uncle as possessory conservators. The San Antonio Court of Appeals affirmed, finding that the trial court did not abuse its discretion.

***In re J.O.A., T.J.A.M., T.J.M. and C.T.M.*,  
262 S.W.3d 7 (Tex. App.–Amarillo 2008, pet. granted)**

TEX FAM. CODE § 263.405(b)  
TEX FAM. CODE § 263.405(i)  
TEX FAM. CODE § 161.001(1)(D)  
TEX FAM. CODE § 161.001(1)(E)  
Best Interest

The trial court signed its termination order on February 16, 2007. On February 21, 2007, mother's counsel filed a notice of appeal and a motion to withdraw. On February 22, 2007, father's counsel filed a notice of appeal and a motion to withdraw. The trial court never ruled on

either motion. On March 5, 2007, seventeen days after the date the final order was signed, appellate counsel was appointed for mother. On March 15, 2007, twenty-seven days after the date the final order was signed, appellate counsel was appointed for father. Mother had a history of marijuana, cocaine and barbiturate abuse. Father used marijuana with mother. At the birth of the twins, mother admitted to marijuana use and tested positive for cocaine and barbiturates. At trial, mother admitted to going on a five-hour cocaine binge just prior to the birth of the twins. Subsequent to removal, mother was incarcerated for four months for cocaine possession and eleven days for criminal trespass. At trial, father admitted to using marijuana on June 28, 2006, and was delinquent in child support. He also missed several drug tests. At trial, father presented evidence of employment as he had been working at Wal-Mart for about three weeks. He had a car and housing, had attended parenting class, had attended regular visitation with the children, and had three negative drug tests. The Amarillo Court first found that both mother and father's counsel were ineffective in failing to file a statement of points. The court next conducted a *Matthews v. Eldridge* analysis to determine whether the failure to file a statement of points in this case rose to the level of a due process violation. The court, while acknowledging that not every failure to preserve error by not timely filing a statement of points rises to a due process violation, concluded that this case warranted a legal and factual sufficiency review to determine whether the parents had meritorious defenses. In the case of mother, the court found that the risk of erroneous deprivation was slight from a sufficiency of the evidence prospective and concluded that her claim of ineffective assistance of counsel did not raise a due process violation. However, in the father's case, the court found the opposite, concluding that the evidence supporting termination of his parental rights was both legally and factually insufficient. In conducting its analysis of father's legal and factual insufficiency claims, the Amarillo Court concluded that, "where the Department seeks termination of both parents' rights to multiple children based primarily upon acts of one parent directed towards less than the whole number of children, we cannot be swept away with an emotional determination of the best interests of the children at the expense of factually sufficient grounds for termination as to each parent, as to each child. In other words, although contextually connected, the grounds for termination must independently exist as to each parent, as to each child."

*\*Note:* DFPS Appellate Attorney Trevor Woodruff presented oral argument to the Supreme Court in this case on October 14, 2008. The issue of whether ineffective assistance of counsel can be brought on appeal when not included in a timely filed statement of points should be settled shortly.

***In re J.P.*, No. 2-07-026-CV, 2008 Tex. App. LEXIS 773 (Tex. App.–Fort Worth Feb. 4, 2008, no pet. )(mem. op.)**

TEX FAM. CODE § 161.001(1)(D)  
TEX FAM. CODE § 161.001(1)(E)

Mother had a history of mental illness. After the birth of her son, she displayed bizarre behavior and reported a history of schizoaffective, bipolar, and obsessive compulsive disorder. The Department caseworker visited her home and discovered that the house was not a suitable environment for a child due to the overwhelming odor of cat urine, cat feces smeared on the floor, clutter, no baby bed, and no car seat or playpen. Mother agreed to a safety plan that

provided that she was to stay with her mother and cooperate with the Department. Shortly thereafter, the caseworker was notified that mother was at a community treatment center for a checkup when she started acting bizarre. Mother was accompanied by a caseworker to an emergency care center where she was checked in. Due to the fact that the mother could not take the child to the care center with her, the Department took custody of the child. Mother was hospitalized for twenty-nine days in a state hospital after making the following remark at her psychological evaluation: “What do I have to do to get some help around here, slit my wrists.” Mother also had three brief relationships with men she had met on the Internet who had mental problems. Although mother had improved the condition of her home, the caseworker testified that it was too soon to determine if she could maintain a clean environment. At trial, mother testified that her remark about slitting her wrists was “flippant.” The caseworker indicated mother had fairly regularly visited her child, but the caseworker was concerned that mother still lacked appropriate parenting skills. The Fort Worth Court considered mother’s mental health and living conditions in the context of endangerment under (D) and (E) grounds. Although the court found the evidence legally sufficient, it concluded that the evidence was factually **insufficient** to support termination under the endangerment grounds. The court, therefore, did not address best interest. *It is interesting to note that although the Department did not attempt to terminate mother’s parental rights under TEX FAM. CODE § 161.003, the court stated that the Department did not meet the more stringent standards of that section. The court stated that 161.003 may be a more appropriate ground when terminating a parent with a mental illness.*

***In re J.S., M.N.S.C., and T.S., No. 2-07-279-CV, 2008 Tex. App. LEXIS 4149 (Tex. App.–Fort Worth June 5, 2008, pet. denied) (mem. op.)***

#### Best Interest

The court of appeals found the evidence legally and factually sufficient to support the trial court’s finding that termination of mother’s parental rights was in the children’s best interest when one of the children was seriously injured. The court reached this conclusion, despite the fact that mother: 1) completed all of her services; 2) maintained steady housing and employment; 3) had made significant progress according to her therapist; and 4) stated that she did not know who harmed her child and offered multiple explanations for the severe injuries. The court held: “In sum, the record demonstrates that although appellant diligently completed her services, the severity of [the child’s] injury, TDFPS’s uncertainty as to the identity of the person or persons who inflicted the injuries, her denial of the intent and nature of the injuries, her failure to inform TDFPS of her new boyfriend, and the intentional neglect of the children, all demonstrate that it was in [the children’s] best interest that appellant’s parental rights be terminated.”

***In re K.B.R., No. 07-07-0098-CV, 2008 Tex. App. LEXIS 4538 (Tex. App.–Amarillo June 20, 2008, no pet.) (mem. op.)***

TEX FAM. CODE § 105.003  
Making of Record Required

Private suit for modification of child support. The importance of the case *vis-à-vis* termination suits lies in the court’s application of Family Code section 105.003 to the case. After filing a

series of modifications, mother obtained a default judgment against father for increased child support obligations, confirmation of certain arrears, and attorney's fees. The judgment recited that father was served with notice but failed to appear. The appellate court reversed and remanded the matter for a new trial as the trial court failed to make a record of the hearing. Family Code section 105.003(c) requires that "a record be made as in civil cases generally unless waived by the parties with consent of the court." Section 105.003 places an affirmative duty on the trial court to ensure that the court reporter makes a record of the proceedings involving parent-child relationships. Failure to do so constitutes error on the face of the record requiring reversal.

The judgment recited that the parties waived a record of the proceeding, however, father was not present to do so. When a party is not present, nor represented by counsel, the making of a record cannot be waived as to the absent party and a trial court commits error in consenting to the waiver of a record. The error was reversible, because, without a reporter's record, the appellate court could not determine whether the evidence supporting the trial court's judgment was legally or factually sufficient.

***In re K.C. and W.C.*, No. 2-06-367-CV, 2007 Tex. App. LEXIS 5729 (Tex. App.–Fort Worth July 19, 2007, no pet.) (mem. op.)**

Constitutionality of TEX. FAM. CODE § 263.405(g)  
Frivolous Finding

A jury terminated father's parental rights to the children. On appeal, father challenged the trial court's finding that his appeal was frivolous, arguing that section 263.405(g) and its abuse of discretion review was an unconstitutional burden shifting. He argued that there could be "no appeal" without a record. Constitutional challenges to a statute can be waived. In the absence of such a complaint in the trial court, "we cannot consider it." Even though not raised before the trial court, the court considered father's issue because he attacked the standard of review. Thus, the court construed his issue liberally, assuming that his brief was the earliest time he could raise it. The court had recently held that 263.405(g) allows it to request a full record, if necessary. As father failed to file a motion for new trial, he waived any factual sufficiency challenges. The court reviewed the record to determine whether it would request a full record to review the frivolousness determination. The court reviewed the eight volumes of exhibits, and found the evidence sufficient to support the frivolous finding. The record showed that K.C. was terribly burned at father's residence, suffering serious and near-death injuries. There were no batteries in the smoke alarm and a charred space heater was found in the child's bedroom. The child was hospitalized for some time. Father did not visit the child regularly and did not learn how to care for the child's burns. Regarding W.C., father was jailed briefly. When released, father did not pick up the child. Father missed approximately half of his visits with W.C. When father visited W.C., he would sometimes fall asleep or talk on his cell phone. Both children were delayed and father did not pay child support as ordered. The trial court did not abuse its discretion in finding father's appeal frivolous.

*In re Kerst,*  
237 S.W.3d 441 (Tex. App.–Texarkana 2007, no pet.)

TEX. FAM. CODE § 155.201  
Transfer of Venue

After termination of parental rights, the Department placed three children with foster parents. After a disagreement, the children were removed from them. The foster parents, who had lived with the children in Bowie County for over six months, filed a motion to modify and a motion to transfer venue in the Hopkins County court of continuing exclusive jurisdiction. At the hearing, it was undisputed that the children had lived with the foster parents in Bowie County for seventeen months. However, the Hopkins County court refused to transfer the case. The court of appeals granted the foster parents' mandamus. Transfer of a SAPCR to a county where the child has resided for more than six months is a ministerial duty under Family Code section 155.201(b). The court declined to follow the Department's argument that *forum non conveniens* prevented the transfer. The Department argued that legislative intent never intended for foster parents to be able to transfer venue of cases. The court disagreed, stating that the statute is "straightforward and clear" – transfer is mandatory if the child has resided in the county for six months or longer. It was immaterial that the foster parents could not file an original SAPCR in Bowie County. The statute has been amended and no longer requires that. Finally, the Department argued that the children did not "reside" with the foster parents, but were merely placed there by the Department. The court did not follow the argument, stating that the children's biological parents' parental rights had been terminated and the children had nowhere more permanent to go. The court noted in a footnote that neither party argued that Family Code section 153.371(10) allows the authorized agency with conservatorship to "designate the primary residence of the child." Arguably, the Department designated the children's residence by placing them in the foster parents' home.

*In re K.J.R. and T.R.B., No. 11-07-00344-CV, 2008 Tex. App. LEXIS 5480 (Tex. App.–  
Eastland July 24, 2008, no pet.) (mem. op.)*

TEX. FAM. CODE § 161.001(1)(D)  
TEX. FAM. CODE § 161.001(1)(E)  
TEX. FAM. CODE § 263.405

At the time of the youngest child's birth, the child tested positive for marijuana. Mother tested positive for cocaine and marijuana. The Department referred the case to Family Based Safety Services, but before services had been started, the Department received a referral for neglect. The children's uncle dropped the children off at the Midland County Detention Center and contacted the Department. Uncle advised the Department that mother's whereabouts were not known and that father was not mentally stable enough to care for the children. The children were removed and service plans prepared which mother and father failed to complete. The trial court terminated mother's and father's parental rights under subsections 161.001(1)(D), (E), (N), (O), and best interest.

Father failed to timely file a statement of points. Pursuant to Family Code section 263.405, the court affirmed the trial court's order of termination as to father because the court was precluded from considering his issues on appeal.

Mother only challenged the trial court's statutory termination ground findings. Conduct of the parent or another person can create an environment that endangers a child. Endangering conduct includes conduct that occurred before the child was born. Mother admitted to smoking marijuana during pregnancy, and despite her denial of cocaine use, tested positive for cocaine at the child's birth. Mother promised to complete the service plan but failed to do so. Mother was incarcerated at the time of trial. Her original release date had been extended because she got into a fight while in prison. She was going to be on probation for three years after release. Mother also promised to complete drug and alcohol treatment and to refrain from criminal activity. Failing to follow a service plan requiring an agreement not to engage in illegal activity is sufficient to show conduct that endangered the well-being of a child. A parent's misbehavior during incarceration, which extends her release date, is evidence of endangerment. The evidence was legally and factually sufficient to support the trial court's findings of termination pursuant to subsections (D) and (E). As only one predicate ground is necessary for termination, the trial court's judgment was affirmed.

***In re K.M.B.*, No. 03-08-0041-CV, 2008 Tex. App. LEXIS 5559 (Tex. App.–Austin July 25, 2008, no pet.) (mem. op.)**

TEX. R. APP. 33.1

TEX. R. CIV. P. 18a

Father's counsel filed an *Anders* brief, advising the court that father's appeal was frivolous and without merit. As required, counsel notified father of his right to file a *pro se* brief, which father did.

In his *pro se* "response" and "letter", father argued that the trial judge who terminated his parental rights was biased against him. He also argued that he was given insufficient notice to prepare for the hearing. To preserve error, an appellant must raise and properly present the claim to the trial court. Father did not file a motion to recuse or disqualify the judge under civil procedure rule 18a, nor did he object to proceeding with trial. In fact, father answered the trial court affirmatively when asked whether he was ready to proceed at trial. Thus, he failed to properly preserve the issues for appeal. The court reviewed the record and concluded father's appeal was without merit. The trial court's judgment was affirmed.

***In re L.K.M.*, No. 2-06-228-CV, 2008 Tex. App. LEXIS 204 (Tex. App.–Fort Worth Jan. 10, 2008, no pet.) (mem. op.)**

Appointment of Counsel

Lack of a Reporter's Record

Involuntary Signing of Relinquishment

Private termination case. Father sought sole managing conservatorship of the child. After her initial counterpetition, mother responded with an amended counterpetition alleging that father had a history of committing family violence and requested sole managing conservatorship. Mother also alleged various other tortious claims and requested a court order. At trial, both parties appeared and were represented by attorneys. The trial court entered an order terminating father's parental rights, finding that the parties had voluntarily entered into an *Agreed Order of Termination*. The order was signed by mother and her attorney but not father or his attorney.

Father complained on appeal that the trial court erred in not appointing him counsel after he became indigent. The trial court conducted a hearing as ordered by the court of appeals. It determined that father had failed to give mother timely notice of the filing of his affidavit of indigence and that the court clerk had failed to give timely notice to the court reporter. After a second hearing, the trial court found father not indigent and denied his request for court-appointed counsel. The test for indigence is whether a preponderance of the evidence shows that the party would be unable to pay costs "if he really wanted to and made a good-faith effort to do so." If a contest is filed, the party filing the affidavit must prove the affidavit's allegations. The trial court's indigence determination is reviewed for an abuse of discretion. Despite being instructed to do so by the trial court, father failed to bring documents establishing his income. The trial court did not abuse its discretion because father failed to meet his burden of proving indigence. The court advised father that if he did not pay for the record it would consider only his issues that did not require a record. Father's attachment of the record as an appendix to his brief could not be considered as part of the record. As father failed to produce a proper record, the court did not consider his issues requiring the record, including father's claims that: 1) he signed the agreed termination under duress due to mother's threats of tort actions; 2) the trial court relied on unsubstantiated hearsay; 3) the legal and factual sufficiency of the evidence; 4) mother's counsel engaged in unethical conduct; 5) his claim that the trial judge should have disqualified himself; and 6) the trial court violated his due process by not granting him a new trial.

***Lopez v. Kushner*, No. 03-06-00779-CV, 2008 Tex. App. LEXIS 1136 (Tex. App.–Austin Feb. 13, 2008, pet. denied) (mem. op.)**

TEX. FAM. CODE § 155.001 - Jurisdiction  
TEX. FAM. CODE § 153.009 - Interviewing the Child  
TEX. FAM. CODE § 107.021 - Appointment of an Attorney *ad Litem*  
Appointment of Psychologist  
Recusal of Judge  
Request for Jury Trial  
Right of Inmate to Participate in Hearing  
Telephonic Appearance

Private termination case. The trial court terminated father's parental rights and granted adoption to a stepparent. After father's and mother's divorce, mother was named sole managing conservator of the child. Shortly after the divorce, father was convicted of two counts of aggravated sexual assault of a child and sentenced to thirty-one years confinement. The trial court terminated father's parental rights under 161.001(1)(Q). Father participated in the trial by

telephone. Father first argued that the trial court did not have jurisdiction because mother and step-father lived in Hawaii. However, mother's petition stated that at the time of filing, the child lived in Tom Green County. Father's issue was without merit. Next, father argued that the trial court was statutorily required to interview the child. The statute states that the trial court "shall" interview of a child twelve years of age or older, and "may" interview a child younger than twelve. The trial court declined father's request to interview the child as the child was under twelve years of age. Father does not show in what respect the trial court abused its discretion. Father contended that he moved to recuse the judge, but the judge would not recuse himself or obtain a ruling from another judge. Father's objection was to the sitting judge, Judge Woodward. Judge Gossett denied the recusal motion because he, not Judge Woodward, heard the case. Father did not renew his objection to Judge Gossett, and the record does not show any reason for recusal. Father claimed that the trial court abused its discretion by denying his request for a jury trial. Father had thirty days notice of trial. He then asked for, and received, a continuance for another sixty days. Despite the continuances, father did not file a jury request until two days before trial. The trial court did not abuse its discretion in denying it. Father argued that he was not allowed to fully participate in the hearing and was excluded from it after he testified. A prisoner in Texas has a constitutional right to access to the courts, but only a qualified right to appear personally in a civil proceeding. If an inmate is allowed to proceed, particularly if the merits can be determined without his presence, a trial court should afford the inmate the opportunity to proceed by affidavit, deposition, telephone, or other effective means. The right of an inmate to appear is not so much the right to personally appear as the opportunity to present evidence and participate in the proceedings. After finding that father failed to justify a personal appearance, the trial court permitted him to appear by telephone. Father was given a chance after the hearing to add additional evidence on the record which he did not do. Father failed to make any request to be present for trial. He further failed to preserve the issue for review, because he did not complain to the trial court of the existence of any excluded evidence. He did not contend his affidavit and testimony were insufficient to put his evidence before the court. Finally, father complains that he and the child were not each appointed counsel and that a psychologist was not appointed to examine the child. In anything other than a suit brought by a governmental entity, the Family Code allows for the discretionary appointment of an *ad litem* for the child. Father did not object to the lack of an *ad litem* for the child and does not show an adverse interest between the mother and child. There is no support for Father's argument that the Family Code requires the appointment of a psychologist to assess any harm to the child caused by the termination. Regarding appointment of an attorney for father, the trial court entered an order requiring father to file an affidavit containing information to justify the appointment of an attorney. Father failed to do so. A parent is not entitled to an attorney in every termination proceeding, only those brought by a governmental entity. Father fails to show how the trial court abused its discretion. He further fails to show how the denial resulted in an improper judgment. Finally, father argues that the trial court erred in not granting his motion for continuance. Father only asked for one continuance. He received it. Again, father failed to show what he would have produced if given a continuance and did not show that the denial resulted in an improper judgment.

***Lumpkin v. Tex. Dep't of Family & Protective Servs.,***  
**260 S.W.3d 524 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2008, no pet.)**

TEX. FAM. CODE § 263.405(d), (g), and (i)  
Challenges to Frivolous Finding  
Meaning of Frivolous Finding *vis-à-vis* Statement of Points  
Standard of Review in Frivolous Determination

The trial court terminated parents' parental rights to their four children. The parents timely filed their statements of points. The trial court determined that their appeals were frivolous. The standard applied to reviewing a trial court's frivolous finding is an abuse of discretion standard. "For analysis purposes, an appeal is frivolous when it lacks an arguable basis either in law or in fact."

The court did not require a separate challenge to the frivolous finding as required in § 263.405(g). Instead, in a footnote, the court interpreted the challenge on the merits to "encompass a challenge to the frivolousness findings."

Regarding the effect of a frivolous finding, the court states:

An appeal of a termination order is limited to the issues presented in the statement of points. (Citations omitted). It follows that, if a trial court determines that an appeal is frivolous, the court has necessarily determined that each of the issues identified in the statement of points is frivolous; that is, that they lack a substantial basis in law or fact.

The parents' statements of points contained three issues for consideration. In the first two issues, the parents "generally averred that the evidence supporting the terminations was legally insufficient". The court held that because § 263.405(i) states that a claim in a statement of points that a judicial decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue for appeal, the trial court correctly found that the first two issues were frivolous.

The third issue raised in the statement of points raised a specific legal and factual sufficiency challenge to the evidence supporting the termination of the parents' parental rights under §§ 161.001 (D) and (E). The issue presented was whether the trial court abused its discretion by determining that the evidence is such that a fact finder could have reasonably formed a firm belief or conviction that its findings were true [clear and convincing burden on proof]. At trial, the parents argued that the Department's investigative caseworker testified that there was no evidence of actual abuse or neglect of the children. Because the caseworker testified that there was only a risk of abuse or neglect at the time the children were removed from the family's home, the parents contend that without evidence of actual abuse or neglect, evidence of a risk of abuse is not sufficient to support an endangerment finding. The court states:

The Supreme Court of Texas has made clear that, although "endanger" means "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the

child *or that the child actually suffers injury.*” (Emphasis in the original). (Citation omitted). Conduct that subjects a child to a life of uncertainty and instability also endangers the child’s physical and emotional well-being. (Citation omitted). For example, a parent’s criminal history and illegal drug usage have been held to be a sufficient basis to establish environmental endangerment and course of conduct endangerment. (Citation omitted). We note that endangerment can be exhibited by both actions and failures to act.

The caseworker testified that the home was dirty and partially without electricity, the refrigerator was not working properly, the home was without gas, and the father tested positive for and admitted to marijuana usage. Other evidence demonstrated that the mother had three felony convictions for cocaine possession, on at least one occasion had threatened suicide while intoxicated, allowed the children to play outside unsupervised while she slept, there was insufficient food to feed the children, the children were found wearing dirty clothes, the mother asked family members to watch the children for extended periods of time, and the parents demonstrated an inability to maintain stable housing or employment.

The court affirmed the trial court’s determination because, based on the evidence, “the trial court could have properly determined that [the parents’] legal and factual sufficiency issues lacked a substantial basis in law or in fact.”

***In re M.A.C., No. 09-07-405-CV, 2008 Tex. App. LEXIS 5325 (Tex. App.–Beaumont July 17, 2008, no pet.) (mem. op.)***

TEX. FAM. CODE § 263.405(b)

After a jury trial, mother’s and father’s parental rights were terminated. Less than fifteen days after the trial court’s order, mother and father filed separate notices of appeal. In the 263.405(d) hearing order, the trial court stated that appellants’ notices of appeal were timely filed. The court found both parents partially indigent and that their “appellate points [were] not frivolous.”

Neither parent filed statements of points for appeal or motions for new trial, only notices of appeal. The court did not go into an analysis of whether a notice for appeal and a statement of points could be combined. However, the court did state: “[b]ased on the language of the version of the Family Code applicable here, it appears the legislature contemplated that a party would file a separate statement of points of appeal or combine a statement of points with a motion for new trial. (Citations omitted).”

Each notice of appeal generally stated: “the evidence did not prove by clear and convincing evidence that [parents’] rights should be terminated.” Because general complaints about evidentiary sufficiency do not comply with subsection 263.405(i)’s requirement that sufficiency points be specific, the court concluded that “the general complaints about the evidence contained in appellants’ notices of appeal, even if considered as statement of points, are not ‘sufficiently specific to preserve’ issues for appellate review.”

***In re M.C. and D.K.*, No. 2-07-408-CV, 2008 Tex. App. LEXIS 4469 (Tex. App.–Fort Worth  
June 12, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE §§ 161.001 (D) and (E) – Drug Use  
Best Interest

Mother had her parental rights terminated as to her two children, M.C., and D.K. Father had his parental rights terminated as to his daughter, M.C. Both mother and father challenged the sufficiency of the evidence to support the trial court’s termination ground and best interest findings. At trial, the mother agreed that although she testified at a previous hearing that she had not used drugs for three months, she took a drug test and was “nowhere near clean”. Mother also testified that she never used drugs “around [her] kids or in front of [her] kids”, but that she “might have” been under the influence of illegal drugs while she kept her children. Mother did not complete her service plan.

The Department did not consider placing the children with father after the children’s removal because he had just been released from jail and would possibly return for a parole violation. Father stated that mother does not do drugs around her children, but “she probably has a drug problem” and she “needs help for drugs.” Father testified that he had not used any illegal drugs since his release from jail. Father has multiple convictions for delivery of a controlled substance, one conviction for possession of a controlled substance, and a misdemeanor conviction for unlawfully carrying a weapon. Father did not complete his service plan.

The court stated:

The evidence demonstrates that [mother] has engaged in a deliberate, continuing course of illegal drug use, that [mother] has a drug problem, and that [mother’s] and [father’s] acts and omissions have subjected M.C. and D.K. to a life of uncertainty and instability. ... Although [mother] testified that she never used drugs in front of M.C. and D.K., she tacitly acknowledged using illegal drugs while caring for them when she explained that she “might have” been under the influence of illegal drugs at some point when she had them.

The court held that a fact finder could reasonably form a firm belief or conviction that mother’s and father’s acts, omissions, or failures to act endangered M.C.’s and D.K.’s physical or emotional well-being given that father knew of mother’s drug use but allowed M.C. to remain in her care despite same. Father also intended to live with mother in the future.

The court found, based on the evidence, that termination of mother’s parental rights was in the children’s best interest due to her use of illegal drugs, her use of illegal drugs while caring for the children, her failure to resolve her drug problem, her leaving the children with her mother or some other person when she uses illegal drugs, and her failure to complete her service plan and demonstrate an ability to provide a stable home for the children.

The court found that the instability of father's home, his acts or omissions as a parent, and the emotional and physical danger to the children now and in the future supported the trial court's findings that termination of father's rights to M.C. was in M.C.'s best interest.

***In re M.D.*, No. 07-07-0126-CV, 2008 Tex. App. LEXIS 2252 (Tex. App.—Amarillo Mar. 28, 2008, no pet.) (mem. op.)**

Constitutionality of TEX. FAM. CODE § 263.405

The trial court terminated mother's and father's parental rights. Mother challenged the legal and factual sufficiency of the evidence supporting the statutory termination grounds and best interest determinations. She also argued that termination is improper when a parent contacts the Department for help. Father argued that Family Code subsections 263.405(b) and (i) violated his federal and state due process rights by requiring a statement of points within fifteen days of the date the trial court signs its final order. He also challenged the sufficiency of the evidence supporting the statutory termination grounds found by the trial court. The filing of a statement of points is a procedural prerequisite to the appellate court's authority to consider any issue presented. Neither parent filed a motion for new trial. Mother filed her statement of points well outside the fifteen-day period. Father did not file a statement of points. The court considered mother's and father's due process complaints because their issues were precluded from review. If possible, a court must interpret a statute in a way that renders it constitutional. The court disagreed with the due process complaints, writing: "[Mother's] appointed counsel points out that he filed a statement of points within fifteen days after receiving the reporter's record, which was necessary to develop a statement of points. He argues that the fifteen day period in which to file the statement of points from the date the trial court's order was signed violated [mother's] due process rights by 'barring her from access to the court system.' Counsel ignores the fact that he was appointed twenty-seven days prior to the statement of points being due, as well as the fact that he also served as appointed trial counsel. Regardless of when he received the reporter's record he should have been able to fully develop a timely statement of points." The court continued: "[Father's] appointed counsel maintains that the arbitrary designation of a date certain to file specific issues for appeal is unnecessary when the Legislature has granted the right to appeal. He argues that the statute promotes a system of unreasonably restricting an indigent parent's right to appeal a termination order thereby violating a parent's due process rights. Section 263.405 operates equally to indigent as well as non-indigent parents. Therefore, it does not, in and of itself, operate to restrict an indigent parent's right to appeal a termination order." Section 263.405 does not provide that a notice of appeal expressing dissatisfaction with the trial court's order is sufficient to satisfy the requirement for a timely filed statement of points. Under these facts, a procedural requirement, *i.e.* the fifteen-day deadline, does not, in and of itself, violate mother's or father's due process rights."

***Mikowski v. Tex. Dep't of Family and Protective Servs.*, No. 01-07-00011-CV, 2007 Tex. App. LEXIS 8309 (Tex. App.—Houston [1<sup>st</sup> Dist.] Oct. 18, 2007, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(O)

TEX. FAM. CODE § 263.405

## Best Interest

The jury terminated mother's and father's parental rights. On appeal, mother and father challenged the sufficiency of the evidence supporting the termination findings. Father filed his statement of points on appeal seventeen days – two days late – after the trial court signed its order of termination. The court held: "Though [father's] statement was filed only two days after the fifteen-day deadline, the plain language of Family Code section 263.405(i) precludes this Court from considering [father's] appellate issues, as draconian as this may seem." Mother filed a timely statement of points, but failed to include one issue in her statement of points. The court did not consider the issue, as it was precluded from doing so pursuant to 263.405(i), even though mother brought the issue in an untimely amended statement of points. One of the termination grounds found by the jury was 161.001(1)(O). At trial, mother admitted that she did not complete counseling, parenting classes, submit to random drug tests, or maintain suitable housing and employment. She argued, however, that she had substantially complied with her court-ordered services. Evidence of substantial compliance will not defeat a section 161.001(1)(O) ground finding. The court stated: "In support of [her] assertion, [mother] does not cite, and we cannot find, any legal authority holding that a parent's substantial compliance with court-ordered services will preclude a section 161.001(1)(O) finding." Aside from the foregoing, the court disagreed "in any event" that mother had substantially complied with her service plan. Thus, the evidence was legally and factually sufficient to support (O) ground. Regarding best interest, the Department presented evidence that mother had engaged in criminal conduct following the child's birth. Mother admitted to smoking marijuana while pregnant with the child. She engaged in domestic violence in front of the child. In addition, the child was bonded with his foster family and was doing well there. While some evidence showed that mother expressed a desire to be a good parent, "evidence cannot be read in isolation; it must be read in the context of the entire record." The evidence was sufficient to support the best interest finding.

***In re M.R. and W.M.,***  
**243 S.W.3d 807 (Tex. App.–Fort Worth 2007, no pet.)**

TEX. FAM. CODE § 104.006

TEX. FAM. CODE § 161.001(D)

TEX. FAM. CODE § 161.001(E)

Best Interest

Mother's and father's rights were terminated under 161.001(1)(D), (E), and best interest. Mother had a history of domestic violence that occurred in the presence of the children and marijuana and methamphetamine abuse. Mother failed to show up for drug tests during the case, and refused to participate in her service plan. M.R. made an outcry while in foster care about mother's drug use. The child made specific reference to mother's using drugs, smoking a pipe, and leaving M.R. in charge of the other children. Father of W.M. had been incarcerated for twenty-six months of W.M.'s thirty-six month life. Father was aware that mother sporadically lived with her parents who used illegal drugs. Mother complained about the admission of the child's hearsay outcry statements (claiming that they were unreliable) and the sufficiency of the evidence. Father complained about the sufficiency of the evidence relative to him. The Fort Worth Court of Appeals affirmed the trial court's termination of both parents. The court

concluded that the child’s outcry statements were admissible under Family Code section 104.006 because both mother and foster mother stated that M.R. is adamant about telling the truth and mother admitted that the child witnessed other people doing drugs at maternal grandparent’s house. Mother invoked her Fifth Amendment privilege when asked about her use of drugs. Based upon the history of both parents indicated above, the court found the evidence to be factually sufficient to support termination of both parents’ rights.

***In re N.L.G.,***  
**238 S.W.3d 828 (Tex. App.–Fort Worth 2007, no pet.)**

TEX. FAM. CODE § 102.004 – Foster Parent Intervention and Substantial Past Contact

Mother complained that the trial court erred in allowing the foster parents to intervene. Foster parents, as intervenors, have two avenues to the courthouse. First, they can bring an original suit affecting parent child relationship if the child has lived in their home “for at least [twelve] months ending not more than [ninety] days preceding the date of the filing of the petition.” The second avenue, which applies to the case at bar, allows foster parents to intervene in a suit affecting the parent-child relationship brought by someone with standing if they can demonstrate that they have had substantial past contact with the child. Since *Mendez*, the Legislature has passed 102.004, which creates the requirement for substantial past contact. Even though the substantial past contact standard may be more relaxed than the “justiciable interest” standard, there still must be substantial past contact in order for a party to properly intervene. The court held: “On appeal, [appellant] relies heavily on the *Mendez* case for its precedential value. As demonstrated, however, such reliance is misplaced because the Texas Legislature has repealed and replaced the statute relied on in *Mendez* with a statute specifically addressing the standing requirements for intervenors in a suit affecting the parent-child relationship.” The evidence was sufficient to show substantial past contact between the foster parents and the child as the child had been placed with the foster parents for seventeen months. The trial court did not abuse its discretion in allowing the intervention.

***In re R.M., W.L., and C.L., No.04-07-00048-CV, 2007 Tex. App. LEXIS 7984 (Tex. App.–***  
***San Antonio July 11, 2007, pet. denied) (mem. op.)***

TEX FAM. CODE § 263.405(i)

Father failed to file a motion for new trial or statement of points on appeal. The single issue on appeal was whether counsel was ineffective for failing to file a statement of points. The San Antonio Court held that although the application of 263.405(i) to claims of ineffective assistance of counsel for failure to file a statement of points is harsh, it was precluded from considering the issue on appeal as the issue itself did not appear in a timely filed statement of points.

***In re S.K.A., M.A., and S.A.,***  
**236 S.W.3d 875 (Tex. App.–Texarkana 2007, pet. denied)**

TEX FAM. CODE § 263.405(i)

TEX FAM. CODE § 263.307(b)(12) – statutory provision for best interest

TEX FAM. CODE § 161.001(1)(D), (E), (N)  
TEX FAM. CODE § 109.002  
TEX FAM. CODE § 107.013(a)(1)  
TEX R. CIV. P. 239  
TEX R. CIV. P. 93  
TEX. CONST. Art. II, § 1  
Best Interest

A default judgment was entered against father who was incarcerated in Mississippi. Father had requested the appointment of appellate counsel, but was not appointed counsel until after the deadline for filing his statement of points had passed.

- February 15, 2006 – Father is served with citation.
- February 17, 2006 – Father is not at adversary hearing but judge noted that he called court coordinator.
- July 11, 2006 – Court orders termination trial set for December 11, 2006.
- September 5, 2006 – Department attorney (A.D.A.) sent notice of trial setting to father in Mississippi prison. Letter was returned due to father being held at other unit;
- October 8, 2006 – Second notice sent to father in prison. Father responded by sending letter to A.D.A., not District Clerk, seeking postponement. (This letter was not brought to the court’s attention until the default hearing of December 11, 2006);
- October 13, 2006 – A.D.A. responds to father’s letter indicating that he would not agree to postponement and intended to request termination;
- November 16, 2008 – A.D.A. send notice to father of November 28<sup>th</sup> pretrial hearing and December 11<sup>th</sup> trial setting;
- December 1, 2006 – Father’s sworn and notarized letter dated November 21, 2006, requesting court appointed counsel, seeking postponement, noting his incarceration, and rebutting allegations in the Department’s petition, is postmarked December 1, 2006. Letter is addressed to “court clerk” but addressed to the A.D.A’s suite number;
- December 11, 2006 – Default judgment entered against father on grounds (D), (E), (N) and best interest. (9:40 – 10:45 a.m.);
- December 11, 2006 – Judge receives father’s letter at 1:30 p.m. Judge treats as request for continuance and for appointment of appellate counsel;
- January 2 or 3 , 2007 – Judge signs order appointing counsel. Counsel not notified until the afternoon of January 3, 2007;
- January 3, 2007 – Father’s counsel files “points for appeal,” motion for new trial, and motion to set aside default judgment; and
- January 4, 2007 – Judge found father indigent, denied motion for new trial, and found appeal “nonfrivolous.”

On appeal, father asserts that Family Code section 263.405(d) is unconstitutional facially and as applied. The facial attack was based upon his complaint that the statute reserves the frivolous finding to the trial court instead of the appellate court. In light of the fact that the trial court ruled that father’s appeal **was not** frivolous, the appellate court considered it to be a request for an advisory opinion and did not address it. The appellate court then turned to the “as applied” analysis, finding that it had been preserved for appellate review because it was raised at the trial

level in the motion for new trial. The appellate court found that the “express purpose” of the statute was to eliminate frivolous appeals in termination cases, reduce associated costs, and dispose of appeals “with the least possible delay.” The appellate court further found that the statute was not to bar appeals that raise meritorious complaints or to prevent appellate courts from considering meaningful appeals. Viewing the fundamental liberty interest implicated in parental-rights termination cases, and the fundamental right to counsel, the Texarkana Court embarked upon a *Matthews v. Eldridge* analysis of father’s constitutional claim. The court decided that the State’s interest in judicial economy by allowing trial courts to correct errors pales in comparison to the private interest at stake in erroneously depriving a parent of his or her parental rights and the child’s right to parental companionship. Regarding father, the appellate court viewed the State’s interest in maintaining procedural integrity as less compelling than the delay in appointing father counsel during a critical period. In sum, the risk of an erroneous decision in a case where an indigent father, who timely and properly requested appointment of counsel but was not appointed counsel until after the deadline for filing a statement of points, was too high. The court concluded that appointment of counsel after the critical deadline had passed was a “meaningless ritual” and held that the statute was unconstitutional as applied to father.

The Texarkana Court then proceeded to review the substantive appeal. Father argues that his October 8, 2006, letter was a pre-default answer. The court rejected that claim, indicating that it had never been filed with the trial court. Father then asserts that his December 1, 2006, letter was a pre-default answer relying on the mail box rule. The court also rejected that claim, finding that the mail box rule only applies to filings with a specific deadline. Although an original answer has a deadline (TEX. R. CIV. P. 93), a pre-default answer can be filed anytime before the hearing. Therefore, the mail box rule does not apply. Having filed no answer in the case, the court did not address the issue of a continuance. Father next complains that the trial court committed reversible error by failing to appoint him counsel pre-default. The court disagreed, explaining that father failed to show harm other than the constitutional claim that was already addressed. Father contended that he was denied access to the courts. The court rejected that argument on the basis that father never requested a bench warrant, and the trial court has no duty, *sua sponte*, to bench warrant an incarcerated person to court. The incarcerated person bears the burden to establish his right to relief. Finally, the court analyzed father’s motion for new trial under *Craddock*. First, father urges that his failure to appear was not intentional or the result of conscious indifference, but was due to accident or mistake. Second, father had a meritorious defense. Third, the motion will not cause delay. The court observed that father’s letters to the district attorney started after the goal changed from reunification to termination. The court viewed that as the reason for his not having filed an answer in the case, not a mistake. Further, the court found that father offered no evidence or affidavit at the hearing on motion for new trial that his failure to file an answer was due to mistake and not conscious indifference. Next, the court reviewed the sufficiency of evidence supporting termination grounds (D), (E), (N), and best interest. The evidence showed that father, after having notice of the termination proceedings, and in violation of the terms of his pre-release for possession of precursors with intent to manufacture methamphetamine, did a line of white powder while in prison. Father had a history of domestic violence, a history of drug use, and a violent outburst when he made his one attempt to visit the children during the pendency of the CPS case. Father had an extensive criminal history aside from the methamphetamine case, including a burglary conviction and revocation in

Gregg County, and another burglary conviction in Rusk County. Father never demonstrated outside of his periods of incarceration that he had the parenting skills necessary to meet the minimum needs of his children. The trial court's judgment was affirmed.

***In re S.L.M.*, No. 04-07-00566-CV, 2008 Tex. App. LEXIS 4488 (Tex. App.–San Antonio June 18, 2008, pet. denied) (mem. op.)**

TEX FAM. CODE § 102.004(b)

TEX FAM. CODE § 102.0045

TEX FAM. CODE § 153.551

TEX FAM. CODE § 153.552

Mother's parental rights were terminated. S.L.M.'s foster parents, who had possession of the child since the date of removal, petitioned for adoption. On the same day as the adoption petition was filed, the foster parents of S.L.M.'s half-sibling filed a petition in intervention seeking appointment as S.L.M.'s sole managing conservator. The trial court struck the intervention on the basis of the intervenors lack of standing. Family Code section 102.004(b) allows other persons to intervene in a SAPCR where parental rights have been terminated if they have past substantial contact with the child. In this case, intervenors did not meet the standing requirements of Family Code 102.004(b). The appellate court could not conclude that the intervenors had past substantial contact with the child. The intervenors next argued that they have an equitable right of intervention. This argument was rejected. The court cannot confer jurisdiction where none exists. The trial court did not abuse its discretion in not granting sibling access. The Family Code only permits a sibling eighteen years of age or older to seek sibling access. A suit for access cannot be brought by a conservator on the child's behalf. Further, the evidence showed that the parties were antagonistic and visits between the children were less than ideal.

***Smith v. Tex. Dep't of Family & Protective Servs.*, No. 01-07-00648-CV, 2008 Tex. App. LEXIS 4568 (Tex. App.–Houston [1<sup>st</sup> Dist.] June 19, 2008, no pet.) (mem. op.)**

TEX. FAM. CODE § 161.001(1)(E)

TEX. FAM. CODE § 161.001(1)(Q)

- Two Year Time Period Applied From Date Petition Includes (Q) Ground
- Burden Not on Department to Show Affirmative Measures to Request Placement Options from an Incarcerated Parent
- Knowledge of Children at Time of Criminal Conduct Not Prerequisite to Termination Under (Q)

Best Interest – (Q) Ground Finding and Criminal Conduct

The Department filed a petition initiating termination proceedings and seeking temporary custody of the children six days after they were born due to their testing positive for marijuana. DFPS sought to terminate the parental rights of Mother and the children's "unknown father". The Department amended its petition naming Father based on a report that the father, whose identity was unknown, was incarcerated. The trial court signed a judgment terminating Mother's

and Father's parental rights under 161.001(1)(N) and best interest. The trial court granted Father a new trial.

At the conclusion of the termination proceedings, the trial court terminated Father's parental rights pursuant to 161.001(1)(E), (Q), and best interest. Father challenges the legal and factual sufficiency of the termination grounds and the best interest finding.

Section 161.001(1)(Q) is applied prospectively. In a footnote, the court stated that it used the date that the petition was **amended to include 161.001(1)(Q)** in its analysis of the two year requirement. Father argued that the evidence was insufficient because he could possibly be paroled before the expiration of the required 161.001(1)(Q) time period. The court states that the Supreme Court has already explained that "[m]ere introduction of parole-related evidence ... does not prevent a factfinder from forming a firm conviction or belief that the parent will remain incarcerated for at least two years." (Citation omitted).

Father also argued that the Department failed to offer sufficient evidence to show his inability to care for the children. The court stated "factors to be considered when deciding inability to care include the availability of financial and emotional support from the incarcerated parent." Father, since learning that he was the children's biological father, made no attempt to assist them financially, or to contact them, either directly or through a family member. Father did not notify the Department of any relatives who could care for the children. Instead, he implied that it was the Department's burden to show that it had asked him for the names of relatives who could care for the children. The court held: "[r]equiring DFPS to prove that it had affirmatively asked [Father] for the names of persons who could care for the children while he was incarcerated would not be reasonable." Father read 161.001(Q) to require a showing that he knew that he was the children's father before he committed the criminal conduct that resulted in his inability to care for his children. The court held: "[s]ubsection Q cannot be reasonably read to require a showing that the parent knew he was the child's parent at the time he engaged in the criminal conduct."

In applying the *Holley* factors, the court stated that the evidence used to support the 161.001(1)(Q) determination was "also probative of whether termination of [Father's] parental rights is in the twin's [sic] best interest" as is the fact that "the evidence showed that [Father] has an extensive criminal history spanning more than 30 years."

Father points out that the evidence shows his paternity had been confirmed only for a short time, thus preventing him from demonstrating his abilities to provide adequate care and a suitable home for the children. The court stated:

We note that the evidence showed that paternity was confirmed four months before trial. We also note, however, that nothing in the record indicates that [Father] made any efforts during that time to demonstrate a desire or an ability to be a parent to the children. In sum, the record contains some evidence showing that [Father] expresses a desire to be a parent to the twins and demonstrating that he has given some thought regarding how he would care for the twins.

Nonetheless, evidence cannot be read in isolation; it must be read in the context of the entire record.

The court affirmed the termination of Father's parental rights.

***In re S.R., J.R., and B.R.*, No. 2-07-454-CV, 2008 Tex. App. LEXIS 4146 (Tex. App.–Fort Worth June 5, 2008, no pet.) (mem. op.)**

Best Interest

The trial court terminated mother's parental rights under § 161.001(1)(D), (O), and best interest. Mother only appealed the trial court's best interest finding. The Department's investigation began after it received a referral alleging neglectful supervision, physical abuse, and sexual abuse of the children. At the initial investigation, mother's home was "deplorable" as it was roach infested, had only enough electricity to run the television, had toilets that were unsanitary and could not be flushed, and trash and unwashed dishes piled in the kitchen. Large holes in the floor were covered by road signs. The children were removed, but later returned after mother cleaned her home. The children were re-removed a few weeks later when mother essentially abandoned the children, leaving them with relatives in conditions similar to the initial removal. The children were placed with relatives where mother visited sporadically and did not financially support them. Mother did not comply with the service plan and did not make her residence appropriate. The children's therapist testified to the children's various issues, including feces smearing and sexual acting out. The therapist believed that it was not in the children's best interest to return to mother. A home study was performed on mother's sister that returned a negative finding.

Applying the *Holley* factors, the Fort Worth Court found the evidence legally and factually sufficient to support the trial court's finding of best interest. Although some of the children wanted to remain away from mother and others wanted to return to her, the remaining evidence supported termination. Mother had an unhealthy residence and frequent job and residence changes. Mother left the children in dangerous situations. Mother's sister was not an appropriate placement as she lived in mother's original residence where the children were removed from. The children had emotional problems, had made outcry statements of sexual abuse, and one of the children had acted out sexually. Mother also failed to complete her service plan and visited the children sporadically. The appellate court affirmed the trial court's judgment of termination.

***In re X.P.*, No. 2-06-339-CV, 2008 Tex. App. LEXIS 6441 (Tex. App.--Fort Worth Aug. 21, 2008, no pet.) (mem. op.)**

TEX FAM. CODE § 161.001(1)(K)

TEX FAM. CODE § 161.003

TEX FAM. CODE § 263.405

Ineffective assistance of counsel

Appellant challenged the trial court's frivolousness determination, contending that he received ineffective or no assistance of counsel after the termination trial because trial counsel withdrew

from representation without filing a statement of points and did not undertake any investigation of the facts supporting a contest to the voluntariness of his execution of an Affidavit of Relinquishment. In addition, appellant contended that the trial court abused its discretion in finding any appeal from the termination order frivolous. Appellant also contended that Family Code sections 263.405(b)(2), 263.405(d)(3), and 263.405(g) violate the separation of powers doctrine to the extent they prevent him from raising his ineffective assistance claim for the first time on appeal. Appellant did not complain that the Affidavit of Relinquishment was involuntary until May 16, 2007, when he filed a motion for enforcement of the trial court's order that he be bench warranted, in which he stated he was "misled into believing that if he would relinquish his parental rights, he would have limited access to his son." The court found no basis for father's ineffective assistance of counsel claim. The Fort Worth Court of Appeals held that, even assuming trial counsel's performance was deficient, appellant was not prejudiced by his trial counsel's conduct. The termination order was supported by uncontroverted testimony that appellant voluntarily executed the Affidavit, and that he thought adoption was "the best place" for X.P. The evidence clearly and convincingly established that the Affidavit of Relinquishment was executed in compliance with the statutory requirements of section 161.103 of the Family Code. *Note that an affiant's unhappiness surrounding his execution of the affidavit of relinquishment does not amount to fraud, duress, or coercion.*