Termination Case Law Update

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APPELLATE RECORD – TFC § 263.405(f)

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APPELLATE TIMELINES

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**J.A.P., P.E.P., and S.J.S., In re* (10th COA)

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**M.A., In re* (14th COA)

Extension of Time – TRAP 26.3

Pool v. TDFPS (1st COA)

Deadline for Filing Motion to Extend Time – TRAP 10.5

**M.A., In re* (14th COA)

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Doe v. Brazoria County Child Protective Services (1st COA)

**M.A., In re* (14th COA)

Time for Perfecting Appeal May Not Be Extended

C.J.C., A.M.M.C., K.L.D.C., C.M.G., S.B.G., and C.J.G., In re (12th COA)

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N.L.G., In re (6th COA)

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Abuse of Discretion Standard of Review

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***Anders* Brief**

**P.A.M., G.M., and E.R., In re* (4th COA)
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R.A., A.P., I.A., J.G., C.V., R.V., and J.V., In re (4th COA)

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Good Faith Effort to Perfect, Motion for New Trial Does Not Constitute
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Earvin v. TDFPS (1st COA)
E.A.W.S., In re (2nd COA)
H.G.H., In re (14th COA)
J.A., In re (2nd COA)
J.A.J., In re (14th COA)
J.E.D., In re (2nd COA)
M.J. and A.M., (9th COA)
M.J.F., In re (6th COA)
M.L.M., In re (7th COA)
Preece v. TDFPS (3rd COA)
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Ruiz v. TDFPS (1st COA)
Shaw v. TDFPS (3rd COA)
S.K. and S.K., In re (5th COA)

Toliver v. TDFPS (1st COA)
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E.J.W., C.L.W., and D.G.G., In re (4th COA)
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J.F.R., J.B.R., J.A.C.R., and J.C., In re (9th COA)
N.L.G., In re (6th COA)
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Statement of Points Not Filed Timely
**M.N., In re* (11th COA)
R.C. and R.C.C., Jr., In re (7th COA)

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Cisneros v. TDFPS (13th COA)
E.A.R., E.A.R., and I.D.A., In re (10th COA)
E.J.W., C.L.W., and D.G.G., In re (4th COA)
H.H.H. and E.A.H., In re (6th COA)
J.F.R., J.B.R., J.A.C.R., and J.C., In re (9th COA)
J.H., In re (12th COA)
K.R., K.P., Jr., K.P. and J.R., In re (9th COA)
**M.D., In re* (5th COA)
N.L.G., In re (6th COA)
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S.C., In re (6th COA)

Record Must Affirmatively Demonstrate Ineffectiveness

**B.S., D.R.S., and P.W.S., In re* (9th COA)

Timing of Appointment of Counsel

J.P.B., In re (S Ct)

Waiver of Constitutional Claim

J.F.R., J.B.R., J.A.C.R., and J.C., In re (9th COA)

V. INEFFECTIVE ASSISTANCE OF COUNSEL

SPECIFIC COMPLAINTS OF INEFFECTIVE ASSISTANCE

Attorney Unable to Participate

A.S.J., E.D.J., R.M.J., and T.J., (4th COA)

Clear and Convincing Burden of Proof Not Explained to Jury

H.R.M., In re (S Ct)

Failure to File Admission or Counterclaim of Paternity

A.H. and V.H., In re (2nd COA)
D.D.S., In re (2nd COA)

Failure to File Statement of Points on Appeal

Doe v. Brazoria County Child Protective Services (3rd COA)
K.R., K.P., Jr., K.P. and J.R., In re (9th COA)

Failure to File Written, Sworn Motion for Continuance

A.H. and V.H., In re (2nd COA)

Failure to Move for Mistrial after Improper Comment

H.R.M., In re (S Ct)

Failure to Perfect Appeal

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**B.S., D.R.S., and P.W.S., In re* (9th COA)
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Failure to Obtain Ruling on Pre-Trial Motion
S.A.C., In re (2nd COA)
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H.R.M., In re (S Ct)
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Failure to Request Extension of Dismissal Date
A.H. and V.H., In re (2nd COA)
Failure to Strike Juror in Voir Dire After Answer Unclear
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**B.S., D.R.S., and P.W.S., In re* (9th COA)
Short Voir Dire with Few Questions
H.R.M., In re (S Ct)
Statement by Counsel Tantamount to Admission of Ignorance of the Law
H.R.M., In re (S Ct)

SUPREME COURT CASES

INTERMEDIATE COURT CASES

SUPREME COURT CASES

In re H.R.M.
209 S.W.3d 105 (Tex. 2006)

Construing: TEX. FAM. CODE § 161.001(1)(Q)
Factual and Legal Sufficiency
Ineffective Assistance of Counsel
Jurisdiction

Procedural History: The jury returned a verdict of termination which the trial court entered. The Fourteenth Court of Appeals reversed, finding that the remaining time on a parent's prison sentence was insufficient evidence from which a fact finder could reasonably form a "firm belief or conviction" that the parent would be confined for at least two years. The Texas Supreme Court reversed and remanded.

Facts: Keith and Stacy were the biological parents of H.R.M. Following divorce in 2001, Stacy was named H.R.M.'s sole managing conservator. Keith was possessory conservator with supervised visitation. Beginning in 2002, Keith was incarcerated on concurrent sentences for robbery and enticing a child. In 2004 Stacy married James. Together they filed a petition to terminate Keith's parental rights and allow James to adopt H.R.M. After entering the jury's termination finding, the trial court denied Keith's motion for new trial. Appeal followed.

Issues Presented: The Texas Supreme Court addressed the following issues: (1) whether the Court of Appeals misapplied the standard of review in finding insufficient evidence to support termination under § 161.001(1)(Q); and (2) whether Keith's counsel was ineffective.

Texas Supreme Court's Reasoning and Conclusions:

(1) § 161.001(1)(Q) Explained: Section 161.001(1)(Q) applies prospectively. The Court recognized that in some cases neither the length of the sentence nor the projected release date is dispositive of when the individual will be released. A parent sentenced to more than two years could be paroled, making evidence of the availability of parole relevant. However, mere introduction of evidence does not prevent a factfinder from forming a firm belief or conviction that the parent will remain incarcerated for two years. Parole decisions are inherently speculative. If the mere possibility of parole prevents a jury from forming a firm belief or conviction that a parent will remain incarcerated for at least two years, then termination under § 161.001(1)(Q) would occur only where there is no possibility of parole. As such, the movant would have to show that there is zero possibility of parole. This would impermissibly elevate the burden of proof from clear and convincing to beyond a reasonable doubt.

(2) Factual and Legal Sufficiency; the Court of Appeals Misapplied the Standard of Review: A court of appeals must give due deference to a jury's fac tfindings in reviewing termination findings for factual sufficiency. The court should inquire "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the allegations." *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasona-

bly have formed a firm belief or conviction, then the evidence is factually insufficient." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). The appellate court's review must not be so "rigorous" that the only fact-findings withstand review are those established beyond a reasonable doubt.

The court of appeals concluded that the jury could not have formed a firm belief that Keith would remain incarcerated for two years because he testified that he would be up for parole each year and was participating in a parole eligibility program available to inmates who were within two years of parole. This was incorrect. The jury, as factfinder, is the sole arbiter of assessing the credibility and demeanor of witnesses. The jury was free to disregard Keith's testimony which was "barely more than conjecture." The evidence showed that Keith had multiple convictions and sentences. The evidence showed that Keith had been on parole for robbery which was revoked due to a conviction of enticing a child. He received a seven year sentence on the enticing conviction and had thirteen years left on the robbery conviction. Keith admitted that he had been denied parole twice and his parole was "up to the parole board." The court of appeals did not weigh all of the evidence and did not fully account for evidence that supported the jury's verdict, nor did it give due deference to the jury's factfindings. It focused only on one pertinent factor and substituted its judgment for that of the jury.

Keith also argued that the evidence was factually insufficient to support the trial court's finding that he would be unable to care for H.R.M. for at least two years. § 161.001(1)(Q) requires two findings: that the parent be both incarcerated or confined *and* that they be unable to care for the child for at least two years from the filing of the termination petition. Evidence was heard regarding Keith's failure to support H.R.M. financially. Keith also presented evidence that he wrote H.R.M. a few letters and that Keith's mother would care for H.R.M. *The Court remanded this argument as it does not have jurisdiction to conduct a factual sufficiency review.*

The Court did address Keith's alternate argument as it presented a question of law. Keith argued that he provided care for H.R.M. by leaving him with Stacy. The Court found the argument "meritless" under the particular facts. Absent evidence that the non-incarcerated parent agreed to care for the child on behalf of the incarcerated parent, merely leaving a child with the non-incarcerated parent does not constitute the ability to care. If it did, then § 161.001(1)(Q) would never apply where there is a non-incarcerated parent willing to care for the child. Stacy, as sole managing conservator, had both the obligations and statutory rights of a parent. It does not follow that an incarcerated parent's obligations are met by allowing the sole managing conservator to be the exclusive caregiver. Stacy's actions of caring for H.R.M. and remaining in contact with Keith did not establish that she agreed to care for H.R.M.

(3) <u>Ineffective Assistance of Counsel</u>: Keith finally argued that his counsel was ineffective as: 1) there was a short voir dire with few questions; 2) one juror should have been struck as his answer of "uh-huh" was unclear; 3) a particular statement of counsel was tantamount to an admission that he did not know the law; 4) the clear and convincing burden was in the charge but nobody explained it to the jury; 5) counsel did not further question a juror who stated that he did not think he could terminate parental rights; 6) counsel did not object when opposing counsel discussed subsection Q in voir dire; and 7) counsel failed to preserve error by not moving for a mistrial after the judge instructed the jury to disregard opposing counsel's comment that Keith had been convicted of sexually abusing a female. Proving ineffective assistance of counsel requires a showing that: 1) counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment, and 2) the deficient performance prejudiced the defense, which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. The Court found that none of the assertions, when taking into account the circumstances surrounding the case, overcame the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Keith failed to show that counsel's alleged deficiencies prejudiced the case, deprived him of a fair trial, or produced an unreliable result.

In re J.P.B.
180 S.W.3d 570 (Tex. 2005)

Construing: TEX. FAM. CODE § 161.001(1)(D)
TEX. R. EVID. 901(a) – Authentication of X-Rays
Credibility of Testimony, Fact Finder Determines
Legal Sufficiency Review in Parental Termination Case
Ineffective Assistance of Counsel – Failure to Preserve Legal-Sufficiency Point
Ineffective Assistance of Counsel – Timing of Appointment of Counsel

Procedural History: The jury found by clear and convincing evidence that Lonnie knowingly placed or knowingly allowed J.P.B. to remain in conditions or surroundings that endangered his physical or emotional well-being and also terminated Esmeralda's parental rights to J.P.B. The Second Court of Appeals concluded no evidence supported the judgment against Lonnie, reversed the judgment, and rendered judgment restoring Lonnie's parental rights. The Second Court of Appeals affirmed the termination of Esmeralda's parental rights. The Texas Supreme Court found there was legally-sufficient evidence to support the jury's finding as to Lonnie, reversed the Second Court of Appeals' judgment, and remanded the case to the Second Court of Appeals to consider Lonnie's factual-sufficiency complaint. The Texas Supreme Court affirmed the Second Court of Appeals' judgment as to Esmeralda.

Facts: J.P.B. was born seven weeks premature on April 25, 2002. After J.P.B. was released from the hospital on May 21, 2002, Esmeralda cared for him at home while Lonnie worked at an airplane parts manufacturer. In early July 2002, Lonnie and Esmeralda took J.P.B. to the emergency room on two occasions due to concerns about his constant crying and swollen leg. J.P.B. was admitted to the hospital on July 7, 2002 and released eight days later with a diagnosis of muscle inflammation. At a July 19, 2002 follow-up appointment, J.P.B.'s skeletal x-ray revealed twenty-one fractures – ranging from one to four weeks in age – in his ribs, arms, and legs.

Lonnie took J.P.B. to either a doctor's office or hospital eight times between May 23, 2002 and July 19, 2002; J.P.B.'s fractures were not diagnosed until the eighth visit. Although J.P.B. was x-rayed on July 7, 2002, no fractures were diagnosed at that time. Although J.P.B. was hospitalized from July 7 to July 15, 2002, his fractures were not diagnosed until a July 19, 2002 follow-up appointment.

Lonnie and Esmeralda shared in J.P.B.'s care, and no other person served as J.P.B.'s primary caregiver. The July 7, 2002 x-ray revealed that J.P.B. had rib fractures that likely occurred between July 5, 2002 and July 7, 2002. Lonnie and Esmeralda were home alone with J.P.B. on those dates. The twenty-one fractures detected in the July 19, 2002 skeletal survey were approximately one to four weeks old. Expert testimony established (1) J.P.B.'s injuries were likely caused by excessive force such as abrupt yanking, pulling, or punching, and were probably not the result of J.P.B.'s medical care; (2) a parent should have known that something was wrong with a child with such injuries; and (3) the parents should have noticed high-pitched screams from J.P.B. due to the fractures.

Issues Presented: Texas Supreme Court addressed four issues: (1) whether there was legally sufficient evidence to support the jury's finding that Lonnie's parental rights should be terminated; (2) whether there was legally sufficient evidence to support the jury's finding that Esmeralda's parental rights should be terminated; (3) whether Esmeralda was denied effective assistance of counsel; and (4) whether the trial court improperly admitted x-ray evidence.

Texas Supreme Court's Reasoning and Conclusions:

(1) <u>Legal Sufficiency Review in Parental Termination Case</u>: In conducting a legal sufficiency review in a parental termination case, the reviewing court must consider all of the evidence, not just that which favors the verdict. However, "witness credibility issues 'that depend on appearance and demeanor cannot be weighed by the appellate court; the witnesses are not present. And even when credibility issues

are reflected in the written transcript, the appellate court must defer to the jury's determinations, at least so long as those determinations are not themselves unreasonable.' " The reviewing court also must consider undisputed evidence that does not support the jury finding.

(2) Credibility of Testimony, Fact Finder Determines: Witness credibility issues "that depend on appearance and demeanor cannot be weighed by the appellate court; the witnesses are not present. And even when credibility issues are reflected in the written transcript, the appellate court must defer to the jury's determinations, at least so long as those determinations are not themselves unreasonable.' " It is within the jury's province to judge Lonnie's demeanor and disbelieve his testimony that he did not know how J.P.B. was injured.

(3) Lonnie Knowingly Placed or Allowed J.P.B. to Remain in Endangering Conditions or Surroundings: Texas Supreme Court concluded there was legally sufficient evidence for a reasonable fact finder to form a firm belief or conviction that Lonnie knowing placed or knowingly allowed J.P.B. to remain in conditions or surroundings that endangered his well-being:

> While it is true that Lonnie sought medical care for J.P.B. multiple times and that J.P.B.'s doctors initially failed to diagnose the fractures, that evidence does not negate the jury's finding that Lonnie knowingly permitted J.P.B. to remain in a setting that was dangerous to his physical well-being. Lonnie was with J.P.B. and Esmeralda every day of the four-week period during which the fractures likely occurred; J.P.B.'s doctors were not. There was evidence that J.P.B. sustained twenty-one fractures during a time when he was under Lonnie's care, and those fractures were likely caused by such abusive treatment as yanking, pulling, or punching. The evidence also indicated that the fractures did not occur all at once and were the result of ongoing mistreatment. In light of this evidence, a reasonable jury could infer that, even though Lonnie sought medical treatment for J.P.B., he nevertheless allowed the child to remain in conditions or surroundings that endangered his physical well-being. While Lonnie may have reacted appropriately to symptoms of abuse, the evidence supports a finding that he knowingly failed to ameliorate the underlying cause.

(4) Ineffective Assistance of Counsel – Failure to Preserve Legal-Sufficiency Point: Texas Supreme Court previously has held the court of appeals may review the factual sufficiency of the evidence in parental termination case – even if a party failed to preserve error in the trial court – if the parent's counsel unjustifiably failed to preserve error. However, the Texas Supreme Court has "not extended this rule to the preservation of 'no evidence' points". The Texas Supreme Court held that Esmeralda did not demonstrate that her counsel unjustifiably failed to preserve the "no evidence" issue, noting that it is reasonable to presume that her counsel's decision not to raise a "no evidence" point was based either on litigation strategy or on her counsel's belief that, in his professional opinion, the evidence was legally sufficient and preservation of error was not warranted.

(5) Ineffective Assistance of Counsel – Timing of Appointment of Counsel: Texas Supreme Court rejected Esmeralda's argument that she was denied effective assistance of counsel because her trial attorney was appointed less than thirty days prior to trial. Esmeralda failed to show her counsel's performance was deficient and that this deficiency prejudiced her case. Counsel participated fully in all aspects of her defense, including objecting to the admission of evidence, cross-examining witnesses, and submitting a proposed jury charge. Esmeralda failed to set out any specific evidence she could have produced to contradict CPS's witnesses if her attorney had been given additional time to prepare.

(6) Admission of X-Rays into Evidence: Authentication as a condition precedent to admissibility may be satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." TRE 901(a). The Texas Supreme Court rejected Esmeralda's argument the trial court erred in admitting the x-ray evidence without proper authentication because the x-rays were printed from a computer program that allowed alteration of the image. A radiologist who worked at the hospital at which the x-rays were taken testified that while the computer program could be used to crop the x-ray or adjust the brightness and contrast of the image, it could not add to or otherwise alter the x-ray.

In re K.M.S.
91 S.W.3d 331 (Tex. 2002)

Discussing: Binding Authority of Texas Supreme Court Pronouncements

Procedural History: In a suit to establish paternity, Gernenz sought to set aside a prior order adjudicating Smith to be the father of K.M.S. The trial court refused to set aside the order. The appellate court reversed the trial court's judgment, concluding Smith's failure to give notice and serve citation on Gernenz in an earlier paternity suit violated Gernenz's constitutional right to due process. *See In re K.M.S.*, 68 S.W.3d 61 (Tex. App.–Dallas 2001, pet. denied). Smith filed a petition for review with the Texas Supreme Court. The Texas Supreme Court issued a per curiam opinion denying Smith's petition for review.

Texas Supreme Court's Reasoning and Conclusions: Texas Supreme Court noted in its per curiam opinion that the Fifth Court of Appeals "declined to follow" Texas Supreme Court precedent interpreting various provisions of the Texas Family Code. The Texas Supreme Court remarked that although the Fifth Court of Appeals' refusal to follow Supreme Court precedent did not affect the disposition of this case, "[n]evertheless, in reaching their conclusions, courts of appeals are not free to disregard pronouncements from this Court, as did the court of appeals here."

In re L.S.R.
92 S.W.3d 529 (Tex. 2002)

Construing: TEX. FAM. CODE § 161.001(1)(L)(iv) – Deferred Adjudication Supports Ground
TEX. FAM. CODE § 161.001(1)(L)(iv) – Indecency with Child Serious Injury

Procedural History: The jury returned a verdict terminating both parents' rights to their daughter, L.S.R., finding that the evidence supported termination under § 161.001(1)(D) and (E) and § 161.003. The jury additionally found clear and convincing evidence on ground (L) against father. The Second Court of Appeals deleted the (L) ground on father but otherwise affirmed the judgment of termination as to both parents. *See In re L.S.R.*, 60 S.W.3d 376 (Tex. App.–Fort Worth 2001, pet. denied). The Texas Supreme Court issued a per curiam opinion denying the parents' petitions for review.

Facts: CPS presented evidence at trial showing father had received deferred adjudication for the offense of indecency against his four-year-old cousin when he was sixteen. The Second Court of Appeals held no evidence existed to support termination under § 161.001(1)(L)(iv) because there had been "no showing" that father's cousin "suffered death or serious injury as a result of his conduct."

Texas Supreme Court's Reasoning and Conclusions: Texas Supreme Court stated in its per curiam opinion, "We deny the petitions for review, but disavow any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury."

Comments: The pronouncement in this opinion calls into question the reasoning used and conclusions reached by the Second Court of Appeals in *In re L.S.R.*, 60 S.W.3d 376 (Tex. App.–Fort Worth 2001, pet. denied) and the Seventh Court of Appeals in *Vidaurri v. Ensey*, 60 S.W.3d 142, 146 (Tex. App.–Amarillo 2001, no pet.) ("premise that serious injury must automatically be inferred from the mere commission of indecency with a child fails to survive reasonable analysis") with regard to the (L) ground.[2]

[2] Courts of appeals "are not free to disregard pronouncements" from the Texas Supreme Court. *In re K.M.S.*, 91 S.W.3d 331 (Tex. 2002).

In re R.R.
209 S.W.3d 112 (Tex. 2006)

Construing: TEX. FAM. CODE § 153.131(b) – Presumption of Child Placed With Parent
TEX. FAM. CODE § 161.001(2) – Meritorious Defense to Best Interest
Denial of Motion for New Trial

Procedural History: The trial court entered a default judgment terminating the parental rights of Rodgers and the children's fathers. After being notified of the termination, Rodgers, through appointed counsel, moved for a new trial. The trial court denied her motion. The Fifth Court of Appeals affirmed. The Texas Supreme Court reversed.

Facts: After Rodgers was jailed on August 31, 2004, CPS took custody of her son R.R. Rodgers was pregnant at the time. CPS filed a SAPCR seeking TMC of R.R. Rodgers gave birth to S.J.S. while incarcerated. CPS took custody of S.J.S. and filed an amended petition seeking termination on both children as to Rodgers and the fathers. Rodgers testified that she received all petitions in the matter.

On May 20, 2005, the trial court held a hearing and entered a default judgment of termination against Rodgers and the fathers. After learning that her parental rights had been terminated, Rodgers wrote the trial court and requested an attorney, which the trial court granted. Rodgers's attorney filed a motion for new trial with an affidavit from Rodgers attached. The affidavit stated that Rodgers had no previous experience with CPS; that she did not understand the significance of the termination petition; and that she relied on the caseworker who told her that "she was there to help" and that Rodgers would get an attorney. The affidavit further stated that Rodgers did not understand she needed to request an attorney or oppose the termination; she thought an attorney would be automatically appointed as in a criminal case, otherwise she would have requested one or opposed the termination; she thought the caseworker would represent her best interest to the trial court; she was to be released from jail in August 2005, and had found a place to stay; she had regularly written her children and the caseworker; she believed it not to be in the children's best interest that her rights be terminated; she was willing to go to trial immediately; and that she was unable to reimburse CPS for expenses in taking the default judgment as she was indigent.

Issue Presented: Whether the trial court abused its discretion in denying Rodgers a new trial.

Texas Supreme Court's Reasoning and Conclusions:

(1) <u>The Trial Court Erred in Refusing to Grant Rodgers a New Trial</u>: A trial court's denial of a motion for new trial is reviewed for abuse of discretion. A default judgment should be set aside and a new trial granted if: 1) the failure to answer was not intentional or the result of conscious indifference but was due to a mistake or accident; 2) the defendant sets up a meritorious defense; and 3) the motion is filed at such time that granting a new trial would not result in delay or otherwise injure the plaintiff. The Department did not file any affidavits in the matter. At the hearing, the caseworker testified that she had sent Rodgers documents regarding the case and had received correspondence from her. The caseworker testified that she did not inform Rodgers that the hearing on May 20, 2005, was to terminate her parental rights due to the fact that the caseworker was unaware of the purpose of the hearing and was not at the hearing. Rodgers's testimony conformed to her affidavit.

Failing to file an answer intentionally or due to conscious indifference means the "defendant knew it was sued but did not care." The court looks to the knowledge and acts of the defendant to determine conscious indifference. Here, Rodgers's affidavit and testimony was not to the effect that her failure to answer was based solely on her misunderstanding of the citation. Her beliefs and experiences set forth in

her affidavit, together with her uncontroverted acts regarding the contact with her children and caseworker, negate the element of conscious indifference.

Rodgers was also required to set up a meritorious defense and to show that her motion was filed at such time that the granting of a new trial would not result in delay or otherwise injure the plaintiff. The Court noted that parental rights may be terminated only if termination is in the best interest of the children. The record reflected allegations of fact by Rodgers that she expressed interest in her children, was off drugs, had arranged for a place to stay, looked into food stamps, and researched employers that would employ felons. Evidence was also submitted that the children were separated and would be moved again if a foster home were found which would take both of them. The Court found that as the *Holley* factors included the stability of the proposed placement and the willingness of a child's family to effect positive changes, as well as the presumption that the interest of the child is served by keeping the child with a parent, Rodgers had established a meritorious defense to CPS's contention that termination was in the best interest of the children.

Rodgers's motion was timely filed and she argued that a new trial would not delay or otherwise injure CPS or the children. It was undisputed that at the time CPS took its default it still had two months until the statutory dismissal date. The caseworker testified that she did not know whether a delay in terminating Rodgers's rights would hurt the children. CPS offered no evidence at all regarding harm to the children or to itself by any delay in granting Rodgers a new trial. Rodgers offered uncontroverted evidence that she was indigent and could not reimburse CPS for expenses in taking the default. The Court reversed and remanded the case to the trial court.

In re TDFPS
210 S.W.3d 609 (Tex. 2006)

Construing: TEX. FAM. CODE § 263.401(a) - Dismissal Dates, Calculation of
TEX. FAM. CODE § 264.402(b)
Mandamus v. Appellate Relief

Procedural History: The jury returned a verdict terminating Higdon's parental rights and awarding conservatorship of the children to the Department after the dismissal date had run. The trial court entered judgment accordingly. The Third Court of Appeals granted mandamus relief and ordered the trial court to dismiss the Department's case as there was no final order. The Texas Supreme Court reversed.

Facts: CPS filed a SAPCR to terminate Higdon's parental rights on January 23, 2003. That same day the trial court conducted an ex parte hearing at which CPS was granted TMC and given authority to remove the children. On February 3, 2003, a full adversary hearing was held wherein Higdon was restored as managing conservator but agreed to place the children with her grandmother, Ludwig. On February 23, 2003, Ludwig intervened in the case. On August 19, 2003, CPS was named TMC of the children by a temporary order of the trial court. The dismissal date was identified as August 16, 2004.

In January 2004, the trial court granted a six month extension and identified the dismissal date as July 24, 2004. Trial began July 19, 2004. On July 22, 2004, both Higdon and Ludwig filed motions to dismiss for failure to render a final order prior to the statutory deadline. CPS rested its case on July 23, 2004. On July 28, 2004, the jury returned a unanimous verdict terminating the parental rights of Higdon and awarding PMC to the Department. The trial court orally entered judgment that day. The trial court signed and filed the final decree of termination on August 13, 2004.

On August 11 and 12, 2004, Ludwig and Higdon respectively filed petitions for writ of mandamus in the Third Court of Appeals seeking to compel the trial court to dismiss the case for failing to render a final

order prior to the dismissal date. The Third Court of Appeals granted mandamus relief and ordered the trial court to dismiss the case. CPS's request for a rehearing was denied on November 18, 2004. The following day CPS filed a petition for writ of mandamus and a motion to stay which was granted.

Issue Presented: Was mandamus relief proper when the trial court failed to render a final order prior to the dismissal date and refused to dismiss the case despite a proper motion for dismissal?

Texas Supreme Court's Reasoning and Conclusions:

(1) § 263.401; Dismissal Date Calculation: The Court rejected CPS's argument that the dismissal date should have been calculated from the hearing in August 2003 when CPS was named TMC. The Court found that the statutory time period started on January 23, 2003, as the trial court "rendered a temporary order appointing the department as temporary managing conservator" through the ex parte hearing order on that day. The Court determined the deadline to be January 26, 2004, being the date of the Monday following the one-year anniversary of January 23, 2003, as "nothing in the statute excludes the Department's fourteen day conservatorship obtained through the ex parte order from the calculation of the dismissal deadline in Section 263.401." The Court went on to state that after the six month extension entered on January 26, 2004, the dismissal date became July 24, 2004. The trial court erred when it did not enter a final order by that date.

(**2) § 263.402(b):** Parties may waive complaints about a trial court's failure to render a timely final order in suits affecting the parent –child relationship. A timely motion to dismiss, or a motion requesting the trial court to enter a final order, must be made prior to the dismissal date. A timely filed motion to dismiss must be entered before CPS introduces all of its evidence, other than rebuttal evidence. A motion requesting the trial court to render a final order must be made before the dismissal deadline passes. Here, Higdon and Ludwig made motions to dismiss on July 22, 2004, prior to the CPS's completion of its case on July 23, 2004. The dismissal date of July 24, 2004 passed without the rendition of a final order. Higdon and Ludwig complied with the statutory deadline by filing their motions before CPS rested and before the dismissal date passed. The trial court abused its discretion in failing to dismiss CPS's petition within the statutory time period as requested by Higdon's and Ludwig's timely motions.

(3) Mandamus v. Appellate Relief: Although a careful balancing of "jurisprudential considerations" is necessary to determine when appellate courts will use original mandamus proceedings to review the actions of lower courts, mandamus will not issue when the law provides another plain, adequate, and complete remedy. In order to address the concerns of appeals and protection of the rights of parents and children, the legislature enacted § 263.405 which provides for an accelerated appeal that shortens deadlines, expedites filing of the appellate record, and requires the appellate court to render its judgment with the least possible delay. The legislature recognized that a statutory deadline would expedite these trials to provide some certainty for children whose family situations are subject to the outcome of these proceedings. Under this case, because the trial was underway when the dismissal deadline passed and because physical possession of the children had already transferred to CPS when the petitions for mandamus were filed, the Court concluded that an accelerated appeal was an adequate remedy. The Court limited its holding to the particular facts of this case, stating "we do not hold that a party complaining of a trial court's failure to dismiss a SAPCR within the statutory deadline could never be entitled to mandamus relief." However, here, the record raised no concern of impending transfer of physical possession of the children, or the trial court's unreasonable delay in entering a final order.

Dissent: The Court has regularly granted mandamus relief in cases affecting child custody. As child custody proceedings touch on constitutional interests of parents and issues affecting children's welfare, the Court has afforded mandamus review even though an appeal may have been available. At the time Higdon and Ludwig filed their petition for mandamus no appeal was available as the trial court had not

rendered a final judgment. At this point it is questionable whether Ludwig or Hilton will be able to appeal the judgment at all. The error was clear and the solution straightforward. The Department's petition for writ of mandamus should have been denied.

INTERMEDIATE COURT CASES

In re A.D and V.G.D.
203 S.W.3d 407 (Tex. App–El Paso, 2006, no pet.)

Construing: TEX. FAM. CODE § 161.001(1)(O) – Partial Compliance
TEX. FAM. CODE § 161.001(1)(O) – Recent Turnaround
TEX. FAM. CODE § 161.001(1)(O) – Statutory Nine-Month Period
Best Interest
Credibility of Testimony, Fact Finder Determines
Factual Sufficiency Review in Parental Termination Case
Legal Sufficiency Review in Parental Termination Case

Procedural History: The trial court terminated Duarte's parental rights on (D), (E), (O), and (P) grounds and best interest. The Eighth Court of Appeals affirmed.

Facts: Duarte was with her six-year-old daughter when police cited her for shoplifting. Although Duarte was not arrested, police did not release her because they believed she was intoxicated. Duarte admitted she was high and had drugs inside her purse. After trying to place the children with other family members without success, police notified CPS. CPS placed the children in foster care.

On November 2, 2004, CPS was named TMC of the children. It developed a Family Service Plan for Duarte. She missed her first scheduled appointment for drug assessment. Her second appointment was scheduled. She arrived early to her appointment, waited until ten minutes after her appointment time and then left. The counselor testified she was delayed five minutes because she was in session with another client. Duarte never attempted to reschedule her appointment for a drug assessment. Duarte also failed to report for drug testing between January 17, 2005 and February 1, 2005.

In March 2005, Duarte was arrested for shoplifting. She was using money she made from shoplifting to buy drugs. On March 18, 2005 drug test results indicated she was using cocaine and alcohol. In April 2005, Duarte voluntarily joined Drug Court, which required her to remain drug free. It also provided services, including in- and out-patient drug counseling, random drug testing, and parenting sessions. She submitted to drug tests on April 11, June 21, and June 27, 2005 and the results of each test indicated she was using cocaine. Duarte failed to complete either her in-patient drug counseling services or her parenting sessions. Drug Court dropped her from the program in July 2005 for failing to participate.

In September 2005, Duarte began making efforts to comply with some of the requirements. She was required to attend out-patient services in August as a requirement for Drug Court, and although she failed to attend in August, she did begin services in September. She enrolled in parenting and anger management classes and began to pay for her own drug screening. However, the September 12, 2005 drug test revealed she was still using cocaine and alcohol. By October 2005, Duarte remained unemployed and did not have housing for the children. Duarte's employment history consisted of working for Wal-Mart for two to three days in January, working in a cannery, and performing some housecleaning services. Duarte would stay some nights with her parents or her sister and other nights with her friends.

Issues Presented: Whether the evidence was legally and factually insufficient to support the trial court's finding under (O) and best interest.

Appellate Court's Reasoning and Conclusions:

(1) § 161.001 (1)(O): The court rejected Duarte's argument that the evidence is factually insufficient because several months before trial she had provided clean drug screens, obtained parenting classes and attended drug treatments. Although some of the drug screens indicated sobriety, the record demonstrates Duarte continued using drugs because she tested positive for cocaine and alcohol in September 2005. Although Duarte made some effort to comply with the service plan by attending out-patient drug services, she still failed to meet other material requirements such as obtaining the drug assessment, refraining from drug use, maintaining her appointments, finding employment, and demonstrating an ability to provide a safe home. Citing *In re J.F.C., A.B.C., and M.B.C.*, 96 S.W.3d 256, 278 (Tex. 2002) (partial compliance is insufficient to establish complete compliance under court-ordered plan). The statutory period under (O) relates to the amount of time the children have been in conservatorship of CPS, not to the amount of time required for compliance with a court-ordered provision.

(2) Best Interest: Duarte's recent efforts to remain drug free do not totally offset her past history of drug abuse. Lack of evidence regarding an adoptive plan – while relevant – is not a conclusive factor in determining what is in the best interest of a child. Duarte's use of drugs after her children were removed, her arrest for shoplifting to support her drug habit, her failure to secure employment and provide housing for the children and the children's bond with their foster family and their adoptability sufficient to support termination under best interest.

(3) Legal Sufficiency Review in Parental Termination Case: In conducting a legal sufficiency review, the court must review the evidence in the light most favorable to the finding in order to determine whether a reasonable fact finder could have formed a firm belief or conviction about the truth of such findings. To give appropriate deference to the fact finder, the court must assume the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so. A corollary to this requirement is that the court should also disregard all evidence that a reasonable fact finder could have disbelieved or found to have been incredible. This does not mean the court must disregard all evidence that does not support the finding, but if the court determines no reasonable fact finder could have formed a firm belief or conviction that the matter to be proven is true, then the evidence is legally insufficient.

(4) Factual Sufficiency Review in Parental Termination Case: In conducting a factual sufficiency review, the court must give due consideration to evidence the fact finder could reasonably have found to be true. The court must determine whether the evidence is such that a fact finder could reasonably have formed a firm belief or truth regarding the allegations. The court must also consider whether the disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding. While the court does not view the evidence in the light most favorable to the challenged finding, its review must maintain the respective constitutional roles of juries and appellate courts. If, in light of the entire record, the disputed evidence establishes that a reasonable fact finder could not have formed a firm belief or conviction in favor of the finding, then the evidence is factually insufficient.

(5) Credibility of Testimony, Fact Finder Determines: It is within the trial court's discretion to determine the weight and credibility of Duarte's testimony.

Adams v. TDFPS
No. 01-06-00243-CV, 2007 Tex. App. LEXIS 1367
(Tex. App.–Houston [1st Dist.] Feb. 22, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(a) –Accelerated Appeal
TEX. FAM. CODE § 263.405(b) – Deadline for Filing
TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Specificity of Challenge to Best Interest

Best Interest
Factual Sufficiency Review in Parental Termination Case
Legal Sufficiency Review in Parental Termination Case

Procedural History: The trial court terminated Adams's parental rights to her two children. The First Court of Appeals affirmed the trial court's termination.

Facts: Adams timely filed in the trial court her statement of points. She did not include in her statement her intent to challenge the legal and factual sufficiency of the evidence supporting the trial court's findings under § 161.003(a). Adams did inform the trial court of her intent to challenge the legal and factual sufficiency of the trial court's findings that termination is in her children's best interest.

Issues Presented: Whether the appellate court could address Adams's legal and factual sufficiency of evidence claims regarding § 161.003(a) and best interest.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(a) – Accelerated Appeal: Appeal of a termination order is an accelerated appeal.

(2) § 263.405(b) – Deadline for Filing; Statement of Points Required: A party intending to appeal a final termination order is required to file a statement of points no later than fifteen days after the final order is signed.

(3) § 263.405(i) – Failure to Preserve Complaint: Adams did not include in her timely filed statement of points her intent to challenge the legal and factual sufficiency of the evidence supporting termination under § 161.003(a). Under the "express terms of the statute, the appellate court cannot consider her contention that the evidence is legally and factually insufficient to support" termination under § 161.003(a).

(4) § 263.405(i) – Specificity of Challenge to Best Interest: Adams's statement of points contains the following "There is no evidence to support the court's finding that termination of [Adams's] parental rights is in the best interest of the child[ren]" … "The evidence is factually insufficient to support the court's finding that termination of [Adams's] parental rights is in the best interest of the child[ren]". The appellate court found that these points "do more than merely raise a general claim of legal and factual insufficiency, which is barred by the statute. Adams did not generally state that the evidence is 'factually or legally insufficient' to support the trial court's 'decision' to terminate her parental rights. Rather, she specifically informed the trial court that the evidence is legally and factually insufficient to support its findings that the termination was in the best interest of the children. Her statement of points was specific enough to allow the trial judge to correct any erroneous findings on the challenged grounds."

(5) Legal Sufficiency Review in Parental Termination Case: In conducting a legal sufficiency review in a termination-of-parental-rights case, the appellate court must determine whether the evidence, viewed in the light most favorable to the finding, is such that the fact finder could reasonably have formed a firm belief or conviction about the truth of the matter on which the State bore the burden of proof. In viewing the evidence in the light most favorable to the judgment, the appellate court must assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so, and should disregard all evidence that a reasonable fact finder could have disbelieved or found to be incredible.

(6) Factual Sufficiency Review in Parental Termination Case: In conducting a factual sufficiency review in a termination-of-parental-rights case, the appellate court must determine whether, considering the entire record, including both evidence supporting and evidence contradicting the finding, a fact finder reasonably could have formed a firm conviction or belief about the truth of the matter on which the State bore the burden of proof. The appellate court should consider whether the disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding. If, in light of the entire record, the disputed evidence that a reasonable fact finder could not have

credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.

(7) Best Interest: The *Holley* factors are not exhaustive and there is no requirement that CPS prove all factors as a condition precedent to parental termination. (a) desires of the child: The children were bonded with their aunt, with whom they are placed; they indicated their desire to remain with Williams; the children were happy with Williams; and the record does not show whether the children desire to have future contact with Adams. (b) Current and Future Physical and Emotional Needs of the Children: Both children have unique emotional issues and their counselor has seen progress in their development since they were removed from Adams's care. Adams has a history of frequently moving residences and failing to provide the children with a stable environment. Adams's mental health problems; the suicide attempt while pregnant; and the possibility she could discontinue taking her medication all potentially pose a serious threat to the well-being of the children. (c) Current and Future Physical Danger to the Children: Adams has been unable to provide the children with a consistent and stable residence and she was physically abused while the children were inside the home. Adams's potential failure to continue taking her prescribed medication poses a danger to the children. (d) Parental Abilities of Person Seeking Custody: Adams did not seek custody of the children. Williams is able to provide a stable and nurturing home. (e) Stability of the Home: Adams moved residences approximately twelve times between 1999 and 2005. Williams will be able to provide a stable and nurturing home. (f) Acts or Omissions of Parent that May Indicate that the Parent-Child Relationship is Not Proper: Adams has a mental illness that she has not fully accepted.

In re A.H. and A.V.
No. 2-06-211-CV, 2006 Tex. App. LEXIS 10249
(Tex. App.–Fort Worth Nov. 30, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.401(b) - Denial of Dismissal Date Extension
TEX. R. CIV. P. 245 – Waiver of Notice of Trial Setting
Failure to Preserve Error
Ineffective Assistance of Counsel

Procedural History: The trial court terminated Father's parental rights under Sections 161.001(1)(D) and (E). The Second Court of Appeals affirmed.

Facts: CPS filed an original petition seeking to terminate the parental rights of the children's mother and Father in July 2005. Father was appointed counsel in August 2005.

At a permanency hearing in January 2006, the court set the matter for trial on May 24, 2006. Father was incarcerated on drug charges and appeared through counsel. At a second permanency hearing, the trial court reset the final hearing for May 23, 2006. Father again appeared through counsel.

At trial, Father's counsel made an oral motion for continuance arguing that CPS had not considered Father's mother as a placement for the children, and that counsel was unable to communicate with Father for two or three months due to Father's incarceration in different facilities. The trial court denied the motion.

At trial, Father testified that he was serving a prison sentence for possession of methamphetamine, that he bought, sold, and used illegal drugs while the children were in his care, and that he once drank to the point of alcohol poisoning while driving with the children. In addition, he stated that he had only visited the children four or five times after CPS removed them and that he did not complete any of the services on his service plan.

Issues Presented: The following issues were presented to the court: (1) whether Father received adequate notice of the trial setting under Rule 245; and (2) whether Father's counsel was ineffective.

Appellate Court's Reasoning and Conclusions:

(1) Rule 245; Father Waived His Notice Issue: Father argued that the trial court gave him inadequate notice of the trial setting under Rule 245. Under Rule 245, a trial court may set contested cases on the court's own motion with reasonable notice of not less than 45 days to the parties of a first trial setting. A party must timely and specifically object to insufficiency of notice under Rule 245 or the error is waived. Father did not object to lack of adequate notice until he filed his motion for new trial. As such, his objection was untimely and preserved nothing for review.

(2) TEX. FAM. CODE § 263.401(b); Denial of Continaunce; Father's Counsel Was Not Ineffective: Father argued that his counsel was deficient for failing to file an admission of paternity or counterclaim to adjudicate paternity, for failing to file a written and sworn motion for continuance, and for failing to petition the trial court to continue the Department's conservatorship. To establish ineffective assistance of counsel, a party must show (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. Although the trial court found that Father had failed to file an admission of or counterclaim for paternity, it also found that Father engaged in conduct as set forth in § 161.001(1)(D) and (E). Either of the latter grounds supported termination. Father failed to show that counsel's conduct prejudiced the defense.

Regarding the written and sworn motion for continuance, the trial court entertained counsel's oral motion and inquired of the parties whether a continuance would be in the children's best interest. The appellate court could not say whether a written, verified motion would have any greater effect. Father also argued that the lack of a continuance prevented him from developing a trial strategy and marshaling evidence. Father, however, did not explain why the ten months between CPS's filing of its petition and the trial was not enough time to prepare. Despite counsel's statement regarding trouble communicating with Father, Father failed to show that counsel's failure to file a written and sworn motion for continuance prejudiced the defense.

Last, Father argues that he was prejudiced by the lack of an extension of the dismissal date. Section 263.401(b) permits a 180 day extension of the dismissal date if extraordinary circumstances necessitate the child remaining in CPS's temporary conservatorship, and such an extension is in the child's best interest. Father argues that his incarceration and inability to communicate with counsel presented the extraordinary circumstances necessary to extend the dismissal date. Again, Father failed to explain how an extra 180 days would have resulted in a different outcome, especially when he had over a half a year to prepare for trial before his incarceration.

Anderson v TDFPS
No. 03-06-00327-CV, 2007 Tex. App. LEXIS 3593
(Tex. App.–Austin May 9, 2007, no pet. h.) (mem. op.)

Construing: Best Interest
Factual Sufficiency Review in Parental Termination Case

Procedural History: The jury found Anderson's parental rights to J.A. and A.M should be terminated. Anderson appealed. The Third Court of Appeals affirmed the judgment.

Facts: Anderson used methamphetamines and kept a notebook detailing her husband's large number of drug sales. Police searched the residence and found methamphetamine, drug paraphernalia, and over

$1,000.00 in cash. While a CPS caseworker and the police questioned Anderson and her husband, J.A. produced a dollar bill concealing a small bag of methamphetamine. At the time of trial, Anderson had pled guilty to federal drug charges and was awaiting sentencing. During the pendency of the case, Anderson made significant progress in recovering from drug addiction and complying with the court orders of the case. She achieved and maintained sobriety. She obtained employment and appropriate housing, completed parenting classes and a psychological evaluation, and submitted to and passed randomly administered drug tests. Anderson testified she hoped to qualify for probation but a federal drug agent testified she was likely to be sentenced to ten years in prison. The children were first placed with relatives, who later said they could not care for the children; the children were placed together in foster care. Anderson wanted the children placed with Wallace, Anderson's father, if she is sent to prison. Wallace lives in another state and did not file a petition in intervention until shortly before trial. Wallace did not pay for a home study himself, and Anderson and her family did not obtain the home study on Wallace until shortly before trial. Wallace never testified in earlier hearings.

Issues Presented: Whether evidence is factually sufficient to support a finding that termination is in the children's best interest.

Appellate Court's Reasoning and Conclusions:

(1) Factual Sufficiency Review in Parental Termination Case: In reviewing factual sufficiency of the evidence, the appellate court must defer to the fact finder's conclusions and give due consideration to evidence the fact finder reasonably could have found to be clear and convincing. If a reasonable fact finder could have formed a firm belief or conviction to support its finding of termination, the evidence is factually sufficient. The appellate court must consider whether disputed evidence is such that a reasonable fact finder could not have resolved that evidence in favor of its finding. Evidence is factually insufficient only if, when viewed in the context of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction. In applying these standards of review, the appellate court considers the evidence that supports a deemed finding regarding best interest and the undisputed evidence. The appellate court does not consider evidence a fact finder reasonably could have disbelieved. The appellate court must maintain the respective constitutional roles of juries and appellate courts and not reverse the trial court's judgment unless a reasonable jury *could not* have formed a firm belief or conviction that terminating Anderson's rights is in the children's best interest.

(2) Best Interest: The Third Court of Appeals affirmed termination but noted, "This is not an easy case and we are somewhat troubled by its outcome." "While we laud Anderson's conduct since her completion of the rehabilitation program, the jury could have considered her conduct leading up to the children's removal, as well as her conduct after their removal and before she admitted herself into the rehabilitation program". "We certainly sympathize with Anderson, who has struggled back from drug addiction, and with her family. This case is troubling because Anderson has fully complied with [CPS's] reunification plan in an effort to regain custody of her children, and yet [CPS] is seeking to terminate her rights. However, when the record is viewed as a whole, we cannot hold that there is insufficient evidence for a reasonable trier of fact to have found by clear and convincing evidence that termination is in the children's best interest."

The focus of a best-interest determination is on the child, not the parent. (a) Emotional and Physical Needs of the Child Now and in the Future: Permanence is of paramount importance in considering a child's present and future needs. Establishing a permanent, stable home for a child is a compelling state interest. Pending drug charges are a significant factor when considering the children's best interests and issues of permanence and stability. The strong possibility Anderson will be sentenced to significant time in prison weighs in favor of termination. (b) Plans for the Children: A fact finder may compare the parent's and the state's permanency plans in determining child's best interest. The foster parents have had the children more than one year, are very committed to the children, and plan to adopt them if parental

rights are terminated. The children are doing "extremely well" in the foster home. Wallace had seen A.M. only twice – one of those visits was, in Anderson's words, "about 30 seconds" – and had seen J.A. only a few times in the one or two years before the children were removed. Anderson and Wallace did not provide the relatives with whom the children were first placed with promised financial support. Further, at the time of trial, Anderson was engaged to a man who had at least two drug-related convictions in the past, although she testified he no longer was involved in drugs. Anderson continued to use drugs after her children were removed from the home until she enrolled in and completed a drug rehabilitation program.

Comment: Despite affirming the termination the Third Court of Appeals made the following comments: "[W]e must note that we are troubled by this case. *There is a complete absence of testimony by [CPS] caseworkers*, and we are especially concerned by the unrebutted testimony that Wallace was ignored as a possibility for placement, although he attended a hearing more than a year before trial, because [CPS] refused to incure the costs of a second home study. Surely, when presented with multiple possibilities for family placement, [CPS] does not make decisions about family placement based largely on whether one home study has already been done and does not ignore a family member who steps forward to care for the children in favor of placing the children into the foster system. We note these concerns in hopes that, if [CPS] is making placement decisions in the manner testified to by Anderson and Wallace, such a decision-making process will change." (emphasis added).

The lesson to be taken from this case is that CPS counsel should always put on one or more CPS witness(es) at a termination final hearing. Period. They can provide CPS's side of the story and, hopefully, rebut the damaging testimony that so troubled the Third Court of Appeals.

In re A.P., C.O., III, R.O., M.O., and M.O.
No. 03-05-00645-CV, 2007 Tex. App. LEXIS 791
(Tex. App.–Austin Feb. 1, 2007, no pet.) (mem. op.)

Construing: TEX. R. CIV. P. 193.6 – Exclusion of Witnesses/Incomplete Discovery Response Admission of Error Harmless

Procedural History: The jury rendered a verdict terminating Osborne's parental rights to the children. The trial court entered judgment accordingly. The Third Court of Appeals affirmed.

Facts: After the children's removal, the trial court appointed Dr. Michael Campbell to interview and evaluate Osborne to determine the best interest of the children and identify risks of harm. Campbell was to provide a professional opinion as to rehabilitation efforts that could assist in providing a safe and stable home. He was to consider Osborne's parenting ability, functional ability, and personality factors, including mental status, motivation, concern for the children and her judgment. Campbell's report was admitted into evidence on April 28, 2004, at a permanency hearing. Osborne did not dispute receiving a copy of the report. The report consisted of several tests, summarized Osborne's personal history and history with CPS, and included a detailed analysis of Osborne's examination and an explanation of the results. The report also includes Campbell's summary and conclusions. Campbell stated that Osborne did not accept responsibility for wrongdoing in her life, was apprehensive during the evaluation, and had low average intellectual functioning. He specifically noted that Osborne's parenting was poor and that she had repeatedly allowed the home to be a safety hazard to the children, allowing drug users and individuals she barely knew to care for the children. However, she admitted no wrongdoing. Campbell had concerns for further neglect. He also stated that Osborne had poor motivation to build a positive relationship with the children, and that Osborne was more interested in forming relationships with males than her own children. Campbell diagnosed Osborne with dependent personality disorder.
In June 2005, Osborne served CPS with Rule 194 Requests for Disclosure. In response, CPS included Ryan Malsbary, the caseworker, and Dr. Campbell, among others, as experts. Also included in the re-

sponse was a brief statement of their connection to the case. CPS did not otherwise provide the required information set forth in TRCP 194.2(f)(2)-(4). On August 24, 2005, Osborne moved to strike several witnesses, including Malsbary, on the ground that CPS had failed to disclose each expert's mental impressions and opinions and a brief summary of the basis for them. Osborne also contended that CPS had failed to provide her with Malsbury's CV or resume. In a separate motion, Osborne moved to strike Campbell's report as unreliable and unfairly prejudicial. The court overruled both motions.

During jury trial, and prior to Dr. Campbell testifying, Osborne objected to Campbell's testimony on the same basis as Malsbary's, namely that CPS had failed to disclose the general substance of his mental impressions and opinions and a brief summary of the basis for them. CPS responded that the psychological evaluation and the records Campbell relied on had been provided to Osborne. The trial court overruled the objection and Campbell testified largely to what was in his report. A redacted copy of his report, that excluded portions concerning drug use the trial court found to be "unfounded", was admitted into evidence. Campbell was also asked to testify to behaviors and events introduced through other witnesses.

Osborne again objected to Malsbary testifying before he took the stand. Osborne again based her objection on the fact that CPS had failed to provide Malsbary's CV. Osborne also contended that Malsbary was not "an expert in the area of anything dealing with child custody or dealing with termination." CPS stated that it was not offering Malsbary as an expert. The trial court permitted Malsbary to testify as to what he believed was in the best interest of the child and to adoption mechanisms within CPS. The trial court did not allow him to testify as an expert. Malsbary testified to CPS reunification procedures, Osborne's failure to comply with services, and his belief that the children could be adopted.
The jury also heard evidence that: (1) CPS became involved after a passing motorist noticed one of Osborne's children standing by the side of the road alone, wearing nothing but a diaper and a t-shirt; (2) police investigated and found the house to be filthy, including rotted meat, feces everywhere, food with green mold, dirty diapers, and a tub with standing water; (3) a crack pipe was found in one of the rooms, as was an infant left alone; (4) Osborne had left the children with a man whom she had met the day before, and whose last name she didn't know, while she went to search for her husband who was found in a motel room using crack with another woman; (5) Osborne left the children with her mother who used "weed" and ecstasy, and with a friend who had hit one of the children in the face with a belt; (6) Osborne's husband had sexually abused one of the children and Osborne's only response was to forbid them to be alone together; and (7) the children's guardian ad litem testified that termination was in the children's best interest.

Issues Presented: Did the trial court err in permitting Campbell and Malsbary to testify?

Appellate Court's Reasoning and Conclusions:

(1) <u>The Trial Court Did Not Err in Permitting the Witnesses to Testify</u>: A trial court's ruling permitting or denying a witness to testify is reviewed for an abuse of discretion. A trial court abuses its discretion when it rules on the admissibility of evidence in an arbitrary or unreasonable manner, without any reference to guiding legal principles. A party must respond to discovery within the time frame prescribed by the rules or order of the court. The responding party must make a complete response, and amend or supplement if necessary. A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce the evidence or material unless the court finds that there was good cause for the failure to tender the response, and the failure to timely tender will not unfairly surprise or prejudice the other parties. The burden of establishing good cause is on the party seeking to admit the evidence.

The trial court did not permit Malsbary to testify as an expert. Therefore, the requirements of 194.2 were not implicated as they apply only to experts. As Osborne raised no other grounds for objection to Malsbary's testifying, the court overruled the contention.

Regarding Campbell, Osborne argued that CPS failed to disclose, at least in its formal response, the general substance of his mental impressions, provide a brief summary of the basis, or provide all documents he reviewed or prepared in accordance with TRCP 194.2(f)(3)-(4). When considered alone, CPS's responses to discovery constituted a failure to respond. Without a showing of good cause and lack of unfair prejudice, the exclusion rule would be triggered. CPS argued that Osborne was not unfairly surprised or prejudiced because she had already received Campbell's information many months earlier. CPS relied on *W.D.W.*, wherein CPS satisfied its discovery response by cross-referencing a copy of its case file. There, the witness's report containing the general substance of his mental impressions and opinions, and a summary of the basis of the opinions, had been turned over to the mother and father in discovery. In addition, neither parent objected to the introduction of the report and both had the opportunity to prepare expert rebuttal opinion. Here, Osborne asserted that CPS did not request the trial court to make the necessary findings regarding good cause and lack of unfair surprise, and also that CPS's tendering of the report did not discharge its obligations to hand over all documents provided to or reviewed by Campbell.

A finding of good cause or the lack of unfair surprise must be supported by the record. However, such a finding may be implied from the trial court's ruling allowing the witnesses to testify. Osborne had previously received a copy of Campbell's report months earlier. Osborne also received a copy of CPS's file. This enabled Osborne to challenge the reliability of Campbell's opinions regarding the drug abuse, including extensive voir dire of Campbell on the matter. Campbell's trial testimony was consistent with his opinions in the report. The trial court did not abuse its discretion in impliedly finding that CPS showed that Osborne was not unfairly surprised or prejudiced by Campbell's testimony. The trial court did not abuse its discretion in admitting the testimony and the report.

The court went on to add that even if the testimony and report was admitted in error, it was harmless. The court will not reverse a judgment based on an improper evidentiary ruling unless the error probably caused the rendition of an improper judgment. Osborne could not show that the best interest determination turned only on Campbell's testimony and report. The jury heard from six other witnesses regarding the housing hazards, the infant being left alone, and the inadequate protection of Osborne's daughter who was sexually abused. In addition, the guardian ad litem stated the children were doing well in their placements and that termination should occur. The court explicitly stated, "This was not a close case."

In re A.S.J, E.D.J., R.M.J., and T.J.
No. 04-06-00051-CV, 2006 Tex. App. LEXIS 5963
(Tex. App.–San Antonio July 12, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.401(b) - Failure to Grant Extension of Dismissal Date
TEX. FAM. CODE § 263.405(d) – Frivolousness, Review of
Failure to Appoint an Attorney
Ineffective Assistance of Counsel

Procedural History: The trial court terminated the parents' parental rights and found any appeal to be frivolous. The Fourth Court of Appeals affirmed the trial court's finding of frivolousness.

Facts: On appeal, Father complained that the evidence was not legally or factually sufficient to support each of the three grounds for termination, as well as the trial court's finding that termination was in the children's best interest. Mother challenged the legal and factual sufficiency of the evidence to support the trial court's best interest finding, contended that her trial counsel was ineffective, and claimed that the

trial court erred in failing to appoint her counsel after her retained counsel was removed form the case due to his ineligibility to practice law. Both also claimed that the trial court erred in not granting an extension of the dismissal date under Section 263.401(b).

Issues Presented: The court was presented with four issues: (1) whether the appeal was frivolous; (2) whether the trial court erred in not granting an extension; (3) whether Mother's counsel was ineffective; and (4) whether the trial court erred in not appointing Mother counsel after her retained counsel was not permitted to participate in the case.

Appellate Court's Reasoning and Conclusions:

(1) § 264.405(d); The Appeal Was Frivolous: An appeal is frivolous when it lacks an arguable basis in law or in fact. In determining whether an appeal is frivolous, the trial judge considers whether the appellant has presented a substantial question for appellate review. A finding of frivolousness is reviewed for an abuse of discretion standard. The evidence presented was legally and factually sufficient to support at least one of the grounds for termination and the best interest finding. Evidence was presented at trial regarding Mother's and Father's choices and endangering conduct including: 1) their testimony that they tested positive for drugs while the children were in CPS care and that they both continued to use drugs; 2) Mother tested positive for three different types of drugs while pregnant with T.J.; 3) Mother failed to have any contact with the children while they were in foster care and failed to provide the children with a safe environment; and 4) both failed to complete their service plans. There was testimony that termination was in the children's best interest.

(2) § 264.401(b); The Trial Court Did Not Err in Not Granting an Extension: Under § 263.401(b) the court may not extend the dismissal date unless the court finds that extraordinary circumstances exist for the extension. Mother and Father failed to provide any evidence of an extraordinary circumstance warranting more time. They were aware that they had one year to fulfill their plans of service and failed to do so.

(3) No Ineffective Assistance of Counsel: There was no ineffective assistance as Mother's counsel was not permitted to participate in the initial adversary hearing as his law license was suspended.

(4) The Trial Court Did Not Err in Not Providing Mother with Alternate Counsel After Her Retained Counsel Was Not Permitted to Participate: The trial court offered to reset the case and allow Mother time to hire other counsel. Mother did not wish to reset the case and signed an order to that effect. At a later date Mother requested counsel, which the court provided. The trial court did not abuse its discretion in determining an appeal based on the parents' asserted issues would be frivolous.

In re B.N.V., K.W.B., I.I.B., and H.W.B.
No. 04-05-00671-CV, 2006 Tex. App. LEXIS 6490
(Tex. App.–San Antonio July 26, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(g) – Abuse of Discretion Standard of Review
TEX. FAM. CODE § 263.405(g) – Sufficiency of Evidence
TEX. FAM. CODE § 263.405(g) – Review § 263.405(d) Hearing Only

Procedural History: The trial court terminated Bowen's parental rights. The trial court found his appellate points frivolous. The Fourth Court of Appeals agreed the appeal was frivolous and without merit.

Facts: Bowen filed a motion for new trial and statement of appellate points, arguing the trial court's findings were not supported by legally and factually sufficient evidence. The trial court overruled Bowen's affidavit of indigence, denied his motion for new trial, and found his appellate points to be frivolous.

Issues Presented: Whether Bowen's sufficiency of evidence points were frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(g) – Abuse of Discretion Standard of Review: An appellate court reviews a trial court's determination that an appeal would be frivolous for an abuse of discretion.

(2) § 263.405(g) – Sufficiency of Evidence: At the hearing on the motion for new trial and statement of appellate points, Bowen's attorney did not attack the trial court's findings supporting termination or summarize for the trial court the evidence that was missing or insufficient to sustain the findings. The trial court did not abuse its discretion in determining Bowen's appellate points pertaining to sufficiency of the evidence were frivolous.

In re B.S., D.R.S., and P.W.S.
No. 09-06-293-CV, 2007 Tex. App. LEXIS 3788
(Tex. App.–Beaumont May 22, 2007, no pet. h.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(N)
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Ineffective Assistance Claim
TEX. FAM. CODE § 263.405(i) – Unconstitutional, Due Process, Equal Protection
Ineffective Assistance of Counsel – Failure to Object to Jury Charge
Ineffective Assistance of Counsel – Failure to Request Severance of Trials

Procedural History: After a trial to the jury, Lisa's parental rights were terminated. She appealed. The Ninth Court of Appeals affirmed the trial court's judgment.

Facts: Separate attorneys represented Lisa and Harold. Harold elected a bench trial; Lisa chose a jury trial. The trial court allowed Harold's attorney to participate during all phases of the jury trial. The jury voted to terminate Lisa's parental rights. Subsequent to the verdict, Harold executed an affidavit voluntarily relinquishing his parental rights.

Issues Presented: Whether (1) Lisa received ineffective assistance at trial; (2) the appellate court was precluded from hearing two issues because they were not presented to the trial court in Lisa's statement of points or motion for new trial; and (3) § 263.405(i) is unconstitutional because it operates to waive appellate review of issues not presented in statement of points on appeal.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(i) – Failure to Preserve Ineffective Assistance Complaints: Appellate court found Lisa failed to preserve two ineffective assistance of counsel complaints under § 263.405(i) because she did not raise them in her statement of points as required by statute.

(2) Ineffective Assistance of Counsel – Severance of Trials: An allegation of ineffective assistance must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. Lisa asserts her counsel was ineffective because she did not request that the trial court sever CPS's case against her from its case against Harold. Because the record regarding trial counsel's strategy in not requesting a severance or a separate trial is undeveloped and trial counsel's strategy is not apparent, the appellate court could not conclude Lisa's attorney was ineffective in failing to request a severance.

(3) Ineffective Assistance of Counsel – Failure to Object to Jury Charge: Lisa asserts her counsel was ineffective because she did not object to the jury charge. Specifically, Lisa contends there

was no evidence or insufficient evidence that Lisa had not regularly visited or maintained significant contact with her children. Lisa asserts her attorney's failure to object to a jury charge containing the § 161.001(1)(N) ground constituted ineffective assistance. The appellate court found the record contained some evidence that she did not regularly visit or maintain significant contact with her children.

(4) § 161.001(1)(N): Missing scheduled family visits, including the first and last visits; intermittent contact with the children after removal; termination of future visitations because of inappropriate interaction with the children during visitations; Lisa's failure to challenge the termination of her visitation rights and subsequent failure to contact CPS or attend court proceedings is evidence that Lisa did not regularly visit or maintain significant contact with her children.

(5) § 263.405(i) – Unconstitutional – Violates Due Process and Equal Protection Rights: Section 263.405(i) prohibits appellate review of any issue not specifically presented in a statement of points on appeal. The constitutional dimension of the parent-child relationship does not override all procedural restrictions. Absent a recognized exception, the appellate court generally does not review unpreserved error, even those that contain constitutional challenges. Lisa's points of appeal and motion for new trial do not contain objections to the constitutionality of § 263.405(i). Lisa dos not complain that the statute is facially unconstitutional. In a facial challenge to the constitutionality of a statute, the challenger must establish the statute always operates unconstitutionally. The general rule is that error must be preserved to save a complaint based on an allegation that a statute is unconstitutional. The general rule applies to Lisa's challenge. The appellate court affirmed because Lisa failed to preserve for the appellate court's review her constitutional challenge to § 263.405(i).

Cartwright v. DFPS
No. 01-05-00994-CV, 2006 Tex. App. LEXIS 8413
(Tex. App.–Houston [1st Dist.] Sept. 28, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 109.002 – Accelerated Appeal
TEX. FAM. CODE § 109.002 – Motion for New Trial Does Not Extend Deadline
TEX. FAM. CODE § 263.405(a) – Accelerated Appeal
TEX. FAM. CODE § 263.405(a) – Motion for New Trial Does Not Extend Deadline
TEX. FAM. CODE § 263.405(c) – Motion for New Trial Does Not Extend Deadline
TEX. R. APP. P. 26.1(b) – Twenty-Day Filing Deadline
Untimely Notice of Appeal – Equal Protection Claim
Untimely Notice of Appeal – Good Faith Effort to Perfect Appeal

Procedural History: The trial court terminated Cartwright's parental rights. The First Court of Appeals dismissed Cartwright's appeal for lack of jurisdiction.

Facts: The trial court signed the termination decree on June 29, 2005. Cartwright filed a motion for new trial on July 28, 2005, which was overruled by operation of law. She filed a notice of appeal on September 29, 2005, ninety-two days after the decree was signed.

Issues Presented: Whether (1) Cartwright's filing of a motion for new trial or her untimely filing of a notice of appeal can be considered a good faith effort to invoke the appellate court's jurisdiction and (2) the accelerated-appeal requirement under § 263.405(a) violates Cartwright's Fourteenth Amendment right to equal protection.

Appellate Court's Reasoning and Conclusions:

(1) § 109.002(a): Under § 109.002(a), the TFC accelerates appeals from judgments terminating parental rights regardless of whether suit is brought by the State or another party. In accelerated appeals motion for new trial does not extend deadline for filing a notice of appeal.

(2) § 263.405(a): In suits where termination of the parent-child relationship is at issue, the TFC provides that an appeal of a final order is governed by the rules for accelerated appeals in civil cases.

(3) § 263.405(c): When the rules governing accelerated appeals apply, the filing of a motion for new trial does not extend the deadline for filing a notice of appeal.

(4) TRAP 26.1(b): Under TRAP 26.1(b) Cartwright's notice of appeal had to be filed within twenty days of the date the final judgment was signed.

(5) Good Faith Effort to Perfect Appeal: The appellate court requested that Cartwright explain why her appeal should not be dismissed for lack of jurisdiction due to the untimely filing of her notice of appeal. Cartwright provided two reasons why her appeal should not be dismissed. First, she contends her notice of appeal should be considered timely based on her good faith efforts to perfect the appeal. Specifically, Cartwright argues that when she took steps to file her appeal, "she believed she was timely pursuant to *Verburgt v. Dorner*, 959 S.W.2d 615, 617-18 41 Tex. Sup. Ct. J. 138 (Tex. 1997)." The *Verburgt* court held that a motion for extension of time is implied when a cost bond was filed late, but within the fifteen-day period in which an extension could be granted. However, the Texas Supreme Court cautioned that their holding did not alter the time for perfecting an appeal beyond the fifteen-day grace period. The only motion Cartwright filed within fifteen days after the twenty-day deadline for filing a notice of appeal was her motion for new trial. Cartwright filed her notice of appeal approximately two months after the end of the fifteen-day grace period. A motion for new trial in a case governed by rules for accelerated appeals does not constitute a bona fide attempt to invoke the appellate court's jurisdiction. Neither Cartwright's filing of a motion for new trial nor her untimely filing of a notice of appeal can be considered a good faith effort to invoke this Court's jurisdiction.

(6) Equal Protection: Cartwright's second contention is that the accelerated-appeal requirement violates her Fourteenth Amendment right to equal protection. Cartwright asserts that parents whose rights are terminated by a state agency have only twenty days in which to perfect an appeal while parents whose rights are terminated by a person or entity other than a state agency have ninety days in which to perfect an appeal, if a motion for new trial is filed. The appellate court agrees with Cartwright's contention that when parental rights are terminated in a suit by a state agency, the parent has twenty days in which to file a notice of appeal regardless of whether there was a motion for new trial. However, under § 109.002(a), the TFC accelerates appeals from judgments terminating parental rights regardless of whether the suit is brought by the State or another party. Moreover, the Texas Supreme Court has held in *In re K.A.F.*, 160 S.W.3d 923, 927, Tex. Sup. Ct. J. 565 (Tex. 2005) that in accelerated appeals a motion for new trial does not extend the deadline for filing a notice of appeal. The applicable Family Code provisions do not treat parents whose rights are terminated by a state agency any differently than a parent whose rights are terminated by an action initiated by a party other than the State. Cartwright fails to show that the Family Code's accelerated appeal provisions place her in a classification that denies her equal protection of the laws compared to other similarly situated parents. Her equal protection argument fails.

Castillo v. TDFPS

No. 03-05-00498-CV, 2006 Tex. App. LEXIS 6700
(Tex. App.–Austin July 28, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(d) – Hearing
TEX. FAM. CODE § 263.405(g) – Abuse of Discretion Standard
TEX. CIV. PRAC. & REM. CODE § 13.003(b) – Substantial Question Presented
TEX. R. APP. P. 44.1(a)(1) – Harmless Error, Cumulative Evidence
Admission of Videotape offered by Children's Attorney ad Litem
Best Interest

Credibility of Testimony, Fact Finder Determines
Factual Sufficiency Review in Parental Termination Case

Procedural History: A jury terminated Castillo's parental rights to her seven children. The trial court found her appellate points to be frivolous. The Third Court of Appeals affirmed the trial court's finding that the appellate points were frivolous.

Facts: *See* paragraph 7.

Issues Presented: Whether the trial court abused its discretion in finding (1) Castillo's factual insufficiency complaint was frivolous and (2) Castillo's claim the trial court erred in admitting a videotaped interview of one of her children was frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) – Statement of Points Required: A party intending to appeal a final termination order is required to file a statement of points on which she intends to appeal.

(2) § 263.405(d): The trial court then must hold a hearing and determine, among other things, whether the appeal is frivolous.

(3) § 13.003(b) – Substantial Question Presented for Appellate Review: An appeal is frivolous if it lacks an arguable basis in law or in fact. In making a determination as to whether an appeal is frivolous, the trial court may consider whether the appellant has presented a substantial question for appellate review under TCP&RC § 13.003(b).

(4) § 263.405(g) – Abuse of Discretion Standard: Appellate court reviews a trial court's determination of frivolousness under an abuse of discretion standard. The appellate court considers the evidence presented at trial in determining whether to affirm the trial court's judgment. To determine whether the trial court abused its discretion in making its finding of frivolousness, the appellate court must decide whether the trial court had sufficient evidence upon which to exercise its discretion and determine whether the trial court erred in the application of its discretion. To decide whether Castillo raised a substantial question as to the evidence supporting the best-interest finding, the appellate court must review all the evidence in the record and conduct a standard sufficiency review. Similarly, to determine whether the trial court abused its discretion in finding that Castillo's point relating to the videotape was frivolous, the appellate court must decide the merits of whether the admission of the videotape was proper.

(5) Factual Sufficiency Review in Parental Termination Case: A factual sufficiency challenge fails if the evidence is such that a reasonable fact finder could form a firm belief or conviction that termination is in the best interest of the child.

(6) Credibility of Testimony, Fact Finder Determines: Issues of witness credibility that depend on appearance and demeanor are left to the jury, and the appellate court will defer to the jury's determinations as long as they are not unreasonable.

(7) Best Interest: That Castillo made some positive changes in her life; ended an unhealthy relationship; had found stable and clean housing; was employed; and loved her children and her children loved her was evidence supporting Castillo's argument that the evidence was insufficient to support termination. However, CPS had attempted to work with Castillo over a number of years trying to help her become an appropriate parent but the children continued to live in a home with roaches and filth. A therapist testified that although Castillo worked hard to regain the children over the years, she was unable to maintain the positive changes she made and the children were removed repeatedly. Several of the children had emotional problems or were acting out sexually and one of the children had a "very guarded" prognosis. One of the children was hospitalized because she was banging her head on the wall, stabbed herself with a pencil, and tried to jump from a moving bus. Since removal, all the children had been pre-

scribed medications, including anti-psychotics and anti-depressants. A pediatrician testified that dating back to 1999, the children were usually dirty and unkempt, their teeth were neglected, and they had lice on several occasions. (a) desires of the child: The older children said that although they loved Castillo, they knew they were better off in their new homes. A younger child, five years old at the time, did not want to see Castillo and did not want to return to her. (b) Parental Abilities of Person Seeking Custody: Castillo's progress in learning to deal with her children's various special needs and appropriate discipline methods and hygiene was slow and not consistent. Castillo had poor judgment and left the children with inappropriate care givers or in dangerous situations.

(8) Admission of Videotape Offered by Children's Attorney ad Litem: Castillo objected to the admission of a videotape of her nine-year-old son describing allegations of sexual abuse on the ground that it was not disclosed by CPS pretrial in response to her motion for disclosure of exhibits. The children's ad litem, not CPS, introduced the tape, pointing out that Castillo had not served him with any disclosure requests. Because the attorney ad litem was not served with any requests for disclosure, his introduction of the videotaped interview was not barred by a failure to disclose.

(9) TRAP 44.1(a)(1) – Harmless Error, Cumulative Evidence: After the video was played, the child testified at trial. Numerous witnesses testified about the child's allegations and the child himself testified to the same allegations made during his recorded statement. Where the evidence in question is cumulative and not controlling on a material issue dispositive of the case, even if there had been error in admitting the recorded statement, such error was harmless in view of the entire record.

In re C.B.M., and M.H.
No. 08-06-00136-CV, 2006 Tex. App. LEXIS 10716
(Tex. App.–El Paso Dec. 14, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(d) – Failure to Request Hearing on Frivolous Issue
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Statement of Points Not Filed

Procedural History: The trial court terminated mother's parental rights to her children. Mother appealed the termination of her parental rights. The Eighth Court of Appeals affirmed the trial court's termination.

Facts: The trial court terminated mother's parental rights to her children. Mother timely filed her notice of appeal. Mother did not comply with the requirements of § 263.405, specifically, filing a motion for new trial, filing a statement of points on which she intended to appeal, or requesting a hearing to determine whether the appeal was frivolous.

Issues Presented: Whether the appellate court can consider mother's issues when she failed to file with the trial court a statement of points on which she intended to appeal.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(d) – Failure to Request Hearing to Determine whether Appeal Was Frivolous: Mother timely filed her notice of appeal. However, mother did not comply with the requirements of § 263.405 by requesting a hearing to determine whether the appeal was frivolous.

(2) § 263.405(i) – Failure to Preserve Complaint: Mother timely filed her notice of appeal. However, she failed to file with the trial court a statement of points on which she intended to appeal. Accordingly, the appellate court may not consider any of the issues she raises on appeal.

In re C.D.B., C.D.B., C.D.L.B., and C.D.B.
218 S.W.3d 308 (Tex. App.–Dallas 2007, no pet.)

Construing: TEX. FAM. CODE § 161.001(1)(D)
TEX. FAM. CODE § 161.001(1)(E)
TEX. FAM. CODE § 161.001(1)(O)
TEX. FAM. CODE § 161.001(1)(P)
Best Interest
Legal and Factual Sufficiency

Procedural History: The trial court signed an order terminating Armstrong's parental rights under Sections 161.001(1)(D), (E), (O), and (P). The trial court further found termination to be in the children's best interest. The Fifth Court of Appeals affirmed.

Facts: In Armstrong's sole issue, she complained that the evidence was legally and factually insufficient to support the termination of her parental rights. She briefly addressed best interest, however the court only addressed endangerment grounds as her argument mainly focused on the endangerment findings.

Issue Presented: Was the evidence legally and factually sufficient to support the termination of Armstrong's parental rights?

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: In reviewing the legal sufficiency of the evidence to support a termination finding, the court looks at all of the evidence in the light most favorable to the termination finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction about the truth of the matter on which CPS bears the burden of proof. The court assumes the factfinder resolved any disputed facts in favor of its finding, if a reasonable factfinder could so do, and disregards all evidence that a reasonable factfinder could have disbelieved or found incredible. The court does not disregard undisputed evidence that does not support the finding.

(2) Factual Sufficiency Review: In reviewing the factual sufficiency of the evidence, the court gives "due consideration" to any evidence the fact finder could reasonably have found to be clear and convincing. The court must consider the disputed evidence and determine whether a reasonable fact finder could have resolved that evidence in favor of the finding. If the disputed evidence is so significant that a fact finder could not reasonably have formed a firm belief or conviction, the evidence is factually insufficient.

(3) § 161.001(1)(O): The trial court was only required to find one of the statutory grounds for termination to be true in order to terminate Armstrong's parental rights. It was undisputed that Armstrong failed to comply with the provisions of the court order specifically established to obtain a return of the children. The trial court ordered Armstrong to submit to a drug and alcohol assessment, complete an appropriate substance abuse treatment program as indicated by the assessment, submit to drug testing, submit to and cooperate with a psychological evaluation, attend and successfully complete parenting and personal enrichment classes, and comply with CPS's service plan. Armstrong went for the drug assessment but did not sign the release or complete the assessment. She started but never completed the psychological evaluation, despite being encouraged to finish it. Armstrong testified that she did not complete the services as she was either in jail or did not have transportation. She also testified that the voucher for the evaluation expired before she could finish it. In addition, Armstrong attended only six of the fifteen visitations scheduled during the sixteen month period before trial.

(4) §§ 161.001(1)(D), (E), and (P): The court stated that there was also other evidence sufficient to support termination on the remaining grounds. At the time of trial, Armstrong was in jail, and had been for the previous six months. Armstrong testified to a history of unstable housing and employment. In 2005, Armstrong and the children's father had an argument and Armstrong attempted to commit suicide by taking a bottle of pills. In the hospital she tested positive for methamphetamine. The father testified that while pregnant with the youngest two children Armstrong used drugs. Armstrong denied using drugs while pregnant, but admitted to using methamphetamine once a month in the house with the children in another room. She also admitted to leaving the children with known drug users. Armstrong was arrested for possession of methamphetamine a few days before the children's removal.

Armstrong had a history of ongoing drug abuse issues that resulted in her inability to care for the children. Despite recommendations, she did not seek medical treatment for the youngest child who had jaundice. Armstrong left the children in their father's care despite his admitting to hitting one of the children. Armstrong also testified that while under her supervision the children wandered across a parking lot to a swimming pool. In addition, one of the children set the apartment on fire due to lack of supervision. The father testified that the house was "trashed," that dirty diapers were all over the house, and that the house was infested with roaches.

(5) Best Interest: Based on the above evidence, the trial court could have formed a firm belief or conviction that termination of Armstrong's parental rights was in the children's best interest. (The jury was never given a specific question on best interest, however, was instructed that they were required to decide whether termination of the parent-child relationship would be in the children's best interest. The trial court's order stated that it found termination to be in the best interest of the children by clear and convincing evidence.)

Cervantes-Peterson v. TDFPS
No. 01-05-00307-CV, 2006 Tex. App. LEXIS 6920
(Tex. App.–Houston [1st Dist.] Aug. 3, 2006, no pet.) (en banc)

Construing: TEX. FAM. CODE § 161.001(1)(E) – Drug Use/Treatment of Other Children in Family
Appellate Court May Only Review Specific Grounds within Termination Order
Best Interest
Legal and Factual Sufficiency

Procedural History: The trial court terminated Cervantes-Peterson's parental rights, finding that she had engaged in conduct under § 161.001(1)(E) and that termination was in the child's best interest. The First Court of Appeals affirmed.

Facts: CPS filed a petition for conservatorship of the child and termination of Cervantes's parental rights. The child had been in CPS's care since his birth. Cervantes testified that she had three other children, D.B., N.C., and B.C. Cervantes was also pregnant at the time of trial. Cervantes stated that CPS was the conservator of N.C., B.C., and J.M. (the child the subject of this suit). N.C., B.C., and J.M. were all born with cocaine in their blood. Cervantes attended drug counseling and successfully completed a drug rehabilitation program after the birth of B.C. She nearly completed another treatment program after N.C.'s birth. Cervantes stated that her cocaine use probably occurred around her ninth month of pregnancy with J.M. Cervantes stated that she was trying to get help with her addiction, however the treatment center recommended by CPS was overcrowded. She had attempted to enroll in various programs but was turned away.

At trial Cervantes had not taken a random drug test in six months. She testified that she had not used narcotics in a "long time," however admitted to using marijuana approximately two months before trial. She

stated that marijuana was the only drug she used after the child's birth. She acknowledged that this meant she used marijuana while pregnant with her fifth child, however stated that she didn't know she was pregnant at the time of use. Cervantes made four out of five visits with the child and admitted that she was late on a few of the visits. She stated she had a GED, was in school, and intended to work in the medical field. Cervantes lived with her mother. She testified she could provide for the child and had been working CPS services until her grandmother's death took a toll on her. She stated she was trying and needed "more time." Cervantes said she would never use drugs again and wanted her children returned to her. The trial court reset the case for a few weeks for the completion of a home study. Upon resuming, Cervantes testified that since the case had been reset, she had been accepted into a drug rehabilitation program and had started classes the day before the hearing. She also stated she had missed two visits with the child due to illness.

Mendez, the CPS caseworker, testified that Cervantes had not followed through on her service plan except for the initial psychological evaluation. The evaluation recommended individual counseling, parenting classes, and random drug tests. Cervantes failed to complete any of the foregoing. Mendez stated that the only support Cervantes provided the children was some Christmas presents. She also stated that Cervantes had missed three of the last seven visitations with the child, even though her visits were scheduled on Cervantes's day off. Mendez testified that the child was in a foster home with his siblings N.C. and B.C. The children seemed to be bonding in the foster home. The child was adoptable and his placement was interested in adopting him. The child was being seen at a pediatric clinic because of his prebirth narcotics exposure and because he had an undescended testicle that would require an operation. Mendez stated that CPS did not want to give Cervantes more time to complete drug rehabilitation as Cervantes knew what was required of her from the beginning and had been given enough time to complete services and had failed to do so. Mendez believed termination to be in the child's best interest.

Issues Presented: Whether the evidence was legally and factually sufficient to support the trial court's predicate ground and best interest findings?

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: In conducting a legal sufficiency review, the court determines whether the evidence is such that the fact finder could reasonably form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof. The evidence is viewed in the light most favorable to the finding. The court assumes that all disputed facts were resolved in favor of the finding, if it is reasonable to do so. The court disregards all evidence the jury could have disbelieved.

(2) Factual Sufficiency Review: In a factual sufficiency review, the court determines whether the evidence both for and against the finding is such that the fact finder could reasonably have formed a firm belief or conviction about the truth of the matter on which the State bears the burden of proof. The court considers whether the disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding.

(3) The Appellate Court May Only Review Specific Termination Ground Findings in the Trial Court's Order: The trial court only found that Cervantes engaged in conduct under § 161.001(1)(E). CPS contended that the trial court could have made an implied finding of conduct under § 161.001(1)(D). CPS relied on the *Thompson* case for the argument. The basis of the argument was that as the trial court did not make any findings of fact in the order, there were no formal findings that the appellate court was required to treat as the sole basis for the trial court's judgment. Essentially, CPS argued that in every termination case the court could uphold the termination on any of the nineteen grounds under § 161.001(1) if the evidence was sufficient to support same, and the parent failed to challenge on appeal the grounds not in the order but supported by the evidence. The court rejected CPS's argument, not-

ing that it was agreeing with its previous holding in *Vasquez*, which held that a parental rights termination can only be upheld on the grounds both pleaded by CPS and found by the trial court. The court expressly overruled *Thompson*.

(4) § 161.001(1)(E): Cervantes argued that the evidence was legally and factually insufficient to support termination under § 161.001(1)(E) as no medical evidence was introduced to show that the child had been exposed either to drugs or to danger. Cervantes also contended that there was no evidence to show that she had drugs in her system when she gave birth to the child. It is not necessary that the child actually suffer injury to prove endangerment. The manner in which other children in the family are treated can be considered in determining whether the parent engaged in a course of endangering conduct. A mother's use of narcotics may constitute endangerment. Cervantes admitted to cocaine use during pregnancy despite knowing it was dangerous for the child. Mendez testified that immediately after birth J.M. was placed in neonatal intensive care, suffering from withdrawal symptoms due to cocaine exposure. Despite Cervantes's contention that no other medical evidence was introduced, she herself admitted to cocaine use while pregnant with J.M. and that she had a serious, recurring problem with drugs. Testimony regarding Cervantes's drug use and the distress suffered by the child demonstrated that she harmed the child as actual physical harm was brought to him. In addition, Cervantes's use of cocaine was part of a course of conduct over four pregnancies. Cervantes testified that she used marijuana while pregnant with her fifth child, showing that she continued to use even while faced with the possibility of random drug tests. The use of narcotics and its effect on a parent's life and stability may establish a course of endangering conduct. The fact that CPS did not offer other medical evidence that Cervantes had cocaine in her system at the time of birth did not render the evidence regarding Cervantes's endangering conduct factually insufficient. The evidence was legally and factually sufficient.

(5) Best Interest: Cervantes's use of narcotics endangered the child and was relevant to best interest. Cervantes had a history of drug use that had already injured the child and would likely injure him in the future. Cervantes admitted that using drugs while pregnant with J.M. was harmful, and then proceeded to use marijuana while pregnant with her fifth child. This was done knowing its inconsistency with her efforts at reunification with the children. Given Cervantes's history and failure to stay away from drugs, despite her enrollment in two drug classes, a reasonable trier of fact could determine that Cervantes would continue to endanger J.M.

The child was in a home that was interested in adopting him. He was living and bonding with his siblings. Cervantes did not indicate that she could provide a stable home for the child. Cervantes's most recent relationship was with J.M.'s father, an admitted drug user, who testified that he had smoked marijuana the day of trial. The court said that the critical factor in determining whether termination was in the child's best interest was Cervantes's drug use during pregnancy and resulting actual physical harm to J.M., and her continued use of narcotics likely exposing him to physical and emotional danger in the future. The court wrote, "From these facts alone, a fact finder could have formed a firm belief or conviction or belief that termination of Cervantes's parental rights was in J.M.'s best interest." The court considered Cervantes's statements regarding successful drug completion before J.M.'s birth, that she could provide for him, and that she was in school, finding them to be outweighed by the facts that she used drugs after completing rehabilitation, she failed to follow through with the service plan, and the only financial assistance she gave the child was Christmas presents. The evidence was legally and factually sufficient to uphold the trial court's best interest finding.

Cervantes also argued that her due process rights were violated by the termination, however, she failed to separately argue it and there was no discussion of it in the body of her brief. There was nothing for the court to review. Cervantes finally contended that CPS should not be PMC as the evidence was factually insufficient to support termination. The court overruled her argument as it previously found the evidence to be factually and legally sufficient.

Cisneros v. TDFPS
No. 13-06-321-CV, 2006 Tex. App. LEXIS 11121
(Tex. App.–Corpus Christi Dec. 29, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405 – Procedure to Appeal Parental Termination
TEX. FAM. CODE § 263.405(b) – Statement of Points on Appeal Required
TEX. FAM. CODE § 263.405(i) – Jurisdiction, Appellate Court Not Deprived of
TEX. FAM. CODE § 263.405(i) – Specificity of Challenge in Statement of Points

Procedural History: Father appealed the termination of his parental rights. The Thirteenth Court of Appeals affirmed the trial court's order.

Facts: Father challenged the legal and factual sufficient of the evidence supporting the termination of his parental rights. Father timely filed his statement of points and motion for new trial. The statement of points merely claimed the evidence was insufficient to terminate his parental rights.

Issue Presented: Whether the appellate court could address father's claim that the evidence is insufficient to support the termination of his parental rights because the statement of points was not sufficiently specific to preserve his issues for appeal.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405 – Procedure to Appeal Parental Termination: Parental termination appeals are subject to the procedures provided in this section.

(2) § 263.405(b) – Statement of Points on Appeal Required: An appellant is required to file with the trial court a statement of points on which appellant intends to appeal no later than fifteen days after the final order is signed. The statement may be filed separately or may be combined with a motion for new trial.

(3) § 263.405(i) – Jurisdiction, Appellate Court Not Deprived of: Failure to comply with § 263.405 does not deprive the appellate court of jurisdiction over the appeal.

(4) § 263.405(i) – Specificity of Challenge in Statement of Points: Cisneros's statement of points claims "the evidence was insufficient to terminate the parental rights …" and the motion for new trial claims "there was insufficient evidence to terminate [Cisneros's] parental rights". Cisneros's statement of points fails to comply with § 263.405(i)'s requirement that issues be specifically presented. Where the statement of points is not sufficiently specific, the issues are not preserved for appeal.

In re C.J.C., A.M.M.C., K.L.D.C., C.M.G., S.B.G., and C.J.G.
No. 12-07-00061-CV, 2007 Tex. App. LEXIS 1274
(Tex. App.–Tyler Feb. 21, 2007, no pet.) (mem. op.) (per curiam)

Construing: TEX. FAM. CODE § 109.002 – Accelerated Appeal
TEX. FAM. CODE § 263.405(a) – Accelerated Appeal
TEX. FAM. CODE § 263.405(c) – New Trial Motion Does Not Extend Deadline
TEX. R. APP. P. 26.1(b) – Notice of Appeal Has Twenty-Day Deadline
TEX. R. APP. P. 26.1 – Time for Perfecting Appeal May Not Be Extended
TEX. R. APP. P. 26.3 – Time for Perfecting Appeal May Not Be Extended

Procedural History: The trial court terminated mother's parental rights. The Twelfth Court of Appeals dismissed mother's appeal for want of jurisdiction.

Facts: Mother's notice of appeal should have been filed no later than November 28, 2006. However, the notice of appeal was not filed until February 1, 2007. On February 6, 2007, the appellate court notified

mother her notice of appeal was untimely. Mother responded, stating she filed a motion for new trial and therefore her notice of appeal was timely.

Issue Presented: Whether the appellate court was authorized to extend the time for perfecting an appeal.

Appellate Court's Reasoning and Conclusions:

(1) § 109.002(a) – Accelerated Appeal: In suits where the termination of parental rights is in issue, an appeal of a final order is governed by the rules for accelerated appeals in civil cases.

(2) § 263.405(a) – Accelerated Appeal: In suits where the termination of parental rights is in issue, an appeal of a final order is governed by the rules for accelerated appeals in civil cases.

(3) § 263.405(c) – Motion for New Trial Does Not Extend Deadline for Filing Notice of Appeal: When the rules governing accelerated appeals apply, the filing of a motion for new trial does not extend the deadline for filing a notice of appeal.

(4) TRAP 26.1(b) – Notice of Appeal Has Twenty-Day Deadline: Under TRAP 26.1(b) the notice of appeal must be filed within twenty days of the date the final judgment was signed.

(5) TRAP 26.1 and 26.3 – Time for Perfecting Appeal May Not Be Extended: An appellate court is not authorized to extend time for perfecting an appeal except as provided by TRAP 26.1 and 26.3.

In re C.M.
208 S.W.3d 89 (Tex. App.–Houston [14th Dist] 2006, no pet.)

Construing: TEX. FAM. CODE § 263.401(d)(3) – Final Order
TEX. FAM. CODE § 263.404(a) – Final Order
TEX. FAM. CODE § 263.405 – Governs Appeals of Children under CPS Care
TEX. FAM. CODE § 263.405(b) – Purpose
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Purpose
Specificity of Challenge

Procedural History: The trial court appointed CPS PMC of Doyle's child. The Fourteenth Court of Appeals affirmed the trial court's appointment of CPS as the child's PMC.

Facts: Trial was to the bench on January 11-12, 2006. On January 23, 2006 the trial court filed a letter setting forth its findings of fact and announcing its ruling. Doyle filed a notice of appeal in which she stated she desired "to appeal from all portions of the judgment". On January 25, 2006 the trial court signed a final order appointing CPS as the child's PMC and appointing Doyle and the child's biological father PC. Doyle did not file a motion for new trial. Doyle raised seven issues on appeal: (1) the trial court abused its discretion when it denied motion for continuance and request for a jury trial; (2) the trial court abused its discretion when it denied Doyle's motion to dismiss; (3) the order appointing CPS as PMC under § 263.404 but purportedly not in compliance with § 161.001 violates Doyle's constitutional rights; (4) the evidence was insufficient to support the trial court's decisions; (5) the trial court abused its discretion by appointing a non-parent as the child's sole managing conservator; (6) the trial court's decision to restrict Doyle's visitation with the child was not based on any evidence; and (7) the trial court's purported receipt of some unspecified incompetent evidence violated Doyle's due process rights.

Issues Presented: Whether the appellate court may review any of the issues Doyle raises on appeal because she did not present them to the trial court in a timely filed statement of points on which she intended to appeal or in a statement combined with a motion for new trial.

Appellate Court's Reasoning and Conclusions:

(1) § 263.401(d)(3) – Final Order: A final order includes one that, without terminating the parent-child relationship, appoints CPS as the managing conservator of the child. The trial court's order appointing CPS as PMC is a final order.

(2) § 263.404(a) – Final Order: The trial court may render a final order appointing CPS as managing conservator of the child without terminating the rights of the parent of the child. The trial court's order appointing CPS as PMC is a final order.

(3) § 263.405 – Governs Appeals of Children under CPS Care: This section governs the appeal of a final order involving children under CPS care.

(4) § 263.405(b) – Purpose: The legislature enacted § 263.405(b) in 2001 to reduce post-judgment appellate delays in termination cases, although § 263.405(b) also applies to final orders appointing CPS managing conservator without terminating parental rights.

(5) § 263.405(i) – Purpose: Historically, some courts of appeals held that a party did not forfeit appellate review of an issue in a termination case by failing to include the issue in the statement of points required by § 263.405(b) or by failing to file the statement of points. The legislature subsequently enacted § 263.405(i) because of its displeasure with appellate decisions allegedly undermining the legislative intent of § 263.405(b).

(6) § 263.405(i) – Failure to Preserve Complaint: Doyle did not file with the trial court a statement of points on which she intended to appeal or a motion for new trial. Therefore, the appellate court may not consider any of the seven issues she raises in the appellate court.

(7) Notice of Appeal – Specificity of Challenge: Doyle's sole reference to any issues she intends to present on appeal is found in her notice of appeal, in which she states, "[Doyle] desires to appeal from all portions of the judgment". Even if a notice of appeal could serve as the statement of points required by § 263.405(b) and (i), Doyle's single reference in her notice of appeal does not provide the trial court with sufficient information to correct the matters of which she complains on appeal. Doyle's general statement in her notice of appeal is not sufficiently specific to preserve any of her seven issues for appeal.

Colbert v. DFPS

Nos. 01-04-01232-CV, 01-04-01233-CV, 01-05-00124-CV, 01-05-00126-CV, 01-05-00127-CV, 2006 Tex. App. LEXIS 10996 (Tex. App.–Houston [1st Dist.] Dec. 21, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(D)
TEX. FAM. CODE § 263.404
Appellate Court May Only Review Specific Grounds within Termination Order
Best Interest
Legal and Factual Sufficiency

Procedural History: The trial court terminated Colbert's parental rights to all seven of her children, finding that she had engaged in conduct under 161.001(1)(D) and finding that termination was in the children's best interest. The First Court of Appeals reversed.

Facts: In April 2003, Colbert was living with her five children, her mother, JoAnn Colbert, and her mother's boyfriend, Kenneth Newman. In early April, Trenton Jackson, father of two of the children, moved into the home. Jackson killed his three-year old daughter by another woman, T.J., after bringing her to the home for a visit. CPS told Colbert not to allow Jackson around the children, however, Colbert allowed Jackson to move back into the house while he was on bond because she did not believe he caused the child's death. CPS removed the children after learning that Jackson was living at the residence. One

child was placed with his paternal grandfather and the other four were placed with Colbert's mother, who along with Newman, still lived in Colbert's house. Colbert moved out an visited the children during the day.

An evaluation was performed on Colbert wherein she revealed that her mother had a history of drug convictions and that she was on parole. Colbert also stated that her mother no longer used drugs and had improved her life. CPS also learned that Colbert's mother had convictions for prostitution and burglary, and that Newman had convictions for aggravated robbery, breaking and entering, and possession of cocaine. In December 2003, CPS took the four children from Colbert's mother and placed them in foster care. CPS offered services and visits to Colbert. Colbert attended every family visit and every court appearance. On January 30, 2004, Colbert gave birth to twins. Jackson was their father. CPS removed the twins from Colbert in April 2004. All the children's cases were tried together.

At trial, Colbert testified that she only saw Jackson spank T.J. with a belt one time. She stated that she left the home after bathing the child and returned an hour and half later to find Jackson sitting in a police car. The children's therapist, Brenda Hornaday, testified that she visited the children in Colbert's home. The house was "orderly but chaotic." She had no opinion regarding the termination of Colbert's parental rights. She said that the children needed consistency, stability, structure and patience, and that the children were getting some, but not all, of what they needed at home. Hornaday testified that the children were bonded to their mother. She stated that she would continue to treat the children if returned to their mother.

The children's guardian ad litem, David Cooney, testified that he had concerns of Newman being in the home due to his criminal record. He also had concerns regarding Colbert's mother's criminal record. Cooney recommended removal of the children because of his concerns of Colbert's minimizing Jackson's role in the death of his daughter and Colbert's failure to acknowledge her own responsibility in not protecting the child or admitting to the severity of the child's bruises. Cooney stated that Colbert did not give the children equal time at visits and that the children loved Colbert. He did not think Colbert could provide the children with the structure they needed. He stated that the children's schoolwork had improved while in foster care and he believed termination to be in the children's best interest.
Adrienne Aiken, CPS's caseworker, testified that Colbert continued to minimize both her and Jackson's roles in the injury of Jackson's daughter. Colbert made conflicting statements to CPS and during Jackson's criminal trial. Aiken believed there to be "overwhelming" evidence to show that the child was abused in Colbert's presence and that she failed to be protective. She said that Colbert's belief that Jackson was not responsible for the child's death showed that she could not be protective. Aiken thought the children were physically abused and neglected, and also emotionally neglected. She saw the results of the abuse in the children's behavior. She did not see a strong bond between Colbert and the children and did not see Colbert do much nurturing. The twins received all of Colbert's attention. She believed termination was necessary as the children deserved consistency, permanency, and stability. She believed the children were adoptable. Aiken claimed that Colbert had not done everything she was asked to as she had not obtained appropriate housing and had not seen proof of Colbert's employment or income. She claimed Colbert's house was an issue because it was where Jackson's daughter's death occurred. Aiken's testimony was contradicted by CPS documentation. The plan of service did not state that Colbert's home was inappropriate, nor did it state that finding other housing was a condition of retaining her parental rights. In addition, a progress report in September 2004 stated that Colbert had located and maintained employment and had appropriate housing. Aiken's notes reflect that after speaking with Colbert she paid more attention to the child E.D.C. in a visit.

Colbert's mother testified that the children were well taken care of. She stated that she and Colbert disciplined the children by taking away privileges. She would move out of the house if it meant Colbert could keep the children. Kenneth Newman testified that Colbert was not home when the ambulance came for

Jackson's daughter. Newman said the child was fine when Colbert left the home and that after Colbert left he heard Jackson beating the child and the child crying. He stated he never saw Colbert "whip" the children and that she disciplined them by taking away privileges. He admitted to criminal convictions and that he used illegal drugs, but not at the home. Colbert challenged the best interest finding as to all seven children, and the trial court's finding of conduct under 161.001(1)(D) as to the twins.

Issues Presented: The trial court was presented with the following issues: (1) whether the evidence was legally and factually sufficient to support the trial court's finding that Colbert knowingly placed or knowingly allowed the twins to remain in dangerous conditions/surroundings; and (2) whether there was sufficient evidence to support the trial court's determination that termination was in the children's best interest.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: The court looks at all the evidence in the light most favorable to the finding to determine whether the factfinder could have formed a firm belief or conviction that the finding was true. The court assumes the factfinder resolved disputed facts in favor of the finding. The court disregards facts the factfinder could have disbelieved, however considers undisputed facts that are contrary to the finding.

(2) Factual Sufficiency Review: The court considers the entire record to determine whether a factfinder could reasonably form a firm belief or conviction about the truth of the allegations. The evidence is legally insufficient if, in light of all the evidence, the disputed evidence that a reasonable factfinder could not have credited toward the finding is so significant that a factfinder could not have reasonably formed a firm belief or conviction as to the finding.

(3) § 161.001(1)(D): Colbert argued that 161.001(1)(D) required the children to have actually been in conditions or surroundings which endangered their well-being and that there was no evidence that the twins were in such a condition. The court agreed. There was no evidence in the record establishing that the environment in Colbert's home posed a danger to the twins. Colbert's testimony is uncontradicted that CPS did not visit the home before removing the children. Thus, CPS had no basis on which to claim the environment was dangerous. Aiken and Cooney's complaints about Colbert's mother went to her criminal history. They failed to take into account that there was no current illegal activity and that she was Colbert's financial and moral support. A CASA report stated that there were no indications that Colbert's mother was presently involved with drugs. Testimony that Colbert's mother had improved her life was uncontradicted. No testimony contradicted Newman's statements that he did not use drugs at home. Aiken's stated reasons for removing the twins included: (1) Colbert's previous CPS history; (2) the fact that the other five children were in custody; (3) Colbert's testimony at Jackson's criminal trial; and (4) the fragility of the twins. These matters did not go to the twins' environment, and as such, did not support termination under 161.001(1)(D). The court stated that there was "no evidence favorable to the trial court's finding under subsection (1)(D)." Thus, the evidence was legally insufficient.

CPS argued that the court should affirm the judgment if any legal theory pleaded by CPS supported the judgment as the court did not file findings of fact separately. The court rejected the argument as in *Cervantes-Peterson and Earvin v. TDFPS. See supra*.

(4) Best Interest:

Desires of the Child: There was testimony that at least three of the children wanted to either live with Colbert or maintain a relationship with her. There was testimony that the children loved their mother

and CPS did not present evidence that any of the children did not want to return to their mother. The factor weighed in Colbert's favor.

Emotional and Physical Needs of the Children Now and in the Future: Colbert provided for the children's basic needs. However, testimony showed that some of the children have significant emotional needs, some of which Colbert was unable to fulfill. The children were making better grades at school while in foster care and Hornaday stated that most of the children's problems existed before CPS became involved. However, the evidence showed that some of the children's issues were cause by their separation from their mother. The evidence weighed in both CPS's and Colbert's favor.

Emotional and Physical Danger to the Children Now and in the Future: At trial there was no evidence that the children would be in danger if returned to Colbert because Colbert and her mother were the only ones in the home. CPS argued that the children's behavior and foul language illustrated abuse, and that the children were sometimes disciplined by spanking and had various scars and old healed marks. There was no evidence that the scars or marks were from physical abuse. A child's use of crude language is not a basis for termination. The factor weighed in favor of Colbert.

Parental Abilities: Hornaday stated Colbert provided the children with some of what they needed emotionally, but not everything. She did not specify what Colbert did and did not provide. Her statement as to the chaotic environment with five children was merely "stating the obvious". Hornaday stated she had no opinion as to termination of parental rights and would continue to work with the children if returned to Colbert. The court found the factor in Colbert's favor, considering the love and attachment between Colbert and the children and Colbert's success in complying with CPS's requirements.

Programs Available to Assist in Promoting Children's Best Interest: It was undisputed that Colbert completed all programs offered by CPS. Aiken's testimony regarding Colbert's failure to obtain appropriate housing was not "credible" because it was contradicted by CPS records. Colbert's completion of doing all CPS asked weighed in her favor.

Plans for the Children: Neither Colbert nor CPS offered much testimony on this issue. Colbert said she would try to protect the children from their fathers and have her mother move out of the house. CPS planned to place the children for adoption but had no adoptive placements.

Stability of the Home or Proposed Placement: CPS argued that Colbert's instability was shown by the fact that she had eight children by four different fathers. CPS failed to consider Colbert's current situation as she had lived in the same house for several years, obtained her GED, obtained a license as a nurse's aid, and was employed. This factor weighed in Colbert's favor.

Acts or Omissions Indicating Relationship Not Proper: Colbert allowed Jackson to move back into the home while he awaited trial. CPS also complained about Colbert's failure to admit the severity of Jackson's daughter's bruises.

Excuses for Acts or Omissions: Colbert allowed Jackson to be around the children after the death of Jackson's daughter as Colbert did not believe Jackson caused the child's death. Her testimony that she believed Jackson caused the child's death after his conviction was corroborated by her therapist. This weighed in Colbert's favor.

The Court found the evidence to be factually insufficient to support the best interest finding. The court reversed the termination order and the trial court's appointment of CPS as PMC of the twins, reasoning that the trial court failed to make specific findings under Texas Family Code Section 263.404. The court remanded the case to enter judgment disposing of all issues consistent with 161.205.

Dissent: In addition to termination, CPS requested the trial court appoint CPS as sole managing conservator of the twins. Section 153.005 of the Family Code permits a court to appoint a sole managing conservator or joint managing conservators. Section 153.131 states that a finding by the court that appointment of a parent as managing conservator would not be in the child's best interest defeats the presumption that a parent should be appointed managing conservator. Here, the trial court appointed CPS as the twins' sole managing conservator, finding the appointment to be in the children's best interest, and granting CPS specific rights and duties. Colbert failed to challenge the appointment of CPS as the twins' sole managing conservator. Further, there is no need to remand as the trial court could modify its order regarding conservatorship as it is the court of continuing exclusive jurisdiction. The court erred in reversing the portion of the judgment as to the trial court's appointment of CPS as the twins' PMC.

In re D.A.R.
201 S.W.3d 229 (Tex. App.–Fort Worth 2006, no pet.)

Construing: TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Purpose

Procedural History: The trial court terminated mother's parental rights. The Second Court of Appeals affirmed the trial court's judgment.

Facts: Trial court terminated mother's parental rights. Mother timely filed a notice of appeal. Mother raised two issues on appeal, contending the trial court erred by delaying the appointment of appellate counsel and contending her trial counsel committed ineffective assistance. Mother's two points on appeal do not appear in her statement of points or motion for new trial. Mother did not challenge the constitutionality of § 263.405(i).

Issues Presented: Whether (1) the appellate court could consider mother's claims that the trial court erred by delaying the appointment of appellate counsel and (2) her trial counsel committed ineffective assistance when those two issues were not presented to the trial court in Haywood's statement of points.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(i) – Purpose: "Historically, this court has held that the absence of a point from a statement of points, and, indeed, the absence of a statement of points, does not deprive us of the ability to review an issue on appeal in a termination case. In response to this line of cases and similar cases from other intermediate appellate courts, the legislature enacted [§ 263.405(i)]."

(2) § 263.405(i) – Failure to Preserve Complaint: This section "bars this court from considering any issues not specifically presented to the trial court in a timely filed statement of points on which the party intends to appeal or in a statement combined with a motion for new trial." "We are barred by the legislature from considering [mother's] points on appeal because they do not appear in [her] statement of points or motion for new trial."

Comment: The Second Court of Appeals "join[s] Justice Vance of our sister court in Waco in questioning the practical applications and constitutional validity of this statute".

In re D.D.S.
No. 2-05-313-CV, 2006 Tex. App. LEXIS 7065
(Tex. App.–Fort Worth Aug. 10, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.002(b) – Ineffective Assistance of Counsel
TEX. FAM. CODE § 263.405(d) - Frivolousness, Review of

Admission of Hearsay Testimony
Ineffective Assistance – Failure to Preserve Sufficiency Claims

Procedural History: The trial court terminated Roy's parental rights. On appeal, Roy's counsel filed a motion to withdraw and a brief that met the requirements of *Anders*. The Second Court of Appeals affirmed.

Facts: The child was taken into CPS custody after his mother left him with a neighbor and never returned. The child had been removed from the mother's care once before in Tennessee and placed with his maternal grandmother in Texas. The trial court terminated Roy's parental rights to the child under 161.002(b), 161.001(D), (E), and (N), and a finding that termination was in the child's best interest. Roy's appellate counsel raised three potential sources of error in his *Anders* brief.

Issues Presented: Raised in part by counsel's *Anders* brief, the court was presented with the following issues: (1) whether trial counsel rendered ineffective assistance by (a) failing to file an admission of paternity or paternity claim under 161.002(b)(1), and (b) failing to preserve legal and factual sufficiency claims; (2) whether the trial court committed reversible error by admitting hearsay testimony; and (3) whether the appeal was frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 161.002(b)(1); Failure to File Admission of Paternity or Counterclaim for Paternity Not Ineffective Assistance: CPS moved to terminate Roy's parental rights as an alleged father. An alleged father's rights may be terminated if he does not timely respond by filing an admission of paternity or counterclaim for paternity after being served. There are no specific formalities for an admission of paternity to be effective. Here, Roy waived service and signed a request for counsel that stated, "I, Roy Antelope [handwritten in black space of form], am a parent of the child named above." In addition, Roy admitted at trial that he was the child's father. In his notice of appeal and affidavit of indigency Roy was referred to as "Respondent Father." Roy admitted his paternity of the child for purposes of § 161.00(2)(b)(1). As such, his counsel was not ineffective for failing to file and admission or counterclaim for paternity.

(2) Failure to Preserve Sufficiency Complaint Not Ineffective Assistance: As this was a bench trial, there was no need to preserve legal and factual sufficiency issues for appeal. As such, counsel was not ineffective as there was no requirement of preservation.

(3) Even if the Trial Court Erred by Admitting Inadmissible Hearsay, Roy Was Not Harmed: At trial, the caseworker was permitted to testify regarding statements made by the child's mother, who was not at trial. The statements were that Roy drank and smoked marijuana on a daily bases, that he was a pimp and used drugs, and that he would manipulate his mother if she had custody of the child. However, Roy himself admitted on both cross and direct examination that he had convictions for DUI and solicitation of prostitution and had acted as a pimp in the past. He also admitted that marijuana was his "drug of choice." The child's maternal grandmother testified, without objection, that on one occasion she talked to Roy on the phone when the child's mother had called her for money. Roy threatened the child's grandmother, saying if she "didn't stay out of it he would kill both" her and the child's mother. The child's grandmother obtained a protective order against him. In addition, evidence was admitted that placement with Roy's mother was not an option as she failed to cooperate with Oklahoma child protection authorities in completing a home study. Despite a few objections to the above issues, the same or similar evidence was admitted other times without objection, much of it through Roy's own testimony. Even if the admission of the hearsay evidence was error, it did not harm Roy.

(4) <u>The Appeal Was Frivolous</u>: An independent review of the record showed there to be no error that might arguably support an appeal or require reversal. All jurisdictional and statutory prerequisites were met. Roy admitted that he habitually used alcohol and marijuana until about sixty days before trial; that he often worked as a pimp, although he had stopped before trial; that he left the child in the child's mother's care, despite knowing that mother had abandoned the child twice; that he had been incarcerated for over three years and on parole for approximately ten years for solicitation of prostitution of a minor; while on parole and participating in his service plan he committed DUI; and he'd been jailed twice for possession of a controlled substance and once for being drunk in a public place and assaulting a peace officer. Roy further admitted that he did not visit the child's mother while pregnant with the child, did not come to see the child when he was born, and did not give the child's mother any money for support as he had no job. He admitted it was good for the child to be removed from a life where the parents engaged in prostitution and its promotion. Roy stated that he had eight other children by three other mothers. He occasionally gave money to the mother of two of the children, but did not support the others. One of Roy's children, Giovanni, lived with Roy and Roy's mother. Roy supported him. Roy said he was working a steady job and would support Giovanni and D.D.S. (the child the subject of this suit) and live at his mother's house until he could afford his own. The evidence also showed that after the child's second removal from his mother he had nightmares and anger issues. Continuing therapy was recommended. The evidence was legally and factually sufficient to support the trial court's finding of conduct under § 161.001(1)(E).

The evidence was also legally and factually sufficient to support the finding that termination was in the child's best interest. Roy admitted to being at a half-way house and being unable to parent the child at trial. Despite his improvements and efforts, the child would have to live with Roy and Giovanni at his mother's house. A CPS caseworker testified Oklahoma child protection authorities denied a home study on Roy's mother because she was uncooperative. Despite testimony from Roy's mother otherwise, the caseworker's report showed her to be uncooperative. Roy did not know much about the child, including his birthday. Roy did not have a job at trial, and could make no assurances about his future stability. Between December 2004 and December 2005 he made no attempts to visit the child. He never returned after March 2005. CASA's report lauded the progress the child made in foster care because of the secure and stable environment. A caseworker testified that the foster parents wanted to adopt the child, the child appeared to be bonded to the foster parents, and that the child had been with the foster parents for about six months. The evidence was legally and factually sufficient to prove that termination was in the child's best interest. The court thus concluded that any appeal would be frivolous.

In re D.H. and C.H.
No. 10-05-00401-CV, 2006 Tex. App. LEXIS 9532
(Tex. App.–Waco Nov. 1, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(D) – Unsanitary living conditions
TEX. FAM. CODE § 161.001(1)(E) – Comment on Weight of the Evidence
TEX. FAM. CODE § 161.001(1)(O) – Comment on Weight of the Evidence
TEX. R. CIV. P. 277 – Comment on the Weight of the Evidence
Factual Sufficiency
Failure to Object to Jury Charge
No Evidence Standard of Review
Motion for Directed Verdict
Motion for Judgment Notwithstanding the Verdict
Submission of Jury Questions

Procedural History: A jury returned a verdict terminating Starrett's and Hegwood's parental rights. The Tenth Court of Appeals affirmed.

Facts: CPS Caseworker Martindale received a referral from a Colorado social services agency in December 2003 regarding the family. The Colorado agency had been working with the family after C.H. was born with drugs in his system. When the agency sought custody, after initially providing informal services, the parents left Colorado and moved to Texas.

In January 2004, CPS began providing services to the family. Martindale developed concerns for the family, including: their financial stability and the difficulty the parents faced in providing adequate clothes, food, and shelter for the children; their inability to provide appropriate discipline and care; their failure to prevent D.H. from wandering away from home; Starrett's locking D.H. out of the house to clean it; drug use by Hegwood; and the failure to place the children with a relative. Hegwood was arrested for robbery in August 2004. He pled guilty and was transferred to Tennessee to face a revocation charge. His probation was revoked and he remained incarcerated through trial.

The jury found that Starrett had engaged in conduct under § 161.001(1)(D), (E), and (O). The jury further found she had mental or emotional illness that rendered her unable to care for the children and terminated pursuant to § 161.003. The jury found that Hegwood had engaged in conduct as set forth in § 161.001(1)(D), (E), (N), and (O). The jury found termination of both parents' rights to be in the children's best interest.

Issues Presented: The court was presented with the following issues: (1) whether there was no evidence, or in the alternative factually insufficient evidence, to prove that Hegwood and Starrett engaged in conduct as set forth under § 161.001(1)(D); (2) whether the court's charge constituted a comment on the weight of the evidence; (3) whether there was insufficient evidence to support the trial court's submission of termination grounds § 161.003 and § 161.001(1)(O) to the jury; and (4) whether the trial court abused its discretion in not granting Starrett's motion for directed verdict and motion for judgment not withstanding the verdict.

Appellate Court's Reasoning and Conclusions:

(1) No Evidence Standard of Review: No evidence issue in a termination appeal will be sustained if, after looking at all the evidence in the light most favorable to the verdict, the court determines no reasonable fact finder could form a firm belief or conviction that the matter that must be proven is true.

(2) Factual Sufficiency Review: When reviewing a factual insufficiency complaint, the court must consider the evidence supporting the verdict and the evidence contrary to the verdict and determine whether the disputed evidence is such that a reasonable fact finder could not have resolved that disputed evidence in favor of the verdict.

(3) § 161.001(1)(D): Unsanitary living conditions can be considered conditions or surroundings which endanger the well-being of a child under § 161.001(1)(D). Endanger means only "to expose to loss or injury; to jeopardize." Here, the record contained more than evidence of mere unsanitary conditions. A Colorado caseworker visited the parents' home unannounced and saw trash overflowing, dog feces on the floor, piles of dirty clothes in the hallway, and dirty dishes and leftover food covering the kitchen. The caseworker stated that in her opinion the home was hazardous. CPS caseworker Martindale testified to similar conditions and stated "the home progressively was worse as far as cleanliness." Martindale further testified that at one visit she saw Starrett shut 9 month old C.H. in his bedroom while she cleaned the bathroom. It was difficult to hear what was happening in the bedroom, which had various safety hazards, making it unsafe for C.H. to remain in the room unsupervised. Starrett testified that she put C.H. in the room on an almost daily basis when she had to address D.H.'s behavioral issues. Starrett lived at five different homes in a twenty-two month period. A clinical psychologist tested the children and stated that C.H. would experience "deterioration in functioning" if not placed in a stable, secure environment. The

psychologist further stated that it would be "disastrous" if the children were not placed in such an environment. Hegwood stated that they had been evicted for not paying rent, and that the electricity had been turned off at least once for non payment. Hegwood stated that in addition to relying on CPS for food, diapers, and beds for the children, they had to rely on his mother's family and "a couple of churches" for food. A neighbor testified that on at least five occasions D.H. came to her house, and had gone to at least two others, looking for something to eat. The evidence was such that a reasonable factfinder could form a firm belief or conviction that the parents engaged in conduct under § 161.001(1)(D).

As controverting evidence, Hegwood stated that when they could not afford food they obtained it from other sources. Despite being left in the bedroom, C.H. was never hurt. Hegwood further testified that the parents withheld rent because the landlord refused to make repairs. He stated any responsibility for other bills was Starrett's. Starrett attributed D.H.'s hunger to his being a picky-eater, not a lack of food. However, the jury could infer from Starrett's testimony that she should have expanded the foods D.H. ate or served more of what he liked. Although there was some evidence contrary to the verdict, the court did not find the disputed evidence to be such that a reasonable factfinder could not have resolved the disputed evidence in favor of the finding. As the court found the evidence sufficient to support one predicate finding, it did not address the parents' contentions on the remaining termination grounds.

(4) Comment on the Weight of the Evidence; "Endangerment": Starrett first contended that the term "endangerment" provided by the court in the charge constituted an impermissible comment on the weight of the evidence. Starrett failed to object to the definition during the charge, thus she failed to preserve the error for review.

(5) Comment on the Weight of the Evidence; § 161.001(1)(O): Starrett also complained that a phrase in the court's charge regarding her compliance with the court's order establishing the actions necessary for her children's return impermissibly commented on the evidence. The Texas Rules of Civil Procedure prohibit a court from directly commenting on the weight of the evidence. When a question, a definition, or an instruction, suggests the court's opinion to the jury on a matter to be decided by the jury, the court has violated the prohibition. The court set out the challenged language and compared it to that of § 161.001(1)(O). Here, the court added the term "if any" in the phrase "who has been in the temporary managing conservatorship for not less than nine months as a result of [the child's] removal from Tina Starrett for the abuse or neglect, *if any*, of the child…" [Emphasis supplied]. When two facts are controverted, and one must be mentioned in inquiring about the other, the erroneous assumption of a controverted fact may be avoided by inserting the phrase "if any." Therefore, the submission of the phrase "if any" in the question did not suggest that the court believed the children were removed due to abuse or neglect.

(6) Submission of Questions; Sufficiency of the Evidence: Starrett also asserted that there was insufficient evidence to support submission of termination ground questions under § 161.001(1)(O) and § 161.003. Submission of an improper jury question can be harmless if the jury's answers to other questions render the improper question immaterial. An answer is immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict. An immaterial issue is not harmful unless its submission confused or misled the jury. Here, the trial court submitted separate questions on each termination ground for each child. As the court determined that the evidence was legally and factually sufficient to support the jury's finding that Hegwood and Starrett engaged in conduct as set forth in § 161.001(1)(D), the court could not say that the submission of the challenged question misled or confused the jury.

(7) Directed Verdict; JNOV: Starrett argued that the court abused its discretion in failing to grant her motion for directed verdict and her motion for judgment not withstanding the verdict. Both motions relied on insufficiency grounds. The test for legal sufficiency should be the same for summary judg-

ments, directed verdicts, judgments notwithstanding the verdict, and appellate no evidence review. The court had already determined that there was at least some evidence to support one of the termination grounds submitted to the jury. Therefore, the trial court did not abuse its discretion in denying Starrett's motion for directed verdict and her motion for judgment notwithstanding the verdict.

Doe v. Brazoria County Child Protective Services
No. 01-05-00987-CV, 2007 Tex. App. LEXIS 259
(Tex. App.–Houston [1st Dist.] Jan. 16, 2007, no pet.) (mem. op.)

Construing: TEX. R. APP. P. 10.5(b) Notice of Appeal – Implied Motion to Extend Time
Best Interest – *Holley* Factors/Drug Abuse
Ineffective Assistance of Counsel
Factual Sufficiency
Raising Ineffective Assistance for the First Time on Appeal
Termination Appeal Deadlines

Procedural History: The jury returned a verdict terminating Doe's parental rights to the children. Doe's trial counsel filed a late notice of appeal and a motion to extend time to file. The First Court of Appeals abated the appeal and remanded the matter to the trial court for an evidentiary hearing regarding ineffective assistance of counsel prejudgment and postjudgment. The trial court found Doe's trial counsel effective prejudgment, but ineffective postjudgment. The First Court of Appeals permitted the appeal and affirmed the termination.

Facts: CPS began an investigation based on a referral that the children resided in a home where drugs were present. With Doe's consent, a CPS employee and a police officer searched the home where Doe and her boyfriend, R.P., lived. Two small baggies of marijuana, roach clips, a set of scales, rolling paper, and three bullets were found. Photographs were taken which were later admitted into evidence. The police arrested Doe and R.P. and charged them with possession of marijuana and child endangerment.

The trial court entered temporary orders granting TMC of the children to CPS. Doe was named a PC. The trial court ordered Doe to: (1) submit to a psychological evaluation; (2) complete parenting classes; (3) complete counseling; (4) complete a drug and alcohol assessment; (5) remain drug and alcohol free for the pendency of the suit; and (6) maintain a safe and stable home environment. The court advised Doe that failure to complete the services could lead to restriction or termination of her parental rights. CPS later asked the court to restrict Doe to supervised visitation, or in the alternative, to terminate her parental rights. CPS alleged that termination was proper as Doe had engaged in conduct under § 161.001(1)(D), (E), and (O).

At trial, Doe testified that before the children's removal they primarily resided with her. She admitted that the police found marijuana in her home which resulted in convictions for her and R.P. for its possession. The day the marijuana was found, Doe admitted to the CPS worker that she sold marijuana from her home and was aware that R.P. had been incarcerated a few times. She saw no problem with him being around the children despite his incarceration. Doe said that R.P. forced her to sell drugs and that drug users came to her home to purchase drugs. She felt like she had a drug problem spanning seven or eight years but stopped rehabilitation because she had lost hope. She tested positive for marijuana and cocaine shortly after the children's removal. She completed drug rehabilitation successfully, however, she began using again when she miscarried R.P.'s baby. She admitted to using cocaine about seven months before trial and marijuana the weekend before trial. She admitted to two citations for public intoxication during the case. She conceded that she failed to follow through with counseling, that she knew it was wrong to use drugs around the children, and that the only environment her children knew was with a drug dealer. She stated she was an addict because she chose drugs over her children.

Doe testified that despite taking drugs she cared for her children, took them to school, bathed them, and fed them. She said she did not use drugs in front of the children. Trial was in September. Doe testified that the last time she had seen the children was in July. She had not worked since February or March. She stated that when she lived with R.P. she held a job. Doe completed the psychological evaluation but not the parenting classes. She paid her $50.00 per month child support. The longest she went without seeing the children was a month. Doe stated that she had lived with R.P. on and off for the last two years. She stated he was never violent towards her and she did not know of his past of assaulting women. He did not use drugs around her. In June 2004 R.P. assaulted her, resulting in an assault conviction. Doe obtained two protective orders against him. She had no home because of his threats against her. Doe lives with her mother who is her only means of support. She did not think the children should have been returned to her at trial. When questioned by her counsel, Doe stated that she had made a call to a drug rehabilitation facility and completed a screening. She expected a bed to become available in a few days. There was no violence in the home when the children were removed.

CPS workers testified that Doe's continued drug use, positive drug screenings, and noncompliance with conditions she was to complete changed the permanency plan from reunification to termination. Doe attended most or all of her visits with the children. Doe contacted CPS saying she had a drug problem. CPS lined up a rehabilitation program, however, Doe never contacted the program to their knowledge. When questioned about bandages on her arm around the time she was assaulted, Doe replied that she broke some glass while moving it. The children were in a foster home doing well. The home wanted to adopt them. They were not injured when removed from Doe's care.

CPS believed termination to be in the children's best interest. A worker testified that if the children were returned to Doe, CPS would likely continue to get referrals and the children would need to be removed again, hopefully before they were hurt. The children's guardian ad litem testified that she originally had a good relationship with Doe and wanted her to be successful. Her opinion changed, however, because Doe returned to drugs. The guardian ad litem did not think Doe could be rehabilitated or that she could provide the children with a stable, secure environment. Doe was unable to keep a job and had five different residences over the course of the case. She testified that the children were doing well in their placement and involved in activities. She thought that termination would be in the children's best interest. The guardian ad litem admitted that after the children's removal they were confused and upset and wanted to be returned to their parents. Doe's counsel did not call any witnesses.

Issues Presented: The court was presented with the following issues: (1) whether Doe's notice of appeal was timely; and (2) whether Doe's counsel was ineffective.

Appellate Court's Reasoning and Conclusions:

(1) <u>Doe's Notice of Appeal Was Timely Filed</u>: An appeal from the termination of the parent-child relationship is an accelerated appeal. As such, the notice of appeal is due within twenty days after the order is signed. The appellate court may extend the time to file the notice of appeal, if, within 15 days of the deadline for filing, the party files (1) a notice of appeal, and (2) a motion satisfying TRAP 10.5. A motion to extend time is necessarily implied when an appellant, acting good faith, files a perfecting instrument beyond the time allowed for perfecting the appeal, but within the 15-day period in which appellant would be entitled to move to extend the filing deadline. Here, the trial court signed the judgment on September 15, 2005. The deadline for filing the notice of appeal was October 5, 2005. Doe filed her notice of appeal on October 12, 2005, within the 15-day grace period. Therefore, a motion to extend time was necessarily implied. Doe was still required to provide a reasonable explanation for the late filing. A reasonable explanation is any plausible set of circumstances indicating that the failure to file within the specified period was not deliberate or intentional, but due to inadvertence, mistake, or mischance. At the abatement hearing, Doe's counsel testified that he did not primarily practice family law and that he did

not file the appeal timely because he did not know it was an accelerated appeal until more than 15 days after the trial court signed the judgment. This was a plausible statement that the failure to timely file was the result of mistake, even though counsel may have lacked the "due diligence" of most practioners. Doe's appeal was thus timely.

(2) Doe's Counsel Was Not Ineffective: Doe argued her counsel was ineffective both prejudgment and postjudgment as she claimed he: (1) did not present a case on her behalf; (2) did not timely file the notice of appeal; and (3) did not preserve any appellate issues, including whether there was factually insufficient evidence to support the jury's best interest finding. To prevail on her ineffective assistance claim, Doe was required to show that her counsel's performance was deficient and that the deficiency prejudiced the defense. If the appellate court determines the conduct to be deficient, it must determine whether there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different.

Doe asserted that her counsel was ineffective during trial for failing to call witnesses on her behalf, not making an opening statement, and for questioning her for only five minutes. In closing, Doe's counsel argued that he called no witnesses because he did not think CPS had met its burden of proof to show either child endangerment or that the children were removed because Doe abused or neglected them. At the abatement hearing, Doe's counsel testified that he thought Doe had covered all the relevant points in her direct. During his brief cross examination, Doe's counsel elicted testimony from her that she had taken steps to get help for her drug problem and there was no violence in the home when the children were removed. Counsel further stated that his decisions at trial were strategic and that he was not ineffective. The trial court found he had provided effective prejudgment assistance. The record showed that the jury found no child endangerment by a vote of 10-2. Further, a note sent out by the jury reflected that his argument regarding leaving CPS as the children's PMC without terminating Doe's rights was persuasive to at least one or more jury members. The court held that on the record in this case, Doe did not show her trial counsel's performance fell outside the wide range of professional assistance and was not based on trial strategy. She further failed to show how the outcome would have been any different.

(3) Failure to Perfect Appeal: As the court concluded that Doe's notice of appeal was timely filed she was not harmed.

(4) Failure to File Motion for New Trial: Doe contended that her counsel's failure to file a motion for new trial deprived her of appealing the factual sufficiency of the evidence to support the jury's finding that termination of her parental rights was in the children's best interest. In determining harm, the court proceeds as if a factual sufficiency claim had been made. The court engaged in the review set out below.

(5) Factual Sufficiency Review: When reviewing the factual sufficiency of the evidence supporting a termination finding, the court inquires whether all the evidence, both in support of and contrary to the trial court's finding, is such that a reasonable factfinder could reasonable form a firm belief or conviction about the truth of the State's allegations.

(6) Best Interest – Evidence Legally and Factually Sufficient:

Desires of the Children: The children did not testify. Despite the guardian ad litem's testimony that the children were confused and wanted to be returned to Doe's home after the removal, a CPS worker testified that the children were doing well in their placement and were healthy and happy. This weighed in favor of terminating Doe's rights.

Present and Future Emotional of the Children: There was evidence that Doe attended all but one visit evidencing a good bond between herself and the children, tending to show her ability to give them love and support. However, her own testimony of drug addiction throughout the children's lives showed she often could not, and in the future, would not, be emotionally "present with" and supportive of the children because of drug abuse. Her drug trafficking from the home was evidence that such activity was emotionally injurious to the children. This factor weighed against Doe.

Present and Future Physical Needs of the Children: Doe's payment of child support and testimony that she fed and clothed the children weighed for her. She also testified before R.P. moved in she lived alone and worked. Testimony against Doe was the guardian ad litem's statement that Doe could not hold a job, Doe's testimony that she sold drugs, her testimony that because of R.P.'s threats she did not have a home, and that she is living with her mother who is her only means of support. This factor weighed against Doe.

Present and Future Emotional and Physical Danger to the Children: Evidence favorable to Doe was that the children were uninjured when removed. Conversely, Doe's drug trafficking, continued drug use, and citations for public intoxication were evidence from which a jury could reasonably infer the children have been, and in the future could be, in danger. This factor weighed against Doe.

Parental Abilities of the Individuals Seeking Custody: Evidence supporting Doe's parental abilities was her testimony regarding keeping the children clean and fed and that there was no violence in the home while they were there. Evidence showing her lack of abilities included her drug addiction, her selling drugs, her home and job instability, and her failure to complete parenting and rehabilitation classes. This weighed against Doe.

Programs Available to Assist Custody Seeker: The foster home was willing to adopt the children. The children were enrolled in various extracurricular activities. Doe's seeking out rehabilitation might have been in the children's best interest, but her testimony regarding her inability to put the children ahead of her drug addiction made this factor weigh against her.

Stability of the Home or Proposed Placement: The children were doing well in their foster home with individuals who wanted to adopt them. The children were involved in activities. Doe did not have a home and could not demonstrate freedom from drugs. This weighed against her.

Parent's Acts or Omissions Indicating Parent-Child Relationship Not Proper: Doe admitted prolonged drug addiction despite chances at rehabilitation. She returned to drugs when she encountered difficulties. She sold drugs and received public intoxication citations. Doe engaged in relationships leading to an unstable family life. She further lied regarding the physical abuse by R.P. In her favor, Doe testified that: she had another rehabilitation opportunity; cared for the children when with her; the children were not injured when CPS removed them; the violence in the home did not occur when the children were there; she did not use drugs in front of the children; and shortly after being removed the children wanted to go home. This factor weighed against Doe.

Excuse for the Parent's Acts or Omissions: Doe testified that R.P. forced her to sell drugs and that she did not have a home due to his threats. She gave up drug rehabilitation because she lost hope. However, she gave no excuse for her drug addiction, receiving public intoxication citations, not getting or keeping a job, or completing parenting and counseling classes. The evidence was such that a reasonable jury could form a firm belief or conviction that the best interest of the children would be served if the trial court terminated Doe's parental rights. Thus, Doe's counsel's failure to file a motion for new trial did not harm her. The court dismissed her motion for new trial for want of jurisdiction.

(7) Failure to File Points of Error on Appeal: Doe also claimed her trial counsel was ineffective postjudgment because he did not file a statement of points on appeal, thereby barring her from raising any points on appeal. However, Doe was able to pursue her appeal and the court addressed her insufficiency and ineffective assistance of counsel claims. Thus, Doe was not harmed by her counsel's failure to file a timely notice of appeal or motion for new trial. The court could not conclude after reviewing the abatement hearing record, her untimely filed statement of points before the court, or her brief, that a reasonable probability existed that but for counsel's failure to timely file a statement of points, the result would have been any different. As such, Doe failed to show that she was prejudiced in that regard.

The court considered Doe's ineffective assistance of counsel claim because it could be raised for the first time on appeal without preserving it in the trial court.

In re D.W.
No. 04-05-00972-CV, 2006 Tex. App. LEXIS 7005
(Tex. App.–San Antonio Aug. 9, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 107.012 – Presence of Child's Attorney ad Litem at Trial
TEX. R. APP. P. 33.1 – Timely and Specific Objection

Procedural History: The trial court terminated Whitlow's parental rights to her daughter. The trial court found all of Whitlow's appellate points frivolous. The Fourth Court of Appeals affirmed the trial court's judgment.

Facts: Whitlow moved for a new trial and filed a statement of appellate points. The trial court found all Whitlow's appellate points frivolous. On appeal, Whitlow argues the trial court erred in finding her appeal points to be frivolous because the trial court should have recognized the child's attorney/guardian ad litem was a dispensable party to the lawsuit and should not have proceeded to trial without her.

Issues Presented: Whether Whitlow failed to preserve her objection to the absence of D.W.'s attorney/guardian ad litem by not objecting until her motion for new trial.

Appellate Court's Reasoning and Conclusions:

(1) TRAP 33.1 – Timely and Specific Objection: To preserve error, a party must make a timely and specific objection under TRAP 33.1. Whitlow did not object to the absence of D.W.'s attorney/guardian ad litem until her motion for new trial. The termination hearing, not the motion for new trial, was the appropriate point for Whitlow to raise her complaint because it represented the first opportunity the trial court had to cure the alleged error. "Since Whitlow did not raise the issue the first time that it made sense to do so, she has waived her complaint for appeal."

(2) § 107.012 – Presence of Child's Attorney ad Litem at Trial: In her dissent, Chief Justice Alma L. Lopez argues that implicit in the mandatory requirement that an attorney ad litem be appointed is the requirement that the ad litem be present at the hearings in order to represent the child's interest. The ad litem's failure to appear at a hearing should be permitted to be raised for the first time on appeal.

In re E.A.R., E.A.R., and I.D.A.
201 S.W.3d 813 (Tex. App.–Waco 2006, no pet.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points on Appeal Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405

Procedural History: The trial court terminated Arias's parental rights to her children. The Tenth Court of Appeals affirmed the trial court's termination.

Facts: Arias did not file a statement of points and did not file a motion for new trial. On appeal, she attempted to raise three issues.

Issues Presented: Whether the appellate court could consider Arias's issues raised in her brief because she did not file a statement of points.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) –Statement of Points on Appeal Required: An appellant of a state initiated termination order is required to file with the trial court a statement of points on which the appellant intends to appeal no later than fifteen days after the final order is signed. The statement can be combined with a motion for new trial.

(2) § 263.405(i) – Failure to Preserve Complaint: Arias did not file a motion for new trial or a statement of points. "Under the express terms of the amended statute, we cannot consider [Arias's] issue or any other potential issue on appeal."

Comment: In his concurring opinion Justice Bill Vance "write[s] separately to question [§ 263.405(i)'s] practical effects and constitutional implications in termination cases involving an indigent parent represented by appointed counsel".

Earvin v. TDFPS
No. 01-05-00752-CV, 2007 Tex. App. LEXIS 2016
(Tex. App.–Houston [1st Dist.] Mar. 15, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(D)
TEX. FAM. CODE § 161.001(1)(E)
TEX. FAM. CODE § 161.001(1)(N)
TEX. FAM. CODE §§ 161.205, 263.404; Court can Reverse and Render in Part
Best Interest – Unwilling to Provide Child with Proper Environment
Legal Sufficiency
Standard of Review for Appointment of Conservator
Termination Ground Not Listed in the Order
Trier of Fact – Judge of Credibility and Weight Given Testimony

Procedural History: The trial court terminated Earvin's rights to the child, finding that Earvin had engaged in conduct under 161.001(1)(D), (E), and (O) and a finding of best interest. CPS was appointed the child's sole managing conservator. The First Court of Appeals reversed the termination of Earvin's parental rights and affirmed CPS's appointment as PMC.

History: Earvin was dating the child's mother at the time the child was conceived. Earvin found out about mother's drug use and broke up with her. In December 2003, the child was born with cocaine in her system. Both mother and the child were transferred to a drug abuse center. During this time, Earvin visited the child and brought things such as clothes, food, and milk. When mother and the child were released on the weekends they would stay with Earvin. When mother and the child were permanently released from the center they disappeared. Earvin was not able to contact them and did not know where they were.

In March of 2004, Earvin injured his leg and was unable to work. He began working approximately three weeks before trial. In August 2004, CPS found mother and the child living in squalid conditions. Mother was again using drugs. CPS obtained TMC of the child and Earvin attended the show cause hearing.

At the hearing, Earvin was ordered to comply with CPS's service plan. He failed to comply with almost the entire plan.

Issues Presented: The court was presented with the following issues: (1) whether the evidence was sufficient to support the trial court's termination findings; and (2) whether the evidence was insufficient to support the trial court's naming CPS as the child's sole managing conservator.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: When determining legal sufficiency, the court reviews all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions, the court assumes that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. The court disregards all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. In conducting a legal-sufficiency review in a parental-termination case, the court must consider all of the evidence, not only that which favors the verdict.

(2) § 161.001(D) and (E): CPS did not argue that the evidence was legally and factually sufficient to support a finding under § 161.001(D) or (E). Earvin testified uncontradicted that he visited the child and brought the child items while in rehabilitation. When released on weekends, mother and child would stay with Earvin. When released permanently Earvin could not find them. CPS argued that Earvin's losing contact with mother and the child showed he was aware that the child was in a hazardous situation with mother who had drug problems but did nothing. The court stated that the above position was not a proper characterization of the facts. Earvin could not find them. When he finally did, the child was in the care of CPS. The evidence did not suggest that he failed to take action to protect the child, endangered the child, or knowingly allowed the child to be endangered. There was nothing in the record to support § 161.001(D) or (E). The evidence was legally insufficient to support a ruling that Earvin engaged in conduct under § 161.001(1)(D) or (E).

(3) § 161.001(1)(N): In order to prove § 161.001(1)(N), CPS was required to prove that: (1) the child had been under its conservatorship for not less than six months; (2) CPS made reasonable efforts to return the child to Earvin; (3) Earvin had not regularly visited or maintained contact with the child; and (4) Earvin demonstrated an inability to care for the child. The court found that CPS met the first three requirements, but failed the fourth. CPS argued that it met the fourth element based on the following facts: (1) Earvin knew the child's mother was on drugs while pregnant with the child; (2) Earvin did not attempt to take custody of the child while mother and child were in the treatment center; (3) Earvin "likely" had little interaction with the child after his leg injury; (4) Earvin took no action after determining that mother and the child were "out on the street"; and (5) Earvin made little effort to visit the child.

The fifth fact asserted by CPS went to the third element of constructive abandonment. It did not show an inability to care for the child. The third and fourth facts were speculation. Earvin testified that he saw the child regularly and provided items for the child while in the treatment program. He could not contact mother and child and did not know where they were after their release. This did not establish that he had little interaction with the child by choice, or that he took no action after mother and child left the treatment center. The first and second assertions were of no use either as CPS cited no authority that a parent has an obligation to pursue custody when the mother is in a treatment center and is subsequently released. Nothing in the record suggested that Earvin knew of the severity of mother's drug problem or that she would relapse. The record did reflect that Earvin cared for the child, had access to a home to provide for the child, and had obtained a job three weeks before trial. Even if the trial court chose to disbelieve Ear-

vin's testimony, it did not prove the opposite true. The evidence was legally insufficient to support a ruling that Earvin engaged in conduct under § 161.001(1)(N).

(4) § 161.001(1)(O): The Department argued that the court could affirm the termination under § 161.001(1)(O). That ground was not listed in the decree. The court is restricted to reviewing the sufficiency of the evidence presented under the specific statutory grounds found by the trial court in its termination order. Thus, the court could not consider whether Earvin failed to comply with services. *See Cervantes-Peterson*.

(5) §§ 161.205, 263.404; Ability of the Court to Reverse and Render in Part and Affirm in Part: The court's decision resulted in a denial of CPS's petition seeking termination of Earvin's parental rights. Under § 161.205, if the court does not order termination of parental rights, it shall either deny the petition for termination or render any order in the child's best interest. Under § 263.404, the court is permitted to appoint CPS as the child's PMC if appointment of a parent or relative as PMC would not be in the child's best interest. Here, the trial court made the required best interest finding by appointing CPS as sole managing conservator. The appellate court did not remand the case to the trial court as the trial court had already satisfied the requirements of the above two sections by rendering an order based on the best interest of the child.

(6) The Trial Court Did Not Err in Naming CPS as the Child's Sole Managing Conservator: The trial court is given wide latitude in a decision on custody, control, possession, and visitation. The finding will be reversed only on an abuse of discretion. An abuse of discretion occurs when a trial court acts without any reference to guiding rules or principles. Earvin argued that as the evidence was insufficient to support the termination of his parental rights, it "followed" that it was not in the child's best interest that CPS be appointed sole managing conservator. The court did not agree that a reversal of a termination required a reversal of conservatoship appointment. In its Second Amended Petition, CPS pled for both termination and appointment as sole managing conservator. Thus, CPS's appointment as conservator required an independent analysis because its appointment as conservator was independent of the termination finding.

There was sufficient evidence that Earvin was not "willing" to provide the child with an environment that was in its best interest. Under the court-ordered service plan, Earvin was required to attend parenting classes, participate in random drug tests, and participate in counseling. Earvin did not attend any counseling or parenting classes, and attended only one random drug test. In addition, Earvin only visited the child once while in CPS's care. Earvin asserted that his nonparticipation was due to: (1) CPS not telling him where he could receive drug evaluations and psychological evaluations; (2) he had to care for his sick mother who was in the hospital between February 2005 and June 2005; and (3) his injured leg which required him to attend physical therapy two to three times a week. Earvin was able to get friends to take him to and from physical therapy. Earvin visited the child once in December 2004. He cancelled a visit in February 2005 as his mother could not attend. He stated he wanted to reschedule the visit but "never got around to it." According to his own testimony, Earvin could care for his mother and attend physical therapy but could not attend parenting classes, drug evaluations, etc. The trier of fact is the exclusive judge of the credibility of witnesses and the weight to be give their testimony. It was within the trial court's discretion to determine that Earvin was not willing to provide an environment conducive to the child's emotional and physical needs and that appointment of CPS as sole managing conservator was in the child's best interest. The trial court's ruling was not arbitrary or unreasonable, and as such, it did not abuse its discretion.

Concurrence: Sections § 161.205 and § 263.404 are inapplicable to this case as the trial court ordered the termination of Earvin's parental rights. The court should have rendered judgment that Earvin's rights were not terminated because that is the judgment the trial court should have rendered.

In re E.A.W.S.
No. 2-06-00031-CV, 2006 Tex. App. LEXIS 10515
(Tex. App.–Fort Worth Dec. 7, 2006, pet. denied) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(E) – Suicide
TEX. FAM. CODE § 161.001(1)(N) – No Reasonable Efforts to Reunify
TEX. FAM. CODE § 161.002(b)(1)
Best Interest
Denial of Motion for Continuance – Must Show Harm
Legal and Factual Sufficiency
No Answer Default Judgment

Procedural History: The trial court terminated Robin's and David's parental rights to the child. The Second Court of Appeals affirmed the termination as to Robin and reversed as to David.

Facts: Robin overdosed on medication three days before she was due to deliver the child. Although the number of pills she took was disputed, it was enough to require her to have her stomach pumped at the hospital. Upon learning that the child was being removed from her, Robin advised the CPS worker, Christy Stewart, that she was attempting to kill herself but not the baby. She told a CPS supervisor she had tried to commit suicide before. After the child's birth, Robin had issues finding a place to live and work as she had a felony injury to a child conviction based on twelve fractures suffered by her six week old child T.D. Another eighteen month old child had a cigarette burn on the side of its mouth. Victoria, the child's paternal aunt, testified that when Robin worked she did not take her medication, causing her to become aggressive and extremely agitated. While living with Victoria and her husband, Robin quit her job and became fixated on getting the child back. Robin also made threatening comments regarding CPS caseworkers. Robin already had three children who lived with relatives (one with her grandmother and two with their father). Robin moved out of the home so that the child could live with Victoria. Robin continued to have depression and suicidal ideation. Robin had a history of volatile behavior, including a physical altercation with her grandmother the day of the overdose. Robin was revoked from probation twice on the injury to a child charge which resulted in two years of incarceration.

CPS worker Stewart contacted David regarding the child's removal. David intended to seek permission from his parole officer to attend the hearing to request that the judge release the child to him. David had concern for the child's safety with Robin and did not want the child in foster care. CPS gathered information, however, never performed a home study. David failed to file with the paternity registry. Victoria, David's sister, testified that she had been in contact with David throughout the case and that he supported her plan to adopt the child and that he could not parent the child. The CASA volunteer also stated that she had conversed with David and that he supported the plan. The CPS supervisor stated the same.

Trial was originally set on December 8, 2005 and announced on July 21, 2005. At the hearing on July 21, 2005, CPS announced that it did not intend to seek termination of parental rights, but sought relative placement. On November 10, 2005, CPS announced it was seeking termination, and the trial was reset for March 14, 2006. As this date was outside the dismissal date, Robin's attorney received an e-mail on December 2, 2005, resetting that case for December 15, 2005. Robin's attorney filed motion for continuance, arguing that although he originally had forty-five days notice of the original trial setting, he had inadequate time to prepare for trial and conduct discovery on the termination issues. He claimed he did not have reasonable notice of CPS's change in position from relative placement to termination. The trial court denied his motion.

At trial, Victoria testified as to her concerns regarding Robin's emotional stability, safety, and financial difficulties in raising the child. Robin still refused to take her medication, and despite taking some par-

enting classes and counseling, she had not improved. Robin failed to complete counseling and a drug assessment. Robin admitted she could not care for the child. Robin visited one of her children, however, could not visit another because that child had reactive attachment disorder toward her. David received actual notice of the proceedings and the final hearing. He also testified at the motion for new trial hearing. However, no service plan was ever developed for him. He thought that the entire proceedings had pertained to Robin and not to him.

Prior to bench trial the court filed a typewritten, signed, witnessed, and notarized affidavit from David which bore his name, the cause number, and the style of the case. The parties were not sure what to do with it so the trial court filed it. The document stated that David could not attend as he was out of state, but that he knew he had legal rights. In the document, David wanted to "transfer" his parental rights to Victoria. If the child was not going to be placed with Victoria, he "rescinded" and the document became "null and void." The trial court terminated Robin's parental rights on a finding of best interest and conduct under § 161.001(1)(D), (E), and (L). David's parental rights were terminated under § 161.002(b)(1), finding that David had not timely filed an admission or counterclaim of paternity, nor did he file an admission of paternity with the paternity index. The trial court also terminated his rights under § 161.001(1)(N).

Issue Presented: The court was presented with the following issues: (1) whether the trial court abused its discretion in denying Robin's motion for continuance; (2) whether the evidence was legally and factually sufficient to support the trial court's termination of Robin's parental rights; and (3) whether the evidence was legally and factually sufficient to support the trial court's termination of David's parental rights.

Appellate Court's Reasoning and Conclusion:

(1) <u>The Trial Court Erred in Failing to Grant Robin's Continuance, However, Robin Was Not Harmed</u>: A trial court's grant or denial of a continuance is within its sound discretion. Its ruling will only be reversed if the record shows a clear abuse of discretion. Under TRCP 245, Robin was entitled to forty-five days notice of a contested setting. An uncontested matter can be set at any time. Robin argued that the first setting of December 8, 2005, was uncontested as CPS was not seeking termination. Robin asserted, and the court agreed, that the case became contested when CPS announced it was seeking termination. The rescheduled date of December 15, 2005, made known to Robin's counsel on December 2, 2005, did not provide him with forty-five days notice. Therefore, the trial court abused its discretion in denying Robin's motion for continuance as it disregarded Rule 245's reasonable notice requirement.

However, to obtain a reversal of the judgment Robin was required to show that the error probably caused the rendition of an improper judgment. The court cited *J.B.*, wherein the attorney filed multiple motions for continuance as she needed to go through 1,000 pages of CPS documents and to conduct depositions. Here, Robin's counsel filed only one motion for continuance and did not specify in his affidavit why more time was needed beyond general allegations of discovery, time to meet with his client, and prepare for trial. Nothing in the affidavit, at the continuance hearing, or in Robin's brief detailed the harm Robin suffered due to not receiving the continuance. As such, the court overruled her contention.

(2) <u>Legal Sufficiency Review</u>: The court determines whether the evidence is such that a reasonable factfinder could reasonably form a firm belief or conviction that the termination grounds were proven. The court reviews the evidence in a light most favorable to the judgment, assuming that the factfinder resolved any disputed evidence in favor of the finding. The court disregards evidence a reasonable factfinder could have disbelieved, but considers undisupted evidence, even if contrary to the finding.

(3) Factual Sufficiency Review: The court must determine whether the evidence is such that a reasonable factfinder could form a firm belief or conviction that its finding was true. The court considers whether disputed evidence is such that a reasonable factfinder could not have resolved it in favor of the finding.

(4) § 161.001(1)(E): To determine whether termination is necessary because of endangerment, a parent's conduct both before and after the child's birth may be considered. A parent's mental state may be considered in determining whether a child is endangered if the mental state allows the parent to engage in conduct that jeopardizes the child's well-being. This includes a parent's attempts at suicide. Acts done in the distant past, without a showing of present or future danger, will not support termination. Finally, neglect can be as dangerous to a child's well-being as physical abuse.

The court considered Robin's conduct both before and after the child's birth. The specific dangers to the child could be inferred by Robin's conduct alone. She overdosed on prescription medication while pregnant. She endangered the child regardless of the reason for the overdose. On that same day, she was in a physical altercation with her grandmother. There was evidence that she suffered abuse as a child, establishing a pattern. Robin was convicted of injury to a child, however, this prior bad act could not be considered except for the fact that she overdosed on the medication. The attempted suicide comprised present and future danger to the child, so it was relevant for the trial court to consider other acts of endangering conduct by Robin. Robin only admitted negligence in the previous child's injuries. Neglect can be as endangering as physical abuse. Robin also testified that the injured child's father kicked her in the stomach while pregnant and that she and her grandmother "clash." David requested that the child not be placed with Robin as he feared for the child's safety. Finally, after the child's birth, Robin still showed signs of mental instability and agitation, including suicidal ideation, threatening behavior and failure to take her medication. Even after classes Robin's behavior had not improved and she admitted that she was unable to care for the child despite having a job and a place to live. The foregoing evidence was legally sufficient to support termination under § 161.001(1)(E). Essentially the same evidence was factually sufficient.

(5) Best Interest: CPS removed the child due to Robin's prescription overdose. Even without considering her prior conviction, the trial court could have concluded that Robin's overdose, even unintentionally, would have a negative impact on the child's emotional and physical well-being, as well as create a future emotional and physical danger to the child. The trial judge could also conclude that Robin was suicidal. The child had some special needs and Robin continued to have problems coping with her own issues. There was testimony that placement with Victoria and her husband would best serve the child's needs. The evidence was legally and factually sufficient.

(6) No Answer Default Judgment Inappropriate: David argued that there was insufficient evidence to support the trial court's finding that he failed to answer or appear in the lawsuit and as such admitted the allegations in the termination petition, making default termination inappropriate. TRCP 39 states that if a citation has been on file for 10 days after an answer is due, a default judgment may be taken. It is error to grant a default judgment after an answer has been filed, even if the answer was filed late. A post-answer default judgment constitutes neither an abandonment of a defendant's answer nor an implied confession. A defendant who timely files a pro se answer by a signed letter that identifies the parties, the case, and the defendant's current address, has sufficiently appeared by answer. David's document the court filed met these requirements. Therefore, he filed an answer before judgment was rendered, making a no-answer default inappropriate. CPS was thus required to prove each element of its claim.

(7) § 161.002(b)(1): To terminate David's rights, CPS was required to show that he failed to timely file an admission of paternity or counterclaim of paternity after being served, or, that he had not

registered with the paternity index and his identity or his location were unknown. There are no formalities that must be observed for an admission of paternity to be effective. Letters to the trial court admitting paternity will suffice. The document David signed stated his full name and referred to himself as "respondent father." In it he also agreed to relinquish his parental rights. He therefore admitted his paternity for the purposes of § 161.002(b)(1). Although the paternity registry search showed that David had not filed in the paternity index, the record indicates that his identity and location were known. He was served with the petition. Therefore, § 161.002(b)(2) cannot apply because his identity and location were known.

(8) § 161.001(1)(N): David argued that CPS had failed to make reasonable efforts to return the child to him. Section § 161.001(1)(N) provides that constructive abandonment may be used as a termination ground if the child had been in the conservatorship of CPS for at least six months and: (1) CPS has made reasonable efforts to return the child to the parent; (2) the parent has not regularly visited or maintained contact with the child; and (3) the parent has demonstrated an inability to provide the child with a safe environment. "Reasonable efforts" to reunite the parent and child can be satisfied through the preparation and administration of service plans. The child need not be physically returned to the individual. The court reviewed the record for CPS's efforts to return the child to David. David was rarely mentioned as most of the testimony went to Robin. Early in the case David requested a home study which was never completed. Robin was the only parent listed on the service plans, despite CPS's contact with David and knowledge that he had an interest in the child. There was no evidence that David did not attempt to visit the child. There was no testimony from any CPS caseworker as to efforts, reasonable or otherwise, to return the child to David. The evidence was thus legally insufficient.

David's constitutional challenge to § 263.405(i) was not addressed by the court because he was not precluded from raising any issue he appealed and because the court reversed his termination on other grounds. The court affirmed Robin's termination. The court reversed David's termination, however affirmed the portion of the trial court's judgment appointing CPS as PMC as David did not challenge it.

In re E.J.W., C.L.W., and D.G.G.
No. 04-06-00219-CV, 2007 Tex. App. LEXIS 11283
(Tex. App.–San Antonio Oct. 11, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint

Procedural History: The trial court terminated Alaniz's parental rights to her children. The Fourth Court of Appeals affirmed the trial court's termination.

Facts: Alaniz timely filed a motion for new trial and statement of appellate points with the trial court. Alaniz did not present in her statement of points to the trial court the allegation that there was no evidence CPS had conservatorship of the children for at least nine months prior to termination. The trial court subsequently denied Alaniz's motion for new trial and found Alaniz's appellate points to be frivolous.

Issues Presented: Whether the appellate court could address Alaniz's no evidence claim regarding § 161.001(1)(O).

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b): Pursuant to § 263.405(b) Alaniz timely filed a motion for new trial and a statement of appellate points with the trial court.

(2) § 263.405(i) – Failure to Preserve Complaint: On appeal, Alaniz's sole complaint alleges the trial court abused its discretion by determining her appeal is frivolous because there is no evidence CPS had conservatorship of the children for at least nine months prior to termination as required by §

161.001(1)(O). Alaniz's complaint concerns an issue that was not specifically presented to the trial court in her statement of points or her motion for new trial. The appellate court is barred from considering any issues on appeal that are not specifically presented to the trial court in a timely filed statement of points on which the party intends to appeal or in a statement combined with a motion for new trial.

In re F.D.D., D.C.D., H.D., and M.D.
No. 04-06-0692-CV, 2007 Tex. App. LEXIS 3357
(Tex. App.–San Antonio May 2, 2007, no pet.h.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(O)
TEX. FAM. CODE § 263.405(d) – Frivolous Appeal
TEX. FAM. CODE § 263.405(g) – Abuse of Discretion Standard of Review
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. CIV. PRAC. & REM. CODE § 13.003(b) – Frivolous Appellate Points

Procedural History: The trial court terminated parental rights and found the parents' appellate points were frivolous. The Fourth Court of Appeals affirmed the finding of frivolousness.

Facts: Benjamin and Flor filed separate motions for new trial and statements of appellate points. The trial court denied the motions for new trial and found their appellate points to be frivolous.

Issues Presented: Whether the trial court abused its discretion in determining that Benjamin's and Flor's appellate points were frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(d) – Frivolous Appeal: An appeal is frivolous if it lacks an arguable basis in law or in fact.

(2) § 263.405(g) – Abuse of Discretion Standard of Review: An appellate court reviews a trial court's determination that an appeal would be frivolous for an abuse of discretion.

(3) TCP& RC § 13.003(b) – Frivolous Appellate Points: In making a determination as to whether an appeal is frivolous, the trial court may consider whether the appellant has presented a substantial question for appellate review under CPRC § 13.003(b).

(4) § 263.405(i) – Failure to Preserve Complaint: Appellate court found that under § 263.405(i) it could not consider Benjamin's and Flor's complaints that the trial court erred in taking judicial notice of the family service plan because it was not authenticated or admitted into evidence since neither Benjamin's nor Flor's motions for new trial or statements of appellate points specifically presented this issue to the trial court.

(5) § 161.001(1)(O): Testing positive for drug tests on three occasions; refusing to submit to a drug test on one occasion; and failing to provide proof of attendance of Alcoholics Anonymous classes is sufficient evidence to support trial court's finding that Benjamin violated the family service plan.

In re H.G.H.
No. 14-06-00137-CV, 2007 Tex. App. LEXIS 476
(Tex. App.–Houston [14th Dist.] Jan. 25, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(E) – Incarceration/Criminal Conduct
Appointment of CPS as Conservator Over Relative
Best Interest – Desires of Child/Pattern of Criminal Conduct/Excuses for Acts
Legal and Factual Sufficiency

Procedural History: The trial court terminated Father's parental rights. The Fourteenth Court of Appeals affirmed.

Facts: Father was incarcerated when the child was born. The child's mother had been involved with CPS multiple times prior to the child's birth, including having her rights terminated to two other children. Due to the mother's refusal to cooperate with services, CPS sought removal.

Father was released from jail on April 1, 2004. On August 12, he advised Gallion, the CPS caseworker, that he didn't know where the child was and was concerned she had been given away. Father provided contact information in Angleton and a Houston telephone number. On August 19, Father called Gallion and advised her that mother had left the child and all the child's possessions with him.

On August 24, 2004, the trial court issued orders ordering Father to participate in services. That same month, Father committed burglary of a habitation. He was incarcerated on January 3, 2005. He pled guilty and remained incarcerated during the trial and appeal. Prior to his incarceration Father did not complete any court-ordered services, except for his psychological evaluation. He had an extensive criminal history including possession of a controlled substance, possession of marijuana, possession of a firearm, evading arrest, and burglary.

Father's mother, Mullins, became involved in the suit in late 2004 seeking custody of the child. Mullins testified that she didn't become bonded with the child because she was unsure whether Father was the child's biological father. A home study was performed and denied due to physical health and financial concerns. Mullins intervened in the suit.

At trial CPS caseworkers testified to Father's lack of involvement with the child prior to August 2004, that Father visited the child only four times after CPS was named TMC, and Father failed to pay child support or complete his court-ordered services. One worker testified that during her involvement with the case, she had no contact with Father and that he had failed to complete his court-ordered services.

Father testified that he was not seeking custody of the child. He wanted Mullins to have custody. Mullins testified that she wanted to be the child's conservator. The child's foster mother testified to the child's bonding with her family, and that the child was developing normally in her current environment. The trial court terminated Father's parental rights under 161.001(1)(D) and (E) and a best interest finding. CPS was appointed the child's PMC.

Issues Presented: The court was presented with the following issues: (1) whether the evidence was legally and factually sufficient to support the trial court's predicate findings; (2) whether the evidence was legally and factually sufficient to support the best interest finding; and (3) whether there was sufficient evidence to support the trial court's conservatorship finding.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: In reviewing the legal sufficiency of the evidence, the court looks at the evidence in the light most favorable to the finding to determine whether a reasonable fact finder could have formed a firm belief or conviction that its finding was true. The court assumes the factfinder resolved all disputed evidence in the finding's favor if able to do so. The court must disregard any evidence the factfinder could not believe, however, considers undisputed evidence contrary to the finding.

(2) Factual Sufficiency Review: In a factual sufficiency challenge, the court considers all the evidence equally, including both disputed and undisputed evidence. The court considers whether the disputed evidence is such that a reasonable factfinder could not have resolved the disputed evidence in favor

of its finding. The evidence is factually insufficient, if, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited toward the finding is so significant that the factfinder could not have reasonably formed a firm belief or conviction as to the finding.

(3) Best Interest: The child was too young to express her desires, but was bonded to her foster family and developing normally. The foster mother testified that she and her husband had a stable home and wanted to adopt the child. Father's choices left him unable to provide a stable home for the child. The undisputed evidence showed that he was unable to care for the child and had exhibited a pattern of conduct inconsistent with the "very idea of child rearing." Father was incarcerated during the majority of the child's life. His pattern of criminal conduct made it likely he would be incarcerated in the future. When not incarcerated, Father failed to maintain a stable environment and did not pay child support. Father's excuses for his conduct did not sway the court. He did not take responsibility for his burglary or the court's order to pay child support. Father did not work on his services while not incarcerated. While incarcerated he made no effort to work services. Father had no permanent plan for the child. Father argued that he could support the child if she was placed with Mullins. However, Mullins's homestudy was denied, she had inconsitent interest in the child, and had only visited the child once in the six months preceding trial. The evidence was both legally and factually sufficient.

(4) § 161.001(1)(E): Imprisonment alone is not enough to constitute endangerment. However, if the evidence, including imprisonment, is enough to show a course of conduct which endangers the physical or emotional well-being of the child, a finding under 161.001(1)(E) is supportable. Here, Father engaged in a course of conduct which rendered him unable to care for the child's needs and caused him to be absent from her life. When not incarcerated, he failed to maintain a stable home or provide for the child's support. Father testified that after his release the child lived with him on and off until CPS removed the child. On cross-examination he could not recall dates or months in which he was the child's primary caregiver. Father failed to complete any services but his psychological evaluation prior to his incarceration in January 2005. He could have completed more, if not all. His lack of concern for the child is demonstrated by the fact that he committed burglary, risking further incarceration. Father only visited the child four times after CPS was named TMC, and had not seen the child since January 2005. Father argued that his drug arrests were not evidence of endangering conduct because they occurred before the child was born and there was no evidence he used dugs in the child's presence. Father cited *D.J.J.* for his position. However, unlike *D.J.J.*, Father was incarcerated for additional offenses. In addition, the appellant in *D.J.J.* had been incarcerated the child's entire life. Here, Father was released from jail and had an opportunity to improve his life and provide for the child. Father's drug offenses and burglary conviction were evidence of his continuing course of criminal conduct, both before and after the child's birth. Father argued that burglary was not a violent crime, and that the child was not harmed because she was not with him when he committed the crime. However, Father committed burglary when he should have been improving his life. In addition, the court found it "impossible to believe" that Father's conduct which had separated him from the child had not affected her. The evidence was legally and factually sufficient. Having addressed 161.001(1)(E), the court did not address 161.001(1)(D).

(5) The Trial Court Did Not Err in Appointing CPS as PMC: The trial court is given wide latitude in its decision regarding custody, control, possession, and visitation matters. The court is only reversed if it abused its discretion, meaning that it acted arbitrarily or unreasonably, without any reference to guiding rules or principles. Father argued that Mullins had a stable home and employment, and that it was in the child's best interest to maintain a connection with her biological family. Mullins testified that she did not have a bond with the child. Mullins visited the child only two to three times after August 2004, and once during the six months preceding trial. In fact, one visit was ended because the child did not know Mullins and began to cry. CPS recommended placement with the adoptive foster family and CASA recommended against placement with Mullins. The foster parents maintained stable employment. They involved the child in a variety of activities and placed a high importance on education. The child

was developing normally and was bonded with the family. They sought to adopt the child. The trial court did not abuse its discretion in appointing CPS as sole managing conservator of the child.

In re H.H.H. and E.A.H.
No. 06-06-00093-CV, 2006 Tex. App. LEXIS 8563
(Tex. App.–Texarkana Oct. 4, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Jurisdiction, Appellate Court Not Deprived of

Procedural History: The trial court terminated Hotz's parental rights to his children. The Sixth Court of Appeals affirmed the trial court's termination.

Facts: The judgment was entered August 21, 2006 and the notice of appeal was filed September 11, 2006. No statement of points to be raised on appeal was filed, either standing alone or with a motion for new trial.

Issues Presented: Whether the appellate court could address Hotz's appeal when no statement of points was filed.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) – Statement of Points Required: A party intending to appeal a final termination order is required to file a statement of points no later than fifteen days after the final order is signed.

(2) § 263.405(i) – Failure to Preserve Complaint: Section 263.405(i) does not terminate appellate court's jurisdiction over the appeal when a statement of points has not been filed. However, where no statement of points exists, "under the express terms of the statute, there is no contention of error that can be raised that we may consider on appeal."

Comment: In reaching its holding, the Texarkana Court of Appeals joined her sister courts that "have questioned the practical applications and constitutionality of this statute".

Hughes v. TDFPS
No. 03-05-00511-CV, 2006 Tex. App. LEXIS 4742
(Tex. App.–Austin June 1, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(d) – Frivolousness, Review of

Procedural History: The trial court terminated Hughes parental rights finding that she had engaged in conduct under § 161.001(1)(E) and (O) and that termination was in the children's best interest. The Third Court of Appeals affirmed.

Facts: K.H. was born to Hughes prematurely. At the time of K.H.'s birth, Hughes was 16 sixteen years old and unmarried. In April 2004, CPS received allegations that K.H. was being physically and medically neglected by Hughes. CPS investigated and determined that K.H. was at a substantial risk of harm if left in the care of Hughes. Hughes voluntarily placed the child with a relative.

Hughes's psychological evaluation reflected a history of marijuana abuse, depression, and that she planned to quit school. Hughes failed to keep most of her scheduled counseling appointments. Hughes, although making most of her bi-monthly visits with K.H. from October to January, missed most of her visits from June to September. The caseworker testified that the visits Hughes attended went poorly be-

cause Hughes didn't know how to feed, care for, or change the baby, and didn't know what age appropriate toys were. CPS concluded that Hughes had little concern for the care and nurturing of K.H.

Hughes also had a violent history that included assaulting classmates, a teacher, her brother, and her mother. The altercations involving the classmates and teacher, as well as truancy issues, caused Hughes to be assigned to the Justice Alternative Education Center where she failed to complete the program's requirement. The assault on her brother caused her to be placed on probation. While on probation she stabbed a classmate with a pencil.

On two occasions prior to the termination hearing, Hughes tested positive for marijuana and cocaine. During the three months before trial Hughes missed eighteen days of school, failed to get her GED, and was unemployed. Hughes admitted that someone with her history and characteristics was not the type of person "who needs a little infant to raise."

K.H. was placed with a foster family who wanted to adopt her. The caseworker testified that the foster family had bonded with the child, that the foster family provided her with a stable environment, and that it would be disruptive to remove K.H. from the home. The caseworker testified that it was in the best interest of the child that Hughes's parental rights be terminated.

Issue Presented: Was the appeal frivolous?

Appellate Court's Reasoning and Conclusions:

(1) <u>The appeal was frivolous</u>: In the docket entry denying the motion for new trial the court noted that "any appeal of this matter would be frivolous." Counsel filed a motion to withdraw and an *Anders* brief in the court. Hughes was provided a copy of the record, the motion and brief, and was notified of her right to file a pro se brief. Thirty days had passed and Hughes had not filed a pro se brief. After conducting a careful and independent review of the record the court agreed that the appeal was frivolous and without merit. The trial court's termination was affirmed and counsel's motion to withdraw granted.

In re J.A.
No. 2-05-454-CV, 2006 Tex. App. LEXIS 9570
(Tex. App.–Fort Worth Nov. 2, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE §161.001(1)(E) – Drug Use, Course of Conduct
TEX. FAM. CODE § 263.401(b) – Denial of Extension Date/Standard of Review
TEX. R. CIV. P. 251 – Denial of Continuance
Best Interest – Identification of Parent
Legal and Factual Sufficiency

Procedural History: The trial court entered an order terminating Mother's parental rights, finding that she had engaged in conduct under § 161.001(1)(D)(E) and (N) that termination was in J.A.'s best interest. The Second Court of Appeals affirmed.

Facts: Mother gave birth to J.A. in April 2002. She was arrested twice for misdemeanor theft. Her probation was revoked on the first theft charge for failure to pay fines. She served a day in jail on the second theft and was discharged to perform community service. She did not complete her community service.

CPS investigated Mother several times for neglectful supervision. Mother began to use drugs (methamphetamines) and alcohol. In early 2004, CPS started a service plan for Mother, and J.A. was sent to live with Mother's uncle for several months.

Mother claimed that the caseworker gave her permission to take J.A. back which she did. Mother moved and could not be located. She did not complete parenting. She admitted to continuing to use methamphetamine on weekends while still J.A.'s primary caretaker. Mother was arrested twice in 2004 for possession of methamphetamine, once while pregnant with another child. She received three years deferred probation. She admitted to drug use after one of the above arrests and admitted to using methamphetamine even after knowing she was pregnant. At the time of the second child's birth, Mother and the baby both tested positive for methamphetamine. She gave the child up for adoption and lied about J.A.'s whereabouts. CPS continued to searched for J.A.

CPS located J.A. and removed him. Mother increased her methamphetamine use to a few times a week. A new service plan was developed which she failed to complete. She claimed that not receiving the plan until mid February or March of 2005 and a lack of transportation prevented her from completing the plan. She admitted to showing up to two visits high on methamphetamine and missed at least one visit with J.A., prompting CPS to require her to show up before the child was even brought for the visit.

Mother was again incarcerated for 33 days in April 2005 for failing to stay current on probation fees. She was incarcerated again in June for testing positive for methamphetamine. She avoided a motion to revoke by participating in the Substance Abuse Felony Program. (SAFP). At trial Mother had served three months in the SAFP program.

Mother asserted that no one from CPS had checked on her SAFP participation. She testified that while there, she completed parenting classes, NA, attended self-help meetings, and received counseling. She stated that upon a release from SAFP she would be released to a halfway house where she may or may not be able to have J.A. She testified that if a continuance and extension of the dismissal date were allowed, her halfway house requirement would be complete. The court took judicial notice that a hearing occurred but did not record it. The continuance was denied.

The caseworker testified that termination of Mother's parental rights would be in J.A.'s best interest because Mother had not maintained significant contact with him, even when not incarcerated, was still using drugs, and was unable to make the changes necessary to provide for him. The caseworker testified that when asked who his mother was J.A. pointed to a picture of his then-foster parent. The caseworker testified that J.A.'s current foster parents were a dually-licensed foster home who wanted to adopt him. Mother testified that she realized it was time to move past drugs. When asked what she would do differently, Mother stated that she would stay clean, continue treatment, become closer to family, and always put her recovery first.

Issues Presented: The court was presented with four issues: (1) whether the evidence was legally and factually sufficient to support termination of Mother's parental rights under § 161.001(1)(D)(E) or (N); (2) whether the evidence was legally and factually sufficient to support the trial court's finding that termination was in J.A.'s best interest; (3) whether the trial court abused its discretion in denying Mother a continuance; and (4) whether the trial court abused its discretion in denying Mother an extension of the dismissal date.

Appellate Court's Reasoning and Conclusions:

(1) <u>Legal Sufficiency Review</u>: In reviewing the evidence for legal sufficiency in parental termination cases, the court must determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that the grounds for termination were proven. The court must review all the evidence in the light most favorable to the finding, assuming that the factfinder resolved any disputed facts in favor of its finding if a reasonable factfinder could have done so. The court must disregard all

evidence a reasonable factfinder could have disbelieved. Undisputed evidence must be considered even if it is contrary to the finding. Evidence favorable to termination must be considered if a reasonable factfinder could, and contrary evidence disregarded unless a reasonable factfinder could not.

(2) Factual Sufficiency Review: In a factual sufficiency review, in determining whether the evidence is such that a factfinder could have reasonably formed a firm belief or conviction that its finding was true, the court must consider whether disputed evidence is such that a reasonable factfinder could not have resolved it in favor of the finding. If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction in the truth of its finding, the evidence is factually insufficient.

(3) § 161.001(1)(E): The court cites the relevant cases involving endangering conduct arising from drug abuse and criminal conduct, convictions and imprisonment. The court also compares the case to *D.T. In re D.*T., 34 S.W.3d 625, 640 (Tex. App.–Forth Worth 2000, pet. denied).

In *D.T.*, the appellant tried to ensure the child's safety by contacting CPS to request temporary placement for the child after she was arrested. She attempted to comply as fully as possible with the reunification objectives set forth by CPS while incarcerated. Like the instant case, the appellant in *D.T.* also wrote letters to the child, requested photographs, and participated in classes and counseling. However, the underlying offense in *D.T.* was writing bad checks, not using illegal drugs. Further, in *D.T.* the Department conceded that appellant had complied in all possible respects with the service plan.

Here, Mother was arrested twice for theft before she even began using drugs. J.A. was left with a relative while she was incarcerated for failing to pay probation fees. She used drugs while pregnant with another child. The trial court could reasonably have concluded that the drug abuse and its effects on her ability to parent contributed significantly to the overall course of endangering conduct.

Mother showed up high on methamphetamine for two visits and missed at least one. She failed to complete the new service plan before being incarcerated. The trial court could have reasonably considered her decision to continue to engage in illegal drug use, even when faced with the risk of permanently losing J.A., as support for an endangerment finding.

Mother's undisputed drug use while J.A.'s primary caretaker, while pregnant, and then after J.A.'s removal, was legally sufficient to constitute a course of conduct that endangered J.A.'s physical or emotional well-being. The evidence was also factually sufficient as the disputed evidence, being Mother's ability to avoid illegal drugs after being released from prison and to parent J.A., is such that a reasonable factfinder could have resolved it in favor of the endangerment finding and the judgment.

(4) Best Interest: Although J.A.'s desires are unknown, he pointed to a picture of his then-foster parent when asked who his mother was. Mother was uncertain whether she could keep J.A. at the halfway house with her, or whether she would be in a position to meet any of J.A.'s needs, financially, emotionally, or otherwise. Mother admitted to having an addictive personality, and despite first refusing to consider the possibility of relapse, later agreed that "anything could happen." The caseworker testified that J.A.'s foster placement wanted to adopt him. Further, Mother did not state that she would put J.A. first when asked about her plans post release. The foregoing is legally and factually sufficient to support the finding that termination was in J.A.'s best interest.

(5) Rule 251; Denial of Continuance Not Error: To determine whether the trial court abused its discretion, the court must decide whether it acted without reference to any guiding rules or principles;

basically, whether the act was arbitrary or unreasonable. The granting or denial of a motion for continuance is in the sound discretion of the trial court.
A motion for continuance shall not be granted except for sufficient cause supported by an affidavit, consent of the parties, or by operation of law. If a motion for continuance is not made in writing and verified, it will be presumed that the trial court did not abuse its discretion in denying same. Here, Mother requested a continuance without a supporting affidavit. As she did not comply with TRCP 251, the trial court did not abuse its discretion in denying the continuance. In addition, Mother failed to provide a record of the evidence presented to the trial court so the appellate court presumed that the evidence supported the ruling.

(6) § 263.401(b); Extension of Dismissal Date Standard of Review: The court applied an abuse of discretion standard to the denial of the extension of the dismissal date as it is similar to a continuance and Section 263.401 does not indicate which standard of review to apply. The court cited *A.R. In re A.R.*, 2004 Tex. App. LEXIS 209, No. 02-03-00235-CV, 2004 WL 40627, at *1 (Tex. App.–Fort Worth Jan. 8, 2004, pet. denied) (mem. op.). There, the court held that when no record was made of the hearing, even though the order signed recited that the court had heard evidence and argument, there was no competent evidence in the record on appeal to determine whether an abuse of discretion had occurred. Therefore, nothing had been preserved for appellate review. Here, Mother's extension hearing was not recorded. Contrary to *A.R.*, the order in this case did not say evidence or argument was heard. Because Mother did not provide a record of the hearing, the court presumed that the evidence supported the trial court's finding and that it did not abuse its discretion in denying her motion for an extension of the dismissal date.

In re J.A.J.
No. 14-04-01031-CV, 2006 Tex. App. LEXIS 7106
(Tex. App.–Houston [14th Dist.] Aug. 10, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(D) – Explained
TEX. FAM. CODE § 161.001(1)(E) – Explained
Legal and Factual Sufficiency
Reversal of Appointment of Conservator When Not Challenged

Procedural History: The trial court terminated Jackson's parental rights under § 161.001(1)(D) and (E) and a best interest finding. The Fourteenth Court reversed the trial court, and then granted a rehearing. At the rehearing, the Court reached the same conclusion it originally did, reversing and rendering in part and affirming in part.

Facts: CPS received a referral alleging abuse of the child. The child's sister advised her grandmother that the child had attempted suicide by tying shoelaces together and choking himself. Jackson advised her husband, Don Perkins, who became upset with the suicide attempt. Perkins proceeded to take the shoelaces and choke the child until he had marks around his neck. Christine Powers, a CPS caseworker, verified a linear scab around the child's neck. The children were removed. After removing the children, Powers noticed a bruise on the back of the child's left leg. Jackson admitted she spanked the child the day before for attempting to burn the house down. She admitted the spanking left marks.

A service plan was created for Jackson. The record suggested that she did not complete the plan, but made steps to improve her situation and the children's environment. Specifically, she submitted to a psychological evaluation and random drug tests. She tested positive for marijuana once. Jackson explained that she could not complete parenting classes due to inadequate funds and a lack of transportation. She requested individual counseling but was put on a waiting list. She visited the children sporadically and separated from Perkins. The trial court terminated Jackson's parental rights to the child, however, re-

served ruling on Jackson's daughter. On appeal, Jackson did not challenge the trial court's appointment of CPS as the child's PMC.

Issue Presented: Whether the evidence was legally and factually sufficient to support the trial court's predicate ground findings under § 161.001(1)(D) and (E).

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: The court looks at the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could form a firm belief or conviction that its finding was true. The court assumes that the factfinder resolved disputed evidence in favor of its finding if a reasonable factfinder could do so. The court disregards all evidence the factfinder could have disbelieved or found incredible. The court considers any undisputed evidence contrary to the finding. If a reasonable factfinder could not form a firm belief or conviction that the allegations were true, then the evidence is legally insufficient.

(2) Factual Sufficiency Review: In a factual sufficiency review, the court considers all the evidence, both disputed and undisputed. The court considers whether disputed evidence is such that a reasonable factfinder could not have resolved the disputed evidence in favor of the finding. If, in light of the entire record, the disputed evidence a reasonable factfinder could not credit in favor of the finding is so significant that a reasonable factfinder could not have formed a firm belief or conviction, the evidence is factually insufficient.

(3) § 161.001(1)(D) Explained: The conduct of parents or others in the home can generally produce dangerous surrounding or circumstances sufficient to support termination under § 161.001(1)(D). A history or pattern of abuse over time can create a home environment which threatens a child's physical or emotional maturation and risks future emotional problems. In addition, knowingly placing the child in a specific, dangerous situation can support termination under §161.001(1)(D). However, absent a notable history of abuse or a specific instance which clearly endangers a child, the court should be careful to maintain the critical distinction between "conditions or surroundings" under § 161.001(1)(D) and "conduct" as required under § 161.001(1)(E). The court found the logical interpretation of 161.001(1)(D) to be "evidence regarding a parent's conduct is relevant only to the issue of whether the parent "knowingly" placed or allowed the child to remain in [dangerous] conditions or surroundings." Subsection (D) refers only to the acceptability of the child's living conditions, such as whether the child might be living in a home without electricity, gas, or food. It must be the environment that caused the child's injury, not the parent's conduct. As such, the court limited its review of the evidence under § 161.001(1)(D) to the dangerous conditions or surroundings to which the child was exposed.

(4) § 161.001(1)(D): CPS introduced no evidence regarding the child's living environment. CPS argued § 161.001(1)(D) was supported because Jackson was an "uncaring mother" who failed to complete her service plan and that Jackson maintained an excessive and unreasonable disciplinary regimen that subjected the child to a dangerous environment. Jackson's failure to complete services may go to best interest. However, Jackson attempted to improve her living environment as she was living with her sister, was employed, and was saving money for a home. Jackson should have completed her service plan, however, her excuses of poverty and lack of transportation were not rebutted by CPS. In addition, Jackson fought to maintain her parental rights and there was evidence that she loved the child. The court cited *P.S.* for the proposition that evidence of failure to meet conduct specified by an agreement with CPS is insufficient by itself to support termination. As § 161.001(1)(D) applies only to environment, it must be the environment that causes the injury, not the parent's conduct. As such, Jackson's conduct in disciplining the child is not relevant under § 161.001(1)(D). The evidence was legally insufficient to support termination under (D).

(5) § 161.001(1)(E); Explained: Unlike § 161.001(1)(D), under § 161.001(1)(E) the source of the danger must be the parent's conduct alone. Termination may not ordinarily be based on a single transaction. However, a single, extreme case of abuse may warrant termination. A continuing course of conduct is necessary. A parent's rights should not be terminated absent
proof she knew that placing her child with a third party endangered the child's well-being.

(6) § 161.001(1)(E): Placing the child with Perkins may have been endangering conduct. However if Perkins had a proclivity to abuse children, CPS never proved that Jackson knew about it. Nothing in the record suggests that Perkins had ever abused the child before. In addition, CPS offered no evidence of Jackson's reaction to Perkins choking the child. Perkins and Jackson separated after the incident. CPS maintained that Jackson wanted to reunite with Perkins in the future. However, until they reunite, any injury to the child was "theoretical." The court surmised that CPS could "file an appropriate action" when Perkins rejoined the family. There was insufficient evidence to prove that Jackson knew Perkins was a threat to the child and that she permitted the harmful conduct to occur. This singular incident was not enough conduct under 161.001(1)(E). CPS also argued that Jackson had an admitted pattern of hitting the child and inflicting bruises on the child's back and leg that were visible in pictures. However, no photographs were admitted, Jackson could not recall how many times she spanked the child, and she stated that the spankings were infrequent. Jackson stated she would sometimes leave "marks." The court framed the issue as whether "infrequent spankings of a child that leave 'marks' or visible bruises 24 hours after the spanking constitute sufficient evidence" to show endangerment sufficient to warrant termination. The court set forth a lengthy discussion of corporal punishment, including caselaw from other jurisdiction, statistics, and research. The court cited an Illinois case which stated it is "not a court's function to determine whether 'parents measure up to an ideal, but to determine whether the child's welfare has been compromised." "We must take care not to create a legal standard from our personal notions of how best to discipline a child." Jackson stated the spankings were infrequent. There were no pictures of the child's bruises. While evidence offered by CPS showed that Jackson may have used excessive force, the court was not free to make assumptions or inferences not supported by the record. There was no evidence of any previous abuse or complaints. A caseworker conceded that if it weren't for Perkins actions, the child would not have been removed. The evidence was legally and factually insufficient to support the termination finding under § 161.001(1)(E).

The court stated that it was not prepared to hold that a bruise on the buttocks or the back of the legs, by itself, is proof of unreasonable or excessive force.

(7) Best Interest: The record reflected that all parties felt the child should remain in contact with his sister. There was concern that terminating Jackson's parental rights to the child and not to his sister would be detrimental. The child's ad litem did not think termination should be granted. After having found the predicate ground evidence insufficient, the court did not decide whether the evidence was sufficient to support the trial court's conclusion that termination was in the child's best interest. The case was reversed as to Jackson's termination and CPS's appointment as managing conservator. The trial court's termination of the unknown father was affirmed.

Dissent: The proper remedy would have been to reverse the terminations to both Jackson and the unknown father. The rights of the unknown father were interwoven with, and dependent on, Jackson's rights. There was no good reason to terminate the unknown father but not Jackson. Such an action could prejudice the child's rights if his father is identified in the future.

Dissent on Denial of En Banc Rehearing: The court denied a request for en banc rehearing to correct a split in its jurisprudence. The court was presented with almost the exact circumstances in another case as those here. In the other case, mother argued as to termination, but not the appointment of CPS as conser-

vator. Here, Jackson did the same. Here, the court reversed the court's termination and reversed the appointment of CPS as PMC. There, the court reversed the termination but affirmed CPS as PMC. The court needed to reconcile its rulings. There was also a split in the court of appeals on the subject.

In re J.A.P., P.E.P., and S.J.S.
No. 10-07-00099-CV, 2007 Tex. App. LEXIS 4248
(Tex. App.–Waco May 30, 2007, no pet. h.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(a)
TEX. R. APP. P. 26.1(b) – Deadline for Filing Notice of Appeal
Dismissal, No Reasonable Explanation for Late Filing
Notice of Appeal, Implied Motion For Extension

Procedural History: The trial court terminated Page's parental rights to J.A.P. and P.E.P. The Tenth Court of Appeals dismissed the appeal for want of jurisdiction.

Facts: Page sought to appeal the termination of his parental rights to J.A.P. and P.E.P. He filed his notice of appeal twenty-seven days after the court signed the decree. An appeal of termination of parental rights is an accelerated appeal under § 263.405(a). A notice of appeal must be filed within twenty days of the signing of the termination order.

Appellate Court's Reasoning and Conclusions:

§ 263.405(a): Page's notice of appeal, filed twenty-seven days after the judgment was signed, is untimely under § 263.405(a) and under TRAP 26.1(b). However, the notice of appeal was filed within fifteen days after its due date. Thus, the appellate court must imply a motion for extension, which must be granted if Page provides a reasonable explanation for the late filing. The appellate court notified Page the notice of appeal was untimely and that the appeal would be dismissed for want of jurisdiction if a brief or response was not filed within fourteen days providing a reasonable explanation for the late filing of the notice of appeal. Page did not file a response. Accordingly, the implied motion for extension is denied and the appeal dismissed for want of jurisdiction.

In re J.C.B.
209 S.W.3d 821 (Tex. App.–Amarillo 2006, no pet.)

Construing: TEX. FAM. CODE § 152.201 – Subject Matter Jurisdiction
TEX. FAM. CODE § 152.204(a) – Subject Matter Jurisdiction

Procedural History: Beats appealed the trial court's termination of his parental rights. The Seventh Court of Appeals affirmed.

Facts: On October 4, 2004, Beats and the child's mother were arrested for possessing drugs while traveling through Texas from Oklahoma. They presented no placement for J.C.B. As such, CPS filed a petition seeking TMC that was granted by the court. At trial in February 2006, Beats's and the mother's parental rights were terminated.

On appeal Beats argued that the trial court did not have subject matter jurisdiction to terminate his parental rights as the child's home state was not Texas. He further argued that no statute providing Texas courts with authority to assume "temporary emergency jurisdiction" over children remedied the issue.

Issue presented: Did the trial court have subject matter jurisdiction to enter a final order terminating Beats's parental rights when Texas was neither the home state of the child or either parent?

Appellate Court's Reasoning and Conclusions:

(1) §§ 152.201 and 154.204(a); The Trial Court Had Subject Matter Jurisdiction to Enter a Final Order: The burden to establish the existence of subject matter jurisdiction lies with the party initiating the suit. This burden is satisfied through allegations contained in the plaintiff's petition or the presentation of evidence illustrating the existence of the jurisdictional prerequisites.

§ 152.201 sets forth when a Texas court may make an initial custody determination. Much depends on the child's home state except for the exception involving emergency situations. To qualify in that instance, it must be a situation wherein the child was abandoned or where court intervention is "necessary in an emergency" to protect a child subjected to or threatened with mistreatment or abuse. Only when no "child custody proceeding" has been commenced in a another state having jurisdiction over the child, and Texas has become its home state, may a court make a "child custody determination" of a court exercising emergency jurisdiction under § 152.204 final.

At the time of his parents' arrest, J.C.B. was 16 months old. As such he was entirely unable to care for himself. As neither Beats, nor the child's mother, had a suitable placement for the child he was in danger of mistreatment or abuse if left alone. Thus, the trial court had temporary jurisdiction under § 152.204(a) to intervene to protect his welfare.

§ 152.204 permits a custody determination rendered pursuant to emergency jurisdiction to become final if, among other things, the child's home state becomes Texas once the order is entered. A consideration of the plain language of § 152.204 renders a different meaning of "home state" than that of § 152.102. § 152.204 does not require that the six months of residence occur prior to the institution of the suit. Here, the child remained in the care of CPS from October 2004 until trial in February 2006. As CPS had TMC of the child for those 14 months, it could be said that J.C.B.'s home state became Texas. Additionally, counsel for Beats, and CPS's counsel, both stated that they were unaware of any child custody proceeding concerning J.C.B. having been instituted anywhere else. In ordering the parental rights to be terminated the trial court implicitly directed that the subject of its order be final. When taken together, the foregoing served to prove that the trial court had authority to act under § 152.204(a).

In re J.E.D.
No. 2-06-307-CV, 2007 Tex. App. LEXIS 1866
(Tex. App.–Forth Worth Mar. 8, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(i) – Sufficiency of Statement of Points
Best Interest – *Holley* Factors
Legal and Factual Sufficiency

Procedural History: The trial court terminated A.D.'s parental rights, finding that she had engaged in conduct under § 161.001 (D), (E), and (N) and that termination was in the child's best interest. A.D. appealed the judgment as to the trial court's best interest finding only. The Second Court of Appeals affirmed the termination.

Facts: At birth, J.E.D. tested positive for amphetamines. Although A.D. initially denied drug use, Paula Shockey, a counselor for Tarrant Council on Alcoholism and Drug Abuse, testified that A.D. told her after the child's birth that she had used drugs on four occasions in the thirty days prior to J.E.D.'s birth. Ms. Shockey further testified that she referred A.D. to the Volunteers of America rehabilitation program, and that there was a bed available for A.D., however she failed to enter the program.

A.D.'s sister, T.C., testified that she had custody of two of A.D.'s other children. T.C. testified that A.D. had used drugs since junior high school and continued to have drug problems through the time of trial. T.C. testified that A.D. and her husband used drugs together when they had custody of A.D.'s oldest three children. T.C. testified that A.C. was unwilling to change and that termination was in the child's best interest. T.C. further testified that she intended to adopt the child.

Department worker Christine Patron testified that although she was assigned to the case from December 2005 until April 2006, A.D. did not contact her until March 23, 2006. Patron visited the child in T.C.'s home and found he was doing well. A second caseworker, Tahirah Samuels, testified that A.D. did not begin working her services until July 6, 2006, less than a month before trial. Samuels further testified that A.D. was asked to submit to a hair follicle drug test and A.D. told her the test would "come up dirty" for drug use within the last thirty days. Samuels initially testified that termination was in J.E.D.'s best interest, however later testified that it would be in the child's best interest to remain in T.C.'s home without termination of A.D.'s parental rights.

A.D. was on deferred adjudication for possession of a controlled substance at trial. She testified that she had last used drugs about a month before trial. She further testified that she had been involved in an outpatient drug rehabilitation, living with her grandmother, and working as a caretaker. She testified that she was trying to seek admission to college.

Issues Presented: The court was presented with the following issues: (1) whether A.D.'s statement of points was sufficient to meet the requirements of § 263.405(i); and (2) whether termination of A.D.'s parental rights was in the child's best interest.

Appellate Court's Reasoning and Conclusions:

(1) § 264.405(i); Sufficiency of Statement of Points: Each of A.D.'s points complained of legal and factual sufficiency. Specifically she asserted:

> The evidence is legally insufficient to support the finding that termination of the parent child relationship between [A.D.] and [J.E.D.] would be in the best interest of the child, as no reasonable trier of fact could form a firm belief or conviction that termination of the parent-child relationship between [A.D.] and the child would be in the best interest of the child; and
>
> The evidence is factually insufficient to support the finding that termination of the parent child relationship between [A.D.] and [J.E.D.] would be in the best interest of the child, as a trier of fact could not reasonably form a firm belief or conviction that termination of the parent-child relationship between [A.D.] and the child would be in the best interest of the child.

The Court had recently preserved a sufficiency complaint similar to those above in *A.J.H. In re A.J.H.*, 205 S.W.3d 79, 80 (Tex. App.–Forth Worth 2006, no pet. h.). The Court relied on its rationale in *A.J.H.* to find the above complaints adequate to preserve error.

(2) Legal Sufficiency Review: In reviewing the evidence for legal sufficiency in parental termination cases, the court must determine whether the evidence is such that a fact-finder could reasonably form a firm belief or conviction that the grounds for termination were proven. The court must review all evidence in the light most favorable to the finding and judgment. The court must consider evidence favorable to termination if a reasonable fact-finder could, and it must disregard contrary evidence unless a reasonable fact-finder could not.

(3) Factual Sufficiency Review: In a factual sufficiency review the court must consider whether disputed evidence is such that a reasonable fact-finder could not have resolved it in favor of the finding. The evidence is factually insufficient if, in light of the entire record, the disputed evidence that a reasonable fact-finder could not have credited in favor of the finding is so significant that a fact-finder could not have reasonably formed a firm belief or conviction as to the truth of its finding.

(4) Best Interest: In addition to the *Holley* factors, a parent's inability to provide adequate care for the child, lack of parenting skills, poor judgment, and repeated instances of immoral conduct may be considered in determining the child's best interest. By her own testimony, A.D. was a long time drug user and used drugs after the child's birth and essentially until trial. Her drug use was evidence of an emotional and physical danger to J.E.D. at the time and in the future. It was further evidence of repeated instances of immoral conduct. T.C.'s testimony regarding A.D.'s and her husband's drug use while raising three children was a lack of parental abilities. T.C. and her husband were raising three other children and J.E.D. was doing well in her home. This was evidence of T.C.'s parenting abilities and the stability of CPS's placement. Finally, while programs were available to A.D. to remedy her drug problems and improve her parenting skills, she failed to avail herself of them until a few weeks before trial. The evidence was both legally and factually sufficient to support the trial court's finding that termination of the parent-child relationship was in the child's best interest.

In re J.F.R., J.B.R., J.A.C.R., and J.C.
No. 09-06-115-CV, 2007 Tex. App. LEXIS 1727
(Tex. App.–Beaumont, March 8, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(a) – Appellate Court Must Expedite Appeal
TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. R. APP. P. 33.1 – Failure to Timely Present Complaint to Trial Court
Waiver of Constitutional Challenge

Procedural History: The trial court terminated Jennifer's and Tracey's parental rights to their children. They appealed the termination of their parental rights. The Ninth Court of Appeals affirmed the trial court's termination.

Facts: Jennifer and Tracey each filed a statement of points. Neither Jennifer's nor Tracey's statement of points specifically presented the two issues they raised on appeal: (1) that the trial court violated their due process rights by not making specific findings regarding the waiving of the requirement of a service plan and the requirement that CPS make reasonable efforts to return their children to them and (2) that their trial counsel provided ineffective assistance of counsel.

Issues Presented: Whether the appellate court can consider Jennifer's and Tracey's issues regarding (1) that the trial court violated their due process rights and (2) their trial counsel provided ineffective assistance of counsel when Jennifer and Tracey failed to file with the trial court a statement of points presenting the specific points on which they intended to appeal.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(a) – Appellate Court Must Expedite Appeal: Section 263.405 seeks to expedite appeals of final orders related to children under CPS care. In appeals from final termination orders, the statute requires that appellate courts apply the rules of accelerated appeals and render final judgments with the least possible delay.

(2) § 263.405(b) – Statement of Points Required: A party intending to appeal the trial court's termination order must timely file a statement of the point or points on which the party intends to appeal to preserve a claim.

(3) § 263.405(i) – Failure to Preserve Complaint: Because Jennifer and Tracey did not preserve their first complaints pursuant to § 263.405(b), "we may not review them". Moreover, § 263.405(i) "precludes our review of [Jennifer's and Tracey's] claims that their trial counsel provided ineffective assistance of counsel".

(4) Waiver of Constitutional Claim: Generally, to preserve error for appellate review, a party must present the complaint to the trial court by a timely request, objection, or motion. TRAP 33.1(a)(1). In voluntary termination cases, § 263.405(b) requires that an appellant take an additional step – a party intending to appeal the trial court's termination order must timely file a statement of the point or points on which the party intends to appeal to preserve a claim. Moreover, the constitutional dimension of the parent-child relationship does not automatically override the procedural requirements for error preservation. With only a few recognized exceptions, even constitutional complaints are waived if not properly preserved. The rules governing error preservation must be followed in cases involving termination of parental rights as in other cases in which a complaint is based on constitutional error.

In re J.H.
No. 12-06-00002-CV, 2007 Tex. App. LEXIS 407
(Tex. App.–Tyler Jan. 24, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE Chapter 263, Subchapter E
TEX. FAM. CODE § 263.401(b) – Final Order
TEX. FAM. CODE § 263.405(b) – Statement of Points on Appeal Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint

Procedural History: Parents sought review of a final order in a conservatorship and termination proceeding brought by CPS. The Twelfth Court of Appeals affirmed the trial court's order.

Facts: The order appointed two nonparents as joint managing conservators and did not terminate parents' rights. The parents argued that the trial court's final order was illegal based on factual insufficiency and that trial counsel was ineffective. The parents filed a motion for new trial but did not file a statement of points.

Issue Presented: Whether the appellate court could address the parents' claims that the final order was factually insufficient and their trial counsel was ineffective.

Appellate Court's Reasoning and Conclusions:

(1) 263 TFC, Subchapter E – Purpose: This subchapter governs final orders in conservatorship and termination proceedings in cases involving children under CPS care.

(2) § 263.401(b) – Final Order under Subchapter E: A final order under subchapter E is one that (1) requires the child to be returned to the child's parent; (2) names a relative of the child or another person as the child's managing conservator; (3) without terminating the parent-child relationship, appoints CPS as the managing conservator of the child; or (4) terminates the parent-child relationship and appoints a relative of the child, another suitable person, or CPS as managing conservator of the child. The proceeding was brought by CPS seeking conservatorship of J.H., a child under CPS care, and termination of the parent-child relationship. Thus, the order is a final order rendered under subchapter E.

(3) § 263.405(b) – Statement of Points on Appeal Required: An appellant seeking review of a subchapter E final order is required to file with the trial court a statement of points on which appellant

intends to appeal no later than fifteen days after the final order is signed. The statement may be filed separately or may be combined with a motion for new trial.

(4) § 263.405(i) – Failure to Preserve Complaint: An appellate court may not consider any issue that is not specifically presented to the trial court in a timely filed statement of points. While a statement of points may be combined with a motion for new trial, a motion for new trial that does not include a statement of points is not sufficient to allow appellate review of a subchapter E final order. Because parents did not file a statement of points, "we cannot consider any of the issues [the parents] have raised on appeal. This rule applies to all issues raised by [the parents], even ineffective assistance of counsel.

Johnson v. TDFPS
No. 01-05-00334-CV, 2006 Tex. App. LEXIS 6021
(Tex. App.–Houston [1st Dist.] July 13, 2006, no pet.) (mem. op.)

Discussing: *Anders* Brief –Duty to Inform Client

Procedural History: The trial court terminated Catherine's parental rights. The First Court of Appeals affirmed the trial court's termination.

Facts: Catherine's counsel filed an *Anders* brief in which he made a professional evaluation of the record and concluded there is no reversible error and no ground that can arguably support any appeal. Catherine's counsel affirmed to the appellate court that he delivered a copy of his brief to Catherine at her last known address and that he has advised Catherine of her right to obtain the record and transcript in this case and file a pro se response. Counsel filed a motion to withdraw.

Appellate Court's Reasoning and Conclusions:

The appellate court reviewed the entire record and concluded there were no arguable grounds for appeal. The appellate court granted counsel's motion to withdraw and notes counsel "still has a duty to inform Catherine of the result of this appeal and also to inform her that she may, on her own, pursue a petition for review in the Supreme Court of Texas."

In re J.W.H. and C.B.K.
No. 10-06-00083-CV, 2007 Tex. App. LEXIS 2340
(Tex. App.–Waco March 21, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(i) – Purpose of Statement of Points on Appeal
TEX. FAM. CODE § 263.405(i) – Specificity of Challenge in Statement of Points
TEX. FAM. CODE § 263.405(i) – Jurisdiction, Appellate Court not Deprived of
TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405

Procedural History: The trial court terminated Herrington's parental rights to her children. The Tenth Court of Appeals affirmed the trial court's termination.

Facts: Herrington filed a brief arguing that the evidence was legally and factually insufficient to support findings that termination is in the best interest of the children and to support § 161.001(D) and (E) grounds and that CPS erred by failing to provide a family service plan.

Issues Presented: Whether the appellate court could consider Herrington's issues raised in her brief because her statement of points were not specific.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(i) – Purpose of Statement of Points on Appeal: As the legislative history indicates, the purpose of this section is to decrease postjudgment delay in termination cases. This section is intended to conclusively establish that the Legislature expects litigants to comply with § 263.405(b). Compliance with this section, as intended by the Legislature, would correct any wrongs thirty days after trial, as opposed to extending reversals months or years after a trial.

(2) § 263.405(i) – Specificity of Challenge in Statement of Points: This provision requires more than a statement that the trial court's decision is based on legally or factually insufficient evidence. Herrington's statement of points filed with the trial court states CPS "did not meet the burden of proof at trial required for the termination of [Herrington's] parental rights to her child". The statement is not sufficient to draw the trial judge's attention to any specific erroneous findings in order to correct those findings. The lack of a specific statement of points of appeal results in no issues being preserved for appellate review.

(3) § 263.405(i) – Jurisdiction, Appellate Court Not Deprived of: The requirements of § 263.405 do not negate the jurisdiction of the appellate court.

Comment: In reaching its holding, the Waco Court of Appeals joined her sister courts "in expressing concern over the practical application and the constitutionality of this statute."

In re K.R., A.C., and H.J.C.
No. 04-05-00440-CV, 2006 Tex. App. LEXIS 5260
(Tex. App.–San Antonio June 21, 2006, pet. denied) (mem. op.)

Construing: TEX. CIV. PRAC. & REM. CODE § 13.003 – Frivolous Appellate Points
TEX. FAM. CODE § 263.405(d) – Frivolous
TEX. FAM. CODE § 263.405(g) – Abuse of Discretion Standard of Review
TEX. R. APP. P. 33.1 – Untimely Objection
Bench Warrant – Inmate's Access to Trial Proceedings
Bench Warrant – Factors Considered in Granting or Denying
Bench Warrant – No Duty to Inquire into Necessity of Personal Appearance
Inmate's Presence by Telephone for Entire Hearing Not Required

Procedural History: The trial court terminated Rodrigues's parental rights to her children. The trial court found her appellate points to be frivolous. The Fourth Court of Appeals agreed the appeal was frivolous and affirmed the trial court's order.

Facts: On the day of trial, Rodrigues's attorney informed the trial court that Rodrigues was in jail in Randall County, Texas and moved for a bench warrant so Rodrigues could testify in her own behalf and assist counsel in the presentation of evidence, cross-examination of witnesses, and defense of the suit. The trial court granted the motion "in an excess of caution" but warned counsel that if Rodrigues was not present at the next setting the trial would go forward. One month later, when the case was called for trial, Rodrigues was not present. The bench warrant had not been served because it lacked a TDC number. Rodrigues's counsel objected to proceeding to trial without his client's presence and made an oral request for another bench warrant and a one-week continuation. The trial court considered but denied these requests, ruling that Rodrigues could testify by telephone and that counsel would be given the opportunity to confer with Rodrigues in private to preserve the attorney-client privilege.

Issues Presented: Whether (1) the trial court was not authorized to deny Rodrigues's second request for a bench warrant after initially granting the request; (2) the trial court was required to allow her to listen to the entire trial telephonically; (3) Rodrigues failed to preserve error on issue 2 because the issue was not

raised until the second day of trial; and (4) the trial court abused its discretion in finding Rodrigues's appellate points relating to the bench warrant were frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(d) – Frivolous: An appeal is frivolous when it lacks an arguable basis in law or in fact.

(2) TCP& RC § 13.003(b) – Frivolous Appellate Points: In making a determination as to whether an appeal is frivolous, the trial court may consider whether the appellant has presented a substantial question for appellate review under CPRC § 13.003(b).

(3) § 263.405(g) – Abuse of Discretion Standard of Review: A trial court's determination that an appeal is frivolous is reviewed under an abuse of discretion standard.

(4) Bench Warrant – Inmate's Access to Trial Proceedings: Litigants in civil actions cannot be denied access to the courtroom simply because they are inmates; however, there is no absolute right for a civil litigant to appear in person for every court proceeding.

(5) Bench Warrant – Factors Considered in Granting or Denying: When deciding whether to grant an inmate's request for a bench warrant, courts consider a variety of factors, including but not limited to, the cost and inconvenience of transporting the inmate to the courtroom; the security risk presented by the inmate; the substance of the matter; whether the matter's resolution can be delayed until the inmate's release; whether the inmate can and will offer testimony that can be offered effectively by telephone or otherwise; whether the inmate's presence is important to judging her demeanor and credibility; whether the trial is to a judge or a jury; and the inmate's probability of success on the merits. A key factor is whether the inmate is represented by counsel.

After learning the initial bench warrant had not been served, the trial court re-weighed several of these factors and considered others. The trial court noted that the out-of-county bench warrant process generally takes two to three weeks and there was no guarantee Rodrigues's transport could be expedited. By the time the trial court made its second ruling, the matter was to be tried to the judge. Additionally, the trial court was aware the termination suit was approximately two months away from its statutory dismissal date.

(6) Bench Warrant – No Duty to Inquire into Necessity of Personal Appearance: A trial court has no duty to go beyond a bench warrant request and independently inquire into the necessity of an inmate's personal appearance. Rodrigues sought a bench warrant for two reasons: to allow her to testify and to assist counsel in presenting her case. Rodrigues testified by telephone and Rodrigues was offered the opportunity to communicate with her attorney privately by telephone immediately prior to trial. To the extent counsel desired to confer with Rodrigues about the presentation of the case during the course of the trial, she was available by telephone. Rodrigues does not articulate how the presentation of her case would have been altered had she been in the courtroom. The trial court did not abuse its discretion in concluding the bench warrant issue had no arguable basis in law or in fact.

(7) Inmate's Presence by Telephone for Entire Hearing Not Required: Appellate court rejected Rodrigues's argument that the trial court was required to allow her to listen to the entire trial telephonically.

(8) TRAP 33.1 – Untimely Objection: Because Rodrigues did not seek a ruling on whether the trial court was required to allow her to listen to the entire trial telephonically until the second day of trial, any possible error was not preserved for appellate review.

In re K.R., K.P., Jr., K.P., and J.R.
No. 09-06-056-CV, 2007 Tex. App. LEXIS 300
(Tex. App.–Beaumont Jan. 18, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points on Appeal Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Presume Counsel Continues Representation
TEX. FAM. CODE § 263.405(i) – Not Filing Statement of Points Not Ineffective
Anders Brief – Duty to Inform Client of Result and Right to Petition

Procedural History: The trial court terminated Roberson's parental rights to her children. The Ninth Court of Appeals affirmed the trial court's termination.

Facts: Roberson's counsel filed an *Anders* brief in which counsel provides a professional evaluation of the record and concludes there are no arguable grounds to be advanced on appeal. Counsel provided Roberson a copy of his brief and moved to withdraw. Roberson filed a pro se brief suggesting nine potential issues: whether (1) counsel was ineffective during the trial; (2) Roberson's due process rights were violated because the trial court did not conduct a fourteen-day hearing or a permanency hearing concerning her youngest child; (3-8) the evidence is legally and factually insufficient to support the finding under § 161.001(1)(C), (D), (E), (F), (I), (O), (P), and (Q); and (9) the evidence is legally and factually insufficient to support the finding that termination is in the children's best interest.

Issues Presented: Whether the appellate court could consider Roberson's nine issues raised in her pro se brief because a statement of points was not filed.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) – Statement of Points Required: A party intending to appeal a final termination order is required to file a statement of points no later than fifteen days after the final order is signed.

(2) § 263.405(i) – Failure to Preserve Complaint: Appellate court cannot consider the merits of Roberson's issues because a statement of points was not filed.

(3) § 263.405(i) – Presumption Trial Counsel Continues Representation: Trial court appointed counsel to represent Roberson in the trial court and the clerk's record does not contain a motion to withdraw as counsel. Roberson filed her request for new counsel after the time for filing a statement of points had expired. Roberson filed her notice of appeal pro se, and the trial court appointed new counsel for the appeal within a few days of the filing of a request for new counsel. The record does not reveal what communications occurred between Roberson and her trial counsel, and Roberson does not contend that she was not represented by counsel during the fifteen days after the trial court signed the judgment. The appellate court ruled it must presume Roberson was represented by counsel of record during the time for filing the statement of points on the record before it.

(4) § 263.405(i) –Failing to File Statement of Points Not Ineffective: Given strength of evidence supporting trial court's findings and lack of evidence Roberson communicated her desire to appeal to trial counsel, Roberson cannot argue counsel was ineffective in failing to file a statement of points.

(5) *Anders* Brief – Duty to Inform Client of Result of Appeal and of Right to Petition for Review with Texas Supreme Court: In connection with withdrawing from the case, counsel has a duty to inform Roberson of the result of the appeal and that she has a right to file a petition for review with the Texas Supreme Court.

In re L.F.B.
No. 06-06-00040-CV, 2006 Tex. App. LEXIS 7379
(Tex. App.–Texarkana Aug. 22, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(e) – Untimely Written Order Denying Indigence
TEX. FAM. CODE § 263.405(e) – Mandatory Determination of Indigence
TEX. R. APP. P. 20.1(j) – Free Record on Appeal

Procedural History: The trial court terminated the Cades' parental rights to their child. The trial court denied the Cades' claims of indigence. The Sixth Court of Appeals reversed the trial court's order denying the Cades' claims of indigence and remanded the case with instructions to the trial court to appoint appellate counsel for the Cades and ordered that the Cades receive a free record on appeal.

Facts: The trial court signed its order terminating the Cades' parental rights on March 14, 2006. On March 30, 2006, the trial court heard the Cades' motions for new trial and motions for appointed counsel based on the Cades' claims of indigence. The trial court orally denied the Cades' claims of indigence. However, the trial court did not sign its order denying the Cades' claims of indigence until May 1, 2006.

Issues Presented: Whether under § 263.405(e) the Cades are entitled to appointed counsel to pursue their appeal and entitled to a free record on appeal.

Appellate Court's Reasoning and Conclusions:

§ 263.405(e): TFC specifically provides that trial court must render a *written* order denying a claim of indigence before the thirty-sixth day after the trial court signed the final order. The failure to do so meant the trial court "*shall* consider the person to be indigent and *shall* appoint counsel to represent the person". (emphasis in original) Because trial court did not sign its order denying the Cades' claims of indigence until the forty-eighth day after it signed its order of termination, the Cades are entitled to appointed counsel to pursue their appeal and entitled to a free record on appeal under § 263.405(e) and TRAP 20.1(j).

Lusk v. TDFPS
No. 03-05-00548-CV, 2006 Tex. App. LEXIS 10010
(Tex. App.–Austin Nov. 16, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(d) **–** Frivolousness, Review of Best Interest – Adoption not a Prerequisite

Procedural History: The trial court terminated Mother's parental rights under § 161.001(1)(D) and (E) and a finding that termination was in the children's best interest. Appellate counsel filed an *Anders* brief alleging there to be no arguable grounds for reversal. The Third Court of Appeals affirmed.

Facts: Mother married Robert Mozier while both were in the Army. Both became acquainted with Donald Lusk. Mozier, the children's father, was reported missing in October 2000. Mother and the children moved in with Lusk a month later. Mother divorced Mozier and married Lusk. In August 2004, Lusk and Mother were arrested for Mozier's murder. Lusk admitted to beating Mozier to death and claimed he and Mother threw the body into a dumpster.

During the four year period between when Mother began to reside with Lusk and her arrest, Mother frequently left the children in Lusk's care for up to thirty days. Mother also left the children with Lusk's mother who decided that she could not keep them. Lusk's mother "gave" the children to an aunt and uncle of Lusk's. That placement failed so Mother asked her mother (children's grandmother) to come to Texas and care for the children. Mother testified that her mother abused her physically, emotionally, and mentally during her childhood, and once, while intoxicated, tried to kill her. Mother was in foster care

multiple times, including from 14 to 18 years of age. Mother's mother had a long history of drug and alcohol abuse. Mother testified that despite this history she asked her mother, and not Mozier's parents, to care for the children.

Evidence was presented that termination was in the children's best interest. They were in counseling and their grades had improved to A's and B's. The Moziers had secured benefits for the children due to their father's death occurring while he was on active duty. The caseworker testified that all reports of the Moziers caring for the children were "positive," and both the guardian ad litem and attorney ad litem recommended termination.

Issue Presented: Whether the appeal was frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(d);The Appeal Was Frivolous: Counsel noted that one argument at trial was that termination was premature as Mother had not yet been convicted of the underlying criminal charges. Mother, acting on advice of counsel, "took the Fifth" with regard to any question about the murder. In a civil case, the factfinder can draw a negative inference from the assertion of the privilege. In addition, the basis of the termination included not only Mother's involvement in the murder, but her acts in leaving the children with her mother who had a history of abuse, and who actually abused one of the children, and Lusk, who confessed to murdering the children's father. Counsel also noted the argument that the trial court should not have considered the abuse complaint against the children's grandmother as the children were returned to Mother after a hearing. At the time the children were returned to Mother she was not incarcerated and could have worked services to keep the family together. The return of the children at that time did not negate the relevance of her having left the children in dangerous surroundings. Counsel finally argued that Mother's rights should not be terminated as the Moziers were not seeking adoption. *An adoptive placement is not a prerequisite to finding that a parent has committed one of the grounds for termination and that termination is in the children's best interest.*

In re M.A.
No. 14-06-00720-CV, 2007 Tex. App. LEXIS 2177
(Tex. App.–Houston [14th Dist] March 22, 2007, no pet.) (not yet released for publication)

Construing:
TEX. FAM. CODE § 263.405(a) – Accelerated Appeal
TEX. FAM. CODE § 263.405(a) – Implied Motion for Extension
TEX. FAM. CODE § 263.405(d) –Deadline for Holding Hearing
TEX. FAM. CODE § 263.405(e) – Deadline for Written Order Denying Indigence
TEX. R. APP. P. 10.5(b) – Motion Requirements
TEX. R. APP. P. 20.1(c)(1) – Deadline for Filing Affidavit of Indigence
TEX. R. APP. P. 20.1(c)(1) – Extending Deadline for Filing Affidavit of Indigence
TEX. R. APP. P. 20.1(c)(1) – Untimely Filed Affidavit of Indigence
TEX. R. APP. P. 26.1(b) – Deadline for Filing Notice of Appeal
TEX. R. APP. P. 26.3 – Deadline for Filing Motion to Extend Time
Refusal to Apply *Higgins* in Termination Appeals

Procedural History: The trial court terminated parental rights. The Fourteenth Court of Appeals dismissed the appeal.

Facts: The termination final order was signed July 14, 2006. The notice of appeal was due August 3, 2006. Mother filed her notice of appeal on August 15, 2005, within fifteen days of the due date for the

notice of appeal. On September 7, 2006, mother filed an affidavit of inability to pay costs. On September 18, 2006, the District Clerk filed a contest to mother's affidavit.

Issues Presented: Whether the mother's affidavit of indigence was untimely.

Appellate Court's Reasoning and Conclusions:

(1) TRAP 26.1(b) – Deadline for Filing Notice of Appeal: Mother's notice of appeal was due within twenty days of the date the final judgment was signed.

(2) § 263.405(a) – Implied Motion for Extension: This is an accelerated appeal. Mother's notice of appeal, although filed late, was filed within the fifteen-day period in which parties may file a motion to extend time to file a notice of appeal. TRAP 26.3. The appellate court implied a motion to extend time to file the notice of appeal and concluded the notice of appeal was timely filed.

(3) TRAP 20.1(c)(1) – Deadline for Filing Affidavit of Indigence: TRAP 20.1(c)(1) requires an affidavit of indigence to be filed in the trial court with or before the notice of appeal. The appellate court may extend the time to file an affidavit of indigence if, within fifteen days after the deadline, the party files a motion under TRAP 10.5(b) in the appellate court. The latest date the notice of appeal could have been filed in the case at issue was September 4, 2006. The affidavit was not filed until September 14, 2006. The appellate court distinguishes the Texas Supreme Court's decision in *Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898 (Tex. 2006), that allowed an affidavit of indigence to be filed one hundred thirty-three days after the notice of appeal. *Higgins* did not involve the termination of parental rights and the mandatory deadlines of § 263.405.

(4) § 263.405(d) – Deadline for Holding Hearing: Under § 263.405(d) the trial court shall hold a hearing not later than the thirtieth day after the date the final order is signed to determine whether a party's claim of indigence, if any, should be sustained.

(5) § 263.405(e) – Deadline for Rendering Written Order Denying Indigence: Under § 263.405(e) if the trial court does not render a written order denying the claim of indigence or requiring the person to pay partial costs before the thirty-sixth day after the date the final order being appealed is signed, the trial court shall consider the person to be indigent.

(6) Refusal to Apply *Higgins* in Termination Appeals: If the appellate court applied the rule in *Higgins* to termination cases, an affidavit of indigence filed more than thirty-six days after the final order is signed would either entitle the appellant to indigent status because it would be too late for the trial court to deny the claim or require the trial court, and consequently, the court of appeals, to ignore the statutory deadline. Both scenarios violate the rules of statutory construction by rendering meaningless either TRAP 20.1 or § 263.405. Consistent with traditional statutory construction principles, § 263.405, the more specific statute, should control over the more general TRAP 20.1 as interpreted in *Higgins*. Moreover, applying *Higgins* to cases involving the termination of parental rights would frustrate the Legislature's intent in enacting these deadlines to reduce post-judgment delays in these types of cases. *Higgins* is not applicable to appeals from the termination of parental rights in which the affidavit of indigence is filed more than thirty-six days after date the final order is signed.

(7) TRAP 20.1(c)(1) – Untimely Filed Affidavit of Indigence: Mother's affidavit was filed after the date the trial court must hold a § 263.405(d) hearing (thirty days) and after the date the trial court had to render a written order denying the claim of indigence (thirty-six days) and therefore is untimely.

Martinez v. TDFPS
No. 03-05-00807-CV, 2006 Tex. App. LEXIS 7669
(Tex. App.–Austin Aug. 31, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405 – Frivolousness, Review of

Procedural History: The trial court terminated Martinez's parental rights under § 161.001(1)(D), (E), (N) and (O). Martinez's counsel filed a brief stating that after a thorough review of the case she believed the appeal to be frivolous. The Fifth Court of Appeals affirmed.

Facts: In March 2004, CPS removed the children from their mother and placed them with Martinez after a history of prior involvement with mother due to various allegations of abuse and neglect. A service plan was developed wherein Martinez was not to allow mother to have unsupervised contact with the children. In July, an unidentified woman, who herself had children who had been removed by CPS, brought the children to CPS saying that the children's mother had left them with her and not returned the next day. The children were filthy. CPS subsequently learned that despite Martinez's knowledge that the children were not to be left alone with their mother, and that she abused drugs, he left the children with her for two hours anyway. When the children did not return as promised he searched for them but did not call the police or CPS.

CPS removed the children from Martinez and placed them in foster care. Martinez, originally from Wisconsin, had moved to San Angelo for a period of the case. After the children were removed from him, Martinez moved back to Wisconsin and CPS had trouble contacting him. Among others things, Martinez was ordered to complete a psychological evaluation, a drug and alcohol assessment, complete parenting classes, participate in individual counseling, provide medical and dental care for the children during his possession of them, and have the children assessed by Early Childhood Intervention or enrolled in Headstart. Martinez completed the psychological exam. Martinez said that he completed parenting, but did not show proof of completion to CPS. The child G.T. required "extensive dental work" after being in his care. Martinez did not show that he completed the drug and alcohol assessment, that he had attended counseling, or that he had the children assessed or enrolled in a proper educational program. Martinez missed a few visits with the children when he lived in San Angelo, and did not visit the children at all from June 1, 2005 until trial. Trial was held in November 2005. At the time of trial the children were doing well in a foster home, were getting to see their half-siblings regularly, and G.T. was enrolled in Headstart.

Issue Presented: Whether the appeal was frivolous.

Appellate Court's Reasoning and Conclusions:

(1) <u>§ 263.405(d); The Appeal Was Frivolous</u>: Martinez's counsel filed a brief stating that after a thorough review of the record she believed the appeal to be frivolous. The brief presented a thorough and professional evaluation of the record discussing and demonstrating why there are no arguable grounds for reversal. A copy of the brief was delivered to Martinez who neither filed a pre se brief nor sought counsel. The Department filed its own brief agreeing that the appeal was frivolous. The court found the appeal frivolous after conducting its own review of the record. The trial court's judgment was affirmed and counsel was permitted to withdraw.

In re M.D.
No. 05-06-00779-CV, 2007 Tex. App. LEXIS 3491
(Tex. App.–Dallas May 7, 2007, no pet. h.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. R. APP. P. 43.2(b) – Modifying Termination Order

Procedural History: Jury terminated father's parental rights to M.D. Father appealed. The Fifth Court of Appeals affirmed the termination as modified.

Facts: Jury terminated, finding that father had engaged in at least one of the seven enumerated statutory grounds for termination. Even though the jury did not indicate which of the seven grounds it found true, the trial court listed in its order of termination all seven grounds as a basis for terminating father's parental rights.

Issues Presented: Whether (1) the appellate court could consider father's issue arguing the trial court erred by submitting a jury charge on a ground for termination that was not supported by sufficient evidence because he failed to file a statement of points and (2) the trial court's judgment reflects termination on grounds not supported by the jury's verdict.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) – Statement of Points Required: In termination cases in which CPS is a party, the trial court's final order is subject to the appeal requirements of § 263.405(b) requiring father to file a statement of points in the trial court.

(2) § 263.405(i) – Failure to Preserve Complaint: Because father failed to file a statement of points the appellate court concluded it could not consider father's first issue.

(3) Modifying Termination Order: CPS conceded that the trial court listing all seven grounds as a basis for terminating father's parental rights was error when the jury did not indicate which of the seven grounds it found true. The appellate court noted that under Texas Rule of Appellate Procedure 43.2(b), it had the power to reform a judgment when it has the necessary information to do so. The appellate court reformed the trial court's judgment to add the following italicized words: "The Court finds by clear and convincing evidence that [Father] has *done at least one of the following acts*" and affirmed the trial court's termination order as modified.

In re M.J. and A.M.
No. 09-05-331-CV, 2006 Tex. App. LEXIS 10207
(Tex. App.–Beaumont Nov. 30, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(P)
TEX. FAM. CODE § 161.001(1)(R)
TEX. FAM. CODE § 161.004(b) – Evidence in a Prior Case, Use of
Best Interest
Legal and Factual Sufficiency

Procedural History: The trial court terminated McKenzie's parental rights under § 161.001(1)(P) and (R) grounds and a finding that termination was in the children's best interest. The Ninth Court of Appeals affirmed.

Facts: McKenzie was the mother of four children: Z.M., born in 1994; M.J., born in 1997; A.M., born in 2001; and S.A., born in 2004. She was pregnant at the time of trial in 2005. McKenzie acknowledged her eleven year cocaine addiction and admitted that she used drugs while pregnant with three of the children. The children were first removed in February 2002, but were returned to McKenzie after she completed a four month substance abuse program at a rehabilitation facility. That case was dismissed in November 2003.

CPS instituted removal proceedings again in January 2004 after learning that McKenzie was still using drugs in the home while the children were present. McKenzie was pregnant with S.A. at the time. In July 2004, CPS removed S.A. as he tested positive for cocaine at birth. The trial court transferred conservatorship of Z.M. to her father without terminating McKenzie's parental rights. At the conclusion of the final hearing, the trial court severed the action regarding S.A. from the case. The trial court terminated

McKenze's parental rights and appointed CPS conservator of the two remaining children (M.J. and A.M.).

Issues Presented: The court was presented with the following issues: (1) whether the evidence was legally and factually sufficient to support termination of McKenzie's parental rights under 161.001(1)(P) and (R); and (2) whether the evidence was legally and factually sufficient to support the trial court's finding that termination was in the children's best interest.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: In a legal sufficiency review the court must consider all of the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. The court assumes that the trial court resolved disputed facts in favor of its finding if a reasonable factfinder could do so. The court disregards all evidence that a reasonable factfinder could have disbelieved or found to be incredible. If the court finds the evidence to be legally sufficient, it reviews all of the evidence for factual sufficiency.

(2) Factual Sufficiency Review: In a factual sufficiency review, the court determines whether the evidence is such that the factfinder could reasonably form a firm belief or conviction about the truth of the allegations. The court gives due consideration to evidence that the trial court could reasonably have found to be clear and convincing.

(3) § 161.004(b): McKenzie argued that even though there was some evidence that both M.J. and A.M. tested positive for cocaine when they were born, the evidence does not support the finding because M.J. and A.M. were born before the trial court dismissed the first case. The court did not agree. The court may consider evidence presented at a previous hearing in a subsequent suit for termination with respect to the same child.

(4) § 161.001(1)(P) and (R): Endangerment does not require actual physical injury and may be inferred from conduct involving another child. McKenzie completed the court-ordered substance abuse program and was reunited with her children, but later S.A. tested positive for cocaine at birth. McKenzie admitted to using cocaine after she got the children back and the present suit commenced before S.A.'s birth. McKenzie testified that she used drugs both at the beginning and end of her pregnancy, knowing that drug use was endangering her child's safety. McKenzie admitted to staying away from the children and prostituting herself when she relapsed. Despite McKenzie's contentions that she did not prostitute or use drugs around the children, and that her mother kept the children when she wanted to get "high," the trial court could infer a course of conduct that endangered the welfare of M.J. and A.M. from McKenzie's repeated relapses into "active" drug abuse. McKenzie further testified that she had remained sober for almost a year and claimed that she tested negative for drugs a month before trial upon her admission to a homeless shelter. McKenzie's foregoing evidence regarding sobriety and drug testing was relevant to the best interest inquiry, but did not significantly undermine the support for the predicate termination ground findings. The evidence was legally and factually sufficient to support both § 161.001(1)(P) and (R) grounds.

(5) Best Interest: McKenzie argued that the fact that the trial court did not terminate her parental rights to her oldest and youngest children weighed against the finding that termination was appropriate for the two middle children. The trial court contemplated placing Z.M. and S.A. with their respective fathers. This was not an option for the trial court when it came to M.J. and A.M. A.M.'s father was unknown, and M.J.'s father consented to the termination of his parental rights. CPS's plan for M.J. and A.M. was placement with M.J.'s paternal grandmother for eventual adoption. She left retirement and returned to work to provide for the children and had a stable home. A.M. had resided with McKenzie for

six months after the previous proceeding, but had lived with M.J.'s grandmother since then. Adoption assistance would be available to M.J.'s grandmother and she wanted termination of both parents' rights so that she could raise the children without interference. McKenzie did not present a viable plan for caring for the children. McKenzie's mother is not physically able to care for the children and CPS had removed children from her before. McKenzie was not employed and had not provided any financial assistance to the children. McKenzie was residing in a homeless shelter at the time of trial. She did not know the address. She planned to stay there until S.A. was returned to his father. McKenzie did not identify any of the *Holley* factors that predominated in her favor. Although McKenzie argued that M.J.'s paternal grandmother could raise the children without her rights being terminated, the trial court could reasonably conclude that despite McKenzie's sincere efforts to combat drug addiction, McKenzie would never provide a stable environment for the children and that a secure future for them could only be obtained by terminating her parental rights. The trial court did not err in finding termination to be in the children's best interest.

In re M.J.F.
No. 06-05-00113-CV, 2006 Tex. App. LEXIS 7858
(Tex. App.–Texarkana Sept. 1, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(D) – Drug Use/Criminal Violations
TEX. FAM. CODE § 161.001(1)(E) – Drug Use/Knowledge of Parent's Drug Use
Best Interest – Disabilities of the Child
Legal and Factual Sufficiency

Procedural History: The trial court terminated Michael's and Wreathye's parental rights. The Sixth Court of Appeals affirmed.

Facts: Michael and Sonja were married. While living apart during a separation, Michael fathered M.J.F. with Wreathye. Considerable stress resulted when he and Sonja resumed living together. Two other children in the home independently recounted M.J.F. crying and Sonja repeatedly hitting him in the head until he stopped crying and "went to sleep." Wreathye had substance abuse problems. After a year and a half of working with CPS, Wreathye still admitted using alcohol and marijuana, and was only able to achieve thirteen days of sobriety immediately preceding trial. After substantial progress in the case the child was actually placed back into Wreathye's home on a monitored return. Wreathye was subsequently arrested for driving while intoxicated. The child was in the car with her when she was arrested. CPS subsequently removed again.

Psychological evaluations were performed on Michael and Wreathye by Dr. Donald Winstead. Winstead found issues in both. Michael had a personality disorder and tended to see his the child as meeting his rather needs rather than vice versa. He was a past substance abuse user and was prone to be an abuser as he himself was abused. Michael claimed three years of sobriety. Michael did not believe that Sonja injured the child. Sonja did admit to slapping her daughter. Sonja's attitude toward corporal punishment suggested that she overused it as discipline. Both Sonja and Michael tended to have problems dealing with children striving for normal independence. Winstead diagnosed Wreathye as a substance abuser. She might have had a personality disorder as well. Winstead did testify that Wreathye was always appropriate with the child and did a good job with him. Winstead also testified that Michael had empathy and normal expectations for children. Wreathye stated that Micheal had abused her while they were together. Winstead had concerns for the child being placed with Michael as long as he and Sonja were together. Winstead was concerned that Michael might not have the strength to protect the child from Sonja. Winstead also had concerns for the child being placed with Wreathye as she had been arrested for drunk driving with the child as a passenger. Winstead felt that there was a significant possibility that Wreathye

could not do what is needed to parent the child. Winstead felt that even if the child wasn't adoptable, the alternative was better than placement with Wreathye or Michael.

Wreathye admitted to multiple arrests, episodes of being assaulted, and committing crimes in front of her children, including M.J.F. Wreathye's record reflected numerous examples of her abusing alcohol or marijuana and missing counseling or rehabilitation meetings. Wreathye also had abused benzodiazepines. She violated the terms of the court's order and service plans. Wreathye stated that she was bonded to the child and was attentive to him. Despite her use of drugs and alcohol, Wreathye chose only to obtain an AA sponsor for a short while. She admitted to using marijuana thirteen days before trial.

Michael admitted to a felony conviction for delivery of marijuana. Michael did not know about Sonja's prior CPS involvement. Michael took the child because Wreathye was arrested for public intoxication outside his trailer. Michael did not think that Sonja injured the child. He had seen Wreathye intoxicated on several occasions. Although not at first, he came to realize that Wreathye's alcoholism was a problem for her parenting the child. Michael had used drugs both when he married Sonja and separated from her. He claims to have been sober since the end of 2001. Before 2001, he was heavily into "hard drugs," and had been, since 1984. Michael stated the other children in the home cared for M.J.F. He thought it unjust for him to obtain a divorce from Sonja until after her criminal trial, which he believed would result in an acquittal. The child was born with an enlarged head which might be attributable to Wreathye's drinking. Michael knew of four occasions when the child was dropped or fell.

Kelly Smith, a licensed professional counselor, testified that the other children in play therapy and discussion relayed that violence and aggression were common in the home. One child said she was "whipped" with an extension cord which left marks and bruises. In Smith's opinion Michael could not have missed this. It would not be in the children's best interest to be cared for by Michael. Amanda Prewitt, a CPS caseworker, testified that Wreathye did some, but not all, or her service plan. During visits, there were arguments between Sonja and Michael in the presence of the children. Michael believed Sonja might hurt an older child, but not a baby. Michael knew that sometimes when he came home from work, the child had been in Sonja's care and would have a red mark or cut and being crying. CPS recommended termination. Prewitt stated that Wreathye took good care of the child during visits, and the child seemed to improve markedly during the visits.

Judith Ward, of CASA, recommended termination of both parents' rights. In addition to the above facts, Faye Hubbard, a CPS supervisor, testified that termination should occur for a multitude of reasons, including the fact that the child could not care for himself and was mentally impaired, the parents were unwilling to protect the child, and that they lacked parenting skills. Megan Crim, another CPS caseworker, testified that Wreathye's DWI with the child in the car was conduct which endangered his well-being. However, Crim stated that at the monitored return hearing the trial court found that both parents were complying with the service plan, and that Wreathye was willing and able to provide the child with a safe and secure environment. The only change was the DWI.

Rick Sirls, a substance abuse counselor, testified that Wreathye admitted to smoking marijuana and drinking alcohol after he ordered a drug test. The test was positive for alcohol but not marijuana. Two other drug tests were negative. Sirls testified that if Wreathye had a good support system, she had a good chance to stay sober. Terry Gower, the child's foster mother, testified that when the child came into her care, he had few or no language skills, but had improved since then. He was developmentally delayed. While under her care the child became more affectionate and was learning sign language. She wanted to adopt him. He was a special needs child and likely would remain so. She and her husband wanted to provide long term care for him, with or without adoption.

Issues Presented: The court was presented with the following issues: (1) whether the evidence was sufficient to support the trial court's § 161.001(1)(D) and (E) findings; and (2) whether the evidence was sufficient to support the trial court's best interest finding.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: The court examines all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. The court assumes that the factfinder resolved disputed evidence in the finding's favor if a reasonable factfinder could do so. The court disregards all evidence the factfinder could have disbelieved or found incredible, but considers undisputed evidence that contradicts the verdict. The court defers to the factfinders determination on witness credibility, unless such a determination would be unreasonable.

(2) Factual Sufficiency Review: The court gives due consideration to evidence the factfinder could have reasonably found to be clear and convincing. The court determines whether the evidence allows the factfinder to form a firm belief or conviction about the truth of the allegations supporting termination. If, in light of the entire record, the disputed evidence not reasonably credited in favor of the finding is so significant that it would not allow a firm belief or conviction as to the finding, the evidence is factually insufficient.

(3) § 161.001(1)(D): Wreathye knowingly placed or allowed the child to be placed in at least two types of endangering conditions or surroundings: (a) her substance abuse and criminal violations, and (b) Michael's potential for physical and emotional abuse. The evidence was uncontested that up until a few days before trial, Wreathye continued to engage in substance abuse, even in the child's presence. Even though there was no evidence that Michael abused the child, there was evidence that Wreathye knew of Michael's abusive tendencies as he had abused her. Michael knowingly placed or allowed the child to be in three types of endangering conditions or surroundings: (a) Sonja's physical abuse, (b) Wreathye's substance abuse and criminal violations, and (c) physical violence and emotional turmoil in Michael and Sonja's home. Despite Michael claiming ignorance of Sonja's abusive behavior, there was evidence that a reasonable factfinder could believe that Sonja was guilty of the abusive behavior, including M.J.F.'s injury while in her care, injuries to the other children, and the children's reports of Sonja's abuse of M.J.F. A reasonable factfinder could also conclude that Michael knew of the physical violence and emotional turmoil in his home. Wreathye's substance abuse problems were essentially undisputable. The evidence was legally and factually sufficient.

(4) § 161.001(1)(E): Wreathye's endangering conduct included substance abuse in the child's presence and while pregnant with him, driving intoxicated with the child in the car, and driving the child without a properly adjusted car seat. Michael's endangering conduct included allowing Sonja to care for the child despite his knowledge of her violent tendencies and allowing Wreathye to care for the child despite his knowledge of her drug abuse. The evidence was legally and factually sufficient.

(5) Best Interest: There was evidence as to the child's emotional and physical needs, the emotional and physical dangers to him, and the relative stability and parenting abilities of Wreathye in relation to the foster parents. There was also evidence of the acts and omissions of Wreathye. In addition to the above evidence supporting best interest, the evidence showed that Wreathye had personality defects impacting her parental suitability. The finding that termination was in the child's best interest was strengthened by his special needs arising from his disabilities. Any contrary evidence did not override the foregoing. Finally, there was substantial evidence that the foster parents would make good alternative parents for the child. The same comparisons between Michael and the foster parents were made. The concerns regarding the child's disabilities remained the same. Like Wreathye, the evidence above war-

ranting a predicate finding of termination as to Michael went to best interest. In addition, there was evidence that Michael had also been diagnosed with personality defects that impacted his parenting. There was legally and factually sufficient evidence to support the trial court's best interest finding.

In re M.L.M.
No. 07-06-0226-CV, 2007 Tex. App. LEXIS 189
(Tex. App.–Amarillo Jan. 12, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(E) – Drug Use/Invocation of Fifth Amendment
Best Interest – Consider Lesser Alternative Than Termination/Fifth Amendment
Sufficiency of the Evidence

Procedural History: The trial court terminated Moore's parental right to the child under § 161.001(1)(D), (E), and (O) grounds and a finding of best interest. The trial court named the child's father, Jerome Flemons, as PMC. The Seventh Court of Appeals affirmed.

Facts: Moore was arrested with her boyfriend, Mickey Charles Hill, for alleged methamphetamine manufacturing in October 2004. CPS took custody of M.L.M. The child was released to Hill's mother and grandmother with the stipulation that Moore not have any unsupervised visitation with the child. When that was violated in July 2005, the child was placed in foster care and a petition seeking termination of the parental rights of Moore, Flemons, and another potential father was filed. An order of the trial court adopted CPS's service plan and listed tasks Moore was required to perform to regain custody of the child. In October, CPS filed a permanency plan and progress report that stated that Moore had complied with several aspects of the service plan but still needed to comply with others such as stable employment and timely responses to drug test requests. The goal was family reunification.
In December 2005, the trial court held a permanency hearing. The court issued an order finding that Moore had not demonstrated adequate compliance with the service plan. Flemons was given a paternity test that proved him to be the child's father. CPS took a nonsuit as to the other alleged father and requested a home study on Flemons. After the home study results in February 2006, M.L.M. was placed with Flemons and his wife where she remained until trial.

At trial, CPS requested that Flemons be named the child's PMC. The caseworker, LaRae Alexander, testified to Moore's limited compliance with the service plan. Moore informed Alexander that she was employed before her most recent arrest, but Alexander could not confirm same. Moore completed drug and alcohol assessments but did not complete counseling. Alexander remembered Moore as having passed one drug test but not responding to "approximately five" requests for random drug screenings. Since Moore's assignment to the case in July 2005, Moore had moved two or three times and failed to maintain contact with Alexander. According to Alexander, the child was doing well with the Flemons.

Flemons's wife expressed interest in adopting M.L.M., and Flemons testified that termination was in the child's best interest. Flemons stated that he and his wife would be able to provide support and care for the child. Through her attorney, Moore invoked her Fifth Amendment right against self-incrimination when questioned about her drug use. She did, however, assert that she had attempted to meet all of the conditions of the service plan and that her inability to perform some requirements was due to a lack of resources such as transportation.

Issues Presented: The court was presented with three issues: (1) whether the trial court's failure to consider a "lesser alternative than termination" rendered the evidence of best interest insufficient; (2) whether the evidence was legally and factually sufficient to support the trial court's best interest finding; and (3) whether the evidence was legally and factually sufficient to support the trial court's predicate finding under 161.001(1)(D), (E), or (O).

Appellate Court's Reasoning and Conclusions:

(1) Sufficiency of the Evidence Review: Appellate review of the sufficiency of the evidence supporting a termination finding must determine and address whether the evidence is such that a trier of fact could reasonably form a firm belief or conviction about the truth of the allegation. The court's review must encompass the entire record.

(**2) The Trial Court's Failure to Consider an Alternative Lesser than Termination Did Not Render the Best Interest Evidence Insufficient:** Moore cited *Horvatich* for her contention that the trial court's failure to consider lesser alternatives than termination rendered the best interest evidence insufficient. *Horvatich v. Texas Dep't of Family and Protective Svcs.*, 78 S.W.3d 594, (Tex. App.–Austin 2002, no pet.). There, the court found the evidence of best interest insufficient under the applicable factors. However, the caseworker assigned to the case was not listed as a witness and was thus precluded from testifying. As such, there was no evidence before the court regarding: the children's status at trial, status in foster care, CPS's plans for the children, or why CPS did not place with a relative. Thus, in *Horvatich*, the court found the evidence of the parents' uncertainty regarding plans for the future insufficient to show termination was in the children's best interest when CPS was unable to present evidence of its plans. Here, CPS presented the evidence that was lacking in *Horvatich*, as it showed its plans for permanent placement of M.L.M., including evidence of her functioning in her placement pending trial, and testimony from Flemons and his wife who wanted to adopt M.L.M. The evidence also showed the stability of the Flemons's home, their parental abilitites, and M.L.M.'s bonds with their daughter.

There was little evidence in the record supporting a conclusion that naming Moore as a PC, and requiring her to pay child support, would promote stability for the child or was otherwise in her best interest. At the time of trial, Moore was on felony deferred probation and was in the county jail facing further criminal proceedings. Moore had not made any payments to support the child and herself testified that she did not have the capability to do so. The trial court, as factfinder, was permitted to draw negative inferences when she asserted her Fifth Amendment right when questioned on why she had not submitted to random drug tests. The court also relied on the evidence establishing endangering conduct to support best interest. The evidence was legally and factually sufficient to permit the trial court to reach a firm belief or conviction that termination of Moore's parental rights was in M.L.M.'s best interest.

(3) § 161.001(1)(E): Moore argued that the evidence only showed sporadic and disjointed drug use. She argued CPS was required to show a course of conduct rather than individual acts or omissions. The evidence established that Moore had engaged in a course of endangering conduct. There was evidence that her drug use resulted in termination of parental rights to two other children before M.L.M.'s birth. Again, the trial court could draw adverse inferences from Moore's invocation of her right against self-incrimination. Evidence was presented that Moore's conduct was not limited only to drug use as CPS's initial involvement arose from Moore's arrest for alleged methamphetamine manufacturing. Moore's drug use continued after the child's removal despite her awareness that the child's return depended on her stopping the drug use. The record showed Moore's drug use was part of a continuing course of conduct.

Alexander testified to the risks created by Moore's drug-related conduct. In Alexander's experience as a caseworker, methamphetamine use resulted in the type of instability in the child's environment such as was found here. This included the parent's inability to maintain stable employment or housing. In determining whether the conduct endangered the child, courts may consider a parent's pattern of drug use and its effect on the child. The evidence was sufficient to support a firm belief or conviction that Moore engaged in conduct that endangered M.L.M.'s well-being. The court did not address Moore's remaining points as it found the evidence sufficient for one predicate finding and best interest.

In re M.N.
No. 11-06-00228-CV, 2007 Tex. App. LEXIS 3564
(Tex. App.–Eastland May 10, 2007, mot. rehearing filed) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – No Extension of Time Allowed
TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint

Procedural History: Jury terminated Durham's parental rights to her child. Durham appealed. The Eleventh Court of Appeals affirmed the termination.

Facts: Durham did not file a separate statement of points on appeal within fifteen days of the date on which the termination order was signed. She filed a motion for new trial after the fifteen-day period and within thirty days after the termination order was signed. Durham combined her statement of points on appeal with the motion for new trial. The trial court attempted to enlarge the time for filing the statement of points by granting Durham's motion to extend the time within which to file her statement of points on appeal.

Issue Presented: Whether § 263.405(b) allows for an extension of time in which to file the state-ment of points on appeal.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) – No Extension of Time Allowed to File Statement of Points: Section 263.405(b) does not allow for an extension of time to enlarge the time for filing the statement of points on appeal. "Given that the policy behind subsection (b) of the statute is to shorten postjudgment delays, we hold that the trial court cannot extend the date on which a statement of points is due to be filed." "The statute is clear that a party who does not file a statement of points on appeal within fifteen days does not preserve any issues for appeal."

(2) § 263.405(i) – Failure to Preserve Complaint: Not only does a party waive issues contained in an untimely filed statement of points on appeal, but the statute also prohibits the appellate court from considering any issues that are not contained in a statement of points on appeal.

Comment: In footnote one, the Eastland Court of Appeals joins a number of its sister courts of appeals "that have expressed due process concerns about applying this statute to termination proceedings of parental rights that are final, irrevocable and of constitutional magnitude."

In re M.N.V.
No. 04-05-00894-CV, 2006 Tex. App. LEXIS 11168
(Tex. App.–San Antonio Sept. 13, 2006, no pet.) (mem. op.)

Construing: TEX. CIV. PRAC. & REM. CODE § 13.003 – Frivolous Appellate Points
TEX. FAM. CODE § 263.405(d) – Frivolous
TEX. FAM. CODE § 263.405(g) – Abuse of Discretion Standard of Review
TEX. FAM. CODE § 263.405(g) – Production of Reporter's Record Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. R. APP. P. 44.1(a)(1) – No Material Fact Question (Dissent)
TEX. R. CIV. P. 220 – Jury Demand

Procedural History: The trial court terminated Vasquez's parental rights to her child. The trial court found Vasquez's appeal to be frivolous. The Fourth Court of Appeals concluded that Vaszuez's appellate point related to her jury demand was not frivolous.

Facts: The trial court held a bench trial and terminated Vasquez's parental rights. Vasquez did not appear for trial. Vasquez was granted a new trial and paid the jury demand fee. Once again, Vasquez was not present for trial and her trial counsel announced not ready. Over the objection of Vasquez's attorney, the trial court struck the jury trial and proceeded with a bench trial, terminating Vasquez's parental rights. The trial court subsequently found Vasquez's appellate point relating to her jury demand to be frivolous.

Issues Presented: Whether the abused its discretion in determining that Vasquez's appellate point relating to her jury demand was frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(d) – Frivolous: A trial court may determine an indigent party's appeal from a termination order is frivolous as provided by CPRC § 13.003(b). An appeal is frivolous when it lacks an arguable basis in law or in fact.

(2) CPRC § 13.003(b) – Frivolous Appellate Points: In making a determination as to whether an appeal is frivolous, the trial court may consider whether the appellant has presented a substantial question for appellate review under CPRC § 13.003(b).

(3) § 263.405(g) – Production of Reporter's Record Required: Vasquez claims the trial court abused its discretion in overruling her attorney's announcement of not ready, striking her jury demand, and immediately proceeding to a bench trial. Unable to determine whether there was an arguable basis in law or fact or there was harm in the trial court's denial of Vasquez's jury trial demand, appellate court ordered a reporter's record of the hearing produced.

(4) § 263.405(g) – Abuse of Discretion Standard of Review: Appellate court reviews a trial court's determination that an appeal is frivolous under an abuse of discretion standard.

(5) Jury Demand: For purposes of TRCP 220, a party, although not personally present, appears for trial when her attorney is present. Counsel for Vasquez was present, announced not ready, and stated he was proceeding on instructions of his client as to the jury trial request. As a result, Vasquez presents at least an arguable basis that the trial court erred in relying on TRCP 220 to deny Vasquez's request for a jury trial. Although the trial court stated it struck the jury trial setting due only in part to Vasquez's repeated absences, the appellate court noted if found no other rule or guiding principle to justify the trial court's action. There is an arguable basis the trial court erred in denying Vasquez's right to a jury trial.

(6) No Material Fact Question: Justice Sarah B. Duncan notes in her dissent that the wrongful denial of a jury trial is reversible error only if the case contains a material fact question. She notes Vasquez does not argue, and the record does not reflect, the case contains a material fact question. "Indeed the record cannot possibly contain a material fact question since [Vas-quez] does not even argue the trial court erred in finding grounds for termination and that termination would be in the children's best interest. Because the trial court's unchallenged findings establish the grounds for termination and that termination is in the children's best interest, [the] argument that the trial court erred in denying her a trial court is necessarily frivolous."

In re N.H. and A.G.
No. 04-06-00711-CV, 2007 Tex. App. LEXIS 4186
(Tex. App.–San Antonio May 30, 2007, no pet. h.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(O)
Best Interest

Procedural History: The trial court terminated Harris's parental rights to N.H. and A.G. under § 161.001(1)(O) for failure to comply with the provisions of a court order that specifically established the

actions necessary to obtain the return of the children and found termination was in the children's best interest. The Fourth Court of Appeals affirmed the trial court's judgment.

Facts: Harris completed parenting classes and empowerment classes, submitted to psychological and psychiatric evaluations, and registered with the Texas Work Force. During the eighteen-month pendency of the case, however, Harris held two jobs: two months in one job and, at the time of trial, five weeks at a second job. Harris attended only ten of the required twelve classes of the domestic violence course and had no explanation for her failure to attend all the classes. She was not up to date on her therapy classes, allegedly because of transportation problems. CPS provided Harris with bus tickets so she would have transportation to parenting classes, domestic violence classes, and therapy sessions. Harris had not obtained a GED, although she attended some GED classes. Harris failed to obtain and maintain appropriate housing and maintain a stable residence and provide adequate shelter for her children. Harris had twelve different addresses during the pendency of the case, including living in shelters, her boyfriend's home, her sister-in-law's home, and motels. Harris admitted at trial she did not have a stable home for the children or a plan for how to care for herself and her children.

Issues Presented: Whether evidence is legally and factually sufficient (1) to support termination under § 161.001(1)(O) and (2) that termination is in the children's best interest.

Appellate Court's Reasoning and Conclusions:

(1) § 161.001(1)(O): Evidence legally and factually sufficient to support termination of Harris's parental rights under § 161.001(1)(O).

(2) Best Interest: (a) desires of the child: A strong bond existed between Harris and her children; however, the children were in a stable foster home with foster parents who wanted to adopt the children. Dr. Moran, who conducted the psychological evaluation of Harris, testified that disrupting the relationship between the children and the foster parents would be "uncertain at best". (b) Harris's instability: According to Dr. Moran, Harris's inability to complete service plan objectives was consistent with people who have mood instability or tend to have "unstable decision making". Dr. Moran characterized Harris's judgment as "impaired". Harris showed an inability to care for her children because she was not sufficiently stable. Harris's giving birth six times possibly with six different fathers was an indication of relationship instability. Dr. Moran believed Harris needed to demonstrate for a full year that she could maintain stable relationships, stable housing, a stable mood, and stable adherence to psychiatric treatment before she could be reunited with her children. (c) plan for the child: Harris had no plans for employment or housing other than to stay with her mother and sister; Harris admitted she had "issues" with her mother and her sister. (d) additional time to comply with service plan: Harris did not want the trial court to award her custody of her children; rather she did not want her parental rights terminated and she wanted to be given a "chance". Appellate court noted that the case had been pending for eighteen months and that the trial court reset the case three times to allow Harris additional time and the "chance" to comply with the service plan.

In re N.L.G.

No. 06-06-00066-CV, 2006 Tex. App. LEXIS 10623
(Tex. App.–Texarkana Dec. 14, 2006, pet. denied) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Specificity of Challenge in Statement of Points
TEX. R. APP. P. 33.1 – Claim on Appeal Does Not Comport with Objection
TEX. R. APP. P. 33.1 – Failure to Object to Jury Charge
TEX. R. APP. P. 38.1 – Inadequate Briefing

TEX. R. APP. P. 38.1 – Independent Review of Record Not Required
TEX. R. CIV. P. 274 – Claim on Appeal Does Not Comport with Objection
TEX. R. CIV. P. 274 – Failure to Object to Jury Charge

Procedural History: A jury terminated Rachel's and Thomas's parental rights to their child. The Sixth Court of Appeals affirmed the termination.

Facts: N.L.G.'s foster parents intervened in the trial. The parents timely filed a statement of points but did not include any complaint of error concerning the intervenors' presence at trial other than a complaint regarding the presentation of identical, cumulative, and repetitive evidence to the jury. On appeal, parents argued that intervenors' inclusion in the jury trial violated their due process rights because intervenors were allowed to "present evidence otherwise not admissible and argue in a manner not allowed by [CPS] in a termination case".

Issues Presented: Whether (1) the appellate court can consider errors raised on appeal when the timely filed statement of points does not address these issues; (2) the appellate court can consider the parents' insufficiency of evidence issues because the statement of point was not sufficiently specific; (3) the issue regarding "fundamental fairness and lack of due process" presents the appellate court with nothing to review because of inadequate briefing; (4) Rachel's appellate point regarding § 161.001(1)(P) is waived because it does not comport with the objection made at trial; and (5) Thomas's appellate point regarding the inclusion of the § 161.001(1)(P) ground in the jury charge is waived because Thomas did not timely raise this objection to the trial court.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b): Under § 263.405(b) a party must file a statement of points on which the party intends to appeal not later than the fifteenth day after a final order is signed.

(2) § 263.405(i) – Issue Not Presented: Appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of points on which the party intends to appeal. The issues in the parents' brief regarding the intervenors' participation in trial violating their due process rights were not specifically presented to the trial court in a statement of points; "under the express terms of the statute" the appellate court could not address any points regarding the intervenors other than the presentation of cumulative evidence. Additionally, Thomas did not claim error in the submission of the Subsection (Q) ground in the jury charge in his statement of points. Therefore, the appellate court could not consider it.

(3) TRAP 38.1 – Inadequate Briefing: When a brief contains no authority to support its argument, a point is inadequately briefed. An appellant presents the court of appeals with nothing to review when the appellant fails to cite any authority for the argument or arguments in appellant's points of error. While the parents properly preserved their "fundamental unfairness and lack of due process" in allowing the foster parent intervenors, CPS, and the child's attorney ad litem to present "unduly repetitious, cumulative, and identical" evidence, the parents inadequately briefed the issue on appeal and did not properly object to any alleged errors at trial. The parents point to no authority to support their "broad conclusion" about the cumulative evidence and the parents' record references do not indicate the parents objected to any of these alleged errors during trial. When an appellant does not provide the appellate court with argument sufficient to make an appellate complaint viable, the appellate court will not perform an independent review of the record and applicable law in order to determine whether the error complained of occurred.

(4) § 263.405(i) – Specificity of Challenge in Statement of Points: The parents second issue is: "There is not evidence, or insufficient evidence, to support the jury's affirmative findings that … the parent-child relationship between [(1) Rachel and (2) Thomas] and [N.L.G.] be terminated". Because the parents' statement of points did not reference any specific area of evidentiary insufficiency but, instead,

generally stated the evidence was insufficient, "we are constrained to overrule the parents' second issue for insufficient specificity per Section 263.405(i)."

(5) TRCP 274 and TRAP 33.1 – Claim on Appeal Does Not Comport with Objection: Rachel asserts § 161.001(1)(P) was improperly submitted, despite her admitted use of a controlled substance, since the evidence indicated she did complete all ordered treatment and no evidence indicates her continued abuse. This complaint does not track the objection made to the trial court before the submission of the charge to the jury. Because Rachel's claims of error on appeal do not comport with the objection made at trial, and because the trial court was not made aware of the error now claimed, Rachel has waived the issue on appeal.

(6) TRCP 274 and TRAP 33.1 – Failure to Object to Jury Charge: While Thomas did raise the alleged error in the submission of the Subsection H ground to the jury in his statement of points, he did not raise this objection to the trial court before the submission of the charge to the jury. Thomas has waived the issue on appeal.

Comment: The Sixth Court of Appeals, citing to the Bill Analysis to House Bill 409, 79th Legislature (2005), notes its "concern that the statute, as written, prohibits a general assertion of factual and legal insufficiency of the evidence [when] the requirement, at the trial court level, of a more specific statement of how the evidence is legally and factually insufficient does not seem necessary to accomplish the Legislature's goal of allowing the trial court to be made aware of mistakes that could have been quickly and easily corrected".

In re P.A.M., G.M., and E.R.
No. 04-06-00894-CV, 2007 Tex. App. LEXIS 3923
(Tex. App.–San Antonio May 23, 2007, no pet. h.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(g) – Frivolousness, Review of – *Anders* Brief

Procedural History: Trial court terminated Ramirez's parental rights to P.A.M., G.M., and E.R. The Fourth Court of Appeals affirmed the trial court's judgment.

Facts: The trial court terminated parental rights. Ramirez appealed the trial court's order determining that an appeal of the termination order would be frivolous. Ramirez's court-appointed appellate attorney filed an *Anders* brief. Ramirez's court-appointed appellate attorney filed a brief containing a professional evaluation of the record and demonstrating that there are no arguable grounds to be advanced. Counsel concludes that the appeal is without merit. Counsel provided Ramirez with a copy of the brief and informed her of her right to review the record and file her own brief. Ramirez did not file a brief.

Issues Presented: Whether Ramirez's appeal is frivolous and without merit.

Appellate Court's Reasoning and Conclusions:

§ 263.405(g): Appellate court has duty to review record and counsel's brief to determine whether the appeal is frivolous and without merit. In reviewing whether an appeal is frivolous when an *Anders* brief has been filed, a court of appeals should not address the merits of issues raised in *Anders* brief or pro se response but only determine whether the appeal is frivolous.

Pool v. TDFPS
No. 01-05-01093-CV, 2007 Tex. App. LEXIS 1576
(Tex. App.–Houston [1st Dist.] March 1, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(a) – Accelerated Appeal
TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(h) – Good Cause for Extending Time to File Brief

TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. R. APP. P. 26.3 – Extension of Time

Procedural History: The trial court terminated Pool's parental rights to his daughter. The First Court of Appeals affirmed the trial court's termination.

Facts: The termination decree was signed October 24, 2005. Pool's notice of appeal was filed November 28, 2005. Pool did not file a statement of points, either standing alone or combined with a motion for new trial. On appeal, Pool challenged the legal and factual sufficiency of the evidence to support termination under § 161.001(1)(D) and (E) and best interest.

Issues Presented: Whether the appellate court could address Pool's insufficient evidence claims when no statement of points was filed.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(a): This is an accelerated appeal. Page's notice of appeal, although filed late, was filed within the fifteen-day period in which parties may file a motion to extend time to file a notice of appeal. TRAP 26.3. Pool filed a reasonable explanation for the late filing of the notice of appeal. The appellate court implied a motion to extend time to file the notice of appeal.

(2) § 263.405(b): A party intending to appeal a final termination order is required to file a statement of points no later than fifteen days after the final order is signed.

(3) § 263.405(h) – Good Cause for Extending Time to File Brief: Under § 263.405(h) the appellate court cannot extend the time for filing an appellate brief except on showing of "good cause". A showing of good cause requires more than a reasonable explanation. General allegations of workload, standing alone, do not constitute good cause for an extension. However, in limited situations, for very limited periods of time, workload will constitute good cause justifying an extension to file a brief. Given the exceptional workload of CPS's attorney the appellate court granted the extension of time to file brief.

(4) § 263.405(i) – Failure to Preserve Complaint: When no statement of points exists, "under the express terms of the statute, there is no contention of error that can be raised that we may consider on appeal. Accordingly, we hold that we cannot consider the issues concerning the sufficiency of the evidence supporting the termination Pool attempts to raise in his brief."

In his motion for rehearing, Pool generally contended the appellate court's holding precludes him from asserting his right to appeal. Pool notes his appellate attorney was not appointed to represent him until after the deadline for filing a statement of points had passed and did not file a statement of points or a new trial motion. The appellate court notes Pool did not assert his trial counsel effectively abandoned him after the trial court signed its judgment, nor did Pool make any argument his trial counsel provided ineffective assistance in not filing a statement of points or a motion for new trial. Pool's "general assertions regarding the appointment of his appellate counsel do not compel the conclusion that he was precluded from exercising his right to appeal."

Comment: In reaching its holding, the Houston [1st] Court of Appeals joined sister courts "in questioning the practical applications and constitutional validity of this statute".

Preece v. TDFPS
No. 03-06-00098-CV, 2006 Tex. App. LEXIS 7670
(Tex. App.–Austin Aug. 30, 2006, no pet.) (mem. op.)

Construing: Best Interest – Attorney for Child Disagrees with Termination
Legal and Factual Sufficiency

Procedural History: The trial court terminated Preece's parental rights to her daughter. Preece appealed, arguing that the evidence was insufficient to support the trial court's finding that termination was in the child's best interest. The Third Court of Appeals affirmed.

Facts: In September 2004, CPS filed a petition seeking conservatorship of A.L.M. The affidavit attached to the petition, executed by Susan Neal, alleged that CPS received a report in July 2004 that Marshall Morris, A.L.M.'s father, failed to return the child after a visit and stated he would shoot the child and himself if anyone came to retrieve her. Both Preece and Morris were alleged to be using methamphetamines. Preece was alleged to have no home or means of support. CPS consulted with the parents and Morris denied making any threats. Both parents agreed to a safety plan wherein A.L.M. was placed with Preece's mother, Mary Louise Parker, and the parents would work with CPS to resolve issues involving substance abuse, anger, and child custody. Preece moved in with Parker and A.L.M. in August 2004, but was admitted to the Kerrville State Hospital on August 17. She was released on August 17 and was diagnosed with major depressive order, "recurrent with psychotic features," substance dependence, and hypertension. After her release Preece lived in a tent with relatives. On September 19, 2004, Preece, Morris, and Parker got into a disagreement over the child's care. The police were called and Parker stated she could "no longer deal with the situation." The parents told CPS that Parker permitted another one of her daughters to care for A.L.M. and that the individual had used drugs around the child. Shortly after that episode the child was removed and placed in foster care. Neal alleged that the parents were unstable and fought in front of A.L.M. causing her emotional stress.

Neal testified at trial that after Preece and her family called CPS to report Morris' threat, Morris denied the threat and agreed to bring A.L.M. into the office. When Morris arrived he declined a drug test, stating he would be positive for marijuana. CPS learned that Morris had six drug arrests and Preece had four. Morris told Neal that Preece was still using methamphetamines. Neal heard an audiotape of a telephone call Preece made to Morris wherein Preece was cursing at Morris and threatened to burn his house down. A.L.M. could be heard screaming in the background.

Another CPS caseworker, Linda Keys, testified that she had seen Morris get angry and out of control. She stated he would scream, yell, curse and threaten. Preece repeatedly told Keys that she was afraid of Morris, that he was physically violent towards her, and that she had concerns about the child being around him. Preece would then deny all of it. CPS put Preece in contact with a drug counselor but she stopped attending the appointments. Keys stated that: Preece was not a stable person; Keys felt Preece had mental issues that were being addressed; Preece had illegal drug issues that were not being addressed; and that Keys felt Preece had an alcohol problem. In addition, Keys stated that Preece had Hepatitis C and Keys did not think Preece was receiving help for it, and that Preece had refused to take several drug tests, even though it meant she could not have visitation with A.L.M.

Keys testified that A.L.M. had Hepatitis C and that currently there was no treatment for children with hepatitis C. However, A.L.M. had been accepted into a medical study in Fort Worth for a childhood Hepatitis treatment. Keys stated that if either parent had custody A.L.M. probably wouldn't get into the study. Morris became angry that A.L.M. had been tested. Keys testified that A.L.M.'s foster parents had expressed interest in adopting her and that A.L.M. was very bonded with her foster family. At trial there was some evidence that A.L.M.'s foster father may have a criminal record from an incident wherein he stole money from his employer at nineteen or twenty years of age. The incident allegedly had occurred about fifteen years earlier. Keys discussed the matter with her supervisor and stated that if the matter was rectified it should not stop the foster placement from being licensed. Keys stated that at six years of age A.L.M. loved her parents and wanted to live with them, but was aware of their drug issues and was afraid to live with them. Keys stated that A.L.M. was doing well in the foster home and that termination was in her best interest.

Keys was questioned regarding whether it would be appropriate to place A.L.M. with Tandus Rizos, one of Morris's older daughters. Preece and Morris advocated the placement. Keys said a home study showed that although Rizos was a good parent, there was "a lot of instability" in the home. In addition, Rizos had Hepatitis A or B and had not had any medical examinations in several years, and Rizos did not get along with Preece. CPS worried that Rizos would not be willing to keep Morris away from A.L.M. Rizos testified that she was willing to take care of A.L.M. and that she and her husband had just moved and rented a house near Houston. Rizos said that she no longer had Hepatitis B. Rizos said she had a close relationship with Morris, but would keep him away from A.L.M. if she believed he was using drugs and would abide by a court order barring Morris from seeing the child. Rizos did not believe that Morris was using drugs or had a drug addiction.

CPS's home study showed that Rizos knew of her father's history of domestic violence and drug abuse, but did not seem to appreciate the severity of it. The study concluded that it would be detrimental to A.L.M. to place her with Rizos as she was bonded to her foster family and was unfamiliar with Rizos and her family. The Rizos's had fluctuating income and lacked consistent medical insurance. CPS continued to have concerns about Rizos protecting A.L.M. from Preece and Morris. In addition, Rizos seemed to minimize the severity of A.L.M.'s medical condition.

A.L.M.'s counselor, Melodee Huggins, testified that it would be "devastating" for A.L.M. to be removed from the foster parents and placed with Rizos. Huggins had recommended that Morris's visits with the child be stopped because A.L.M. would act out after seeing him. Huggins testified that despite A.L.M.'s desire to have a relationship with her parents, it was in her best interest to "move on with her life."

Morris admitted to using marijuana and methamphetamine in the past, sometimes in A.L.M.'s presence. He denied using since July 2004. During trial Morris took a drug test which returned positive for methamphetamine. He again denied use. In January 2005, Morris was arrested for assaulting Preece. He denied making the threat to shoot himself and A.L.M. At the time of trial he and Preece were separated but on friendly terms.

Preece stated that she lived with her mother, but that the home was not suitable for A.L.M. Preece wanted A.L.M. to be placed with Morris, and if that was not possible, with Rizos. She said she lied on two separate instances regarding Morris threatening to shoot A.L.M. and her. Preece stated that she had not used drugs since July 2004 despite refusing the last several drug tests requested by CPS. A recent drug test gave a positive result for methamphetamine, but Preece stated that her doctor told her that the medication she was taking could yield the result. A.L.M.'s attorney ad litem argued against termination. Her court-appointed representative recommended termination and that she be placed for adoption.

Issue Presented: Whether the evidence was sufficient to support the trial court's finding that termination was in the child's best interest.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: In reviewing the legal sufficiency of the evidence, the court considers all of the evidence in the light most favorable to the finding and asks whether a reasonable trier of fact could have formed a firm belief or conviction as to the truth of the finding.

(2) Factual Sufficiency Review: The court reviews the factual sufficiency of the evidence by viewing all of the evidence and asking whether a reasonable fact-finder could have resolved disputed evidence in favor of its finding. If a reasonable fact-finder could have resolved any evidentiary disputes so as to form a firm belief as to the truth of the State's allegations, the evidence is factually sufficient. The court must maintain appropriate deference to the trial court's role as fact-finder by assuming that it re-

solved evidentiary conflicts in favor of its finding when reasonable to do so, and by disregarding any evidence that it could have disbelieved.

(3) Best Interest: Preece argued that the evidence was insufficient to support the best interest finding as A.L.M. and her attorney ad litem opposed the termination and Preece proposed Rizos as an alternate placement. Despite evidence that A.L.M. loved her mother and wanted to return to her care, at six years of age A.L.M. recognized her parents drug problems. She was present during fights between her parents and was heard screaming in the background of Preece's threatening phone call. Rizos testified that she wanted to care for A.L.M. and would protect her from her parents if ordered to do so, however CPS recommended against placement because: CPS was concerned that Rizos would not protect the child from Preece and Morris; Rizos did not appreciate the severity of the child's medical condition; Rizos did not have consistent health insurance; and CPS believed it would be detrimental to remove A.L.M. from her foster home. CPS intended to keep the child with her foster parents who might adopt her. She was doing well in the placement. She had been accepted into a study regarding her Hepatitis. Neither Morris nor Preece appreciated A.L.M.'s medical issues and both recently tested positive for drugs despite their denials. Preece refused to take several drug tests before trial knowing that it would mean she could not visit A.L.M. Preece had stopped seeing her drug counselor and CPS believed she was mentally unstable. Preece had a pattern of breaking up and reuniting with Morris who would get "out of control," and who she accused of physically assaulting her, and then recanting her allegations. Although there was evidence of the foster father possibly having a criminal record, CPS looked into it and believed if rectified the charge did not bar him from being a foster parent. None of the professionals believed A.L.M. should be placed with Rizos. The CPS caseworker, the child's counselor, and the child's court-appointed representative all testified that termination was in her best interest. The evidence was both legally and factually sufficient to support a finding that termination was in A.L.M.'s best interest.

In re R.A., A.P., I.A., J.G., C.V., R.V., and J.V.
No. 04-06-00138-CV, 2006 Tex. App. LEXIS 7950
(Tex. App.–San Antonio Sept. 6, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(g) – Abuse of Discretion Standard of Review
TEX. FAM. CODE § 263.405(g) – Decision Not to Appear because of Warrant
TEX. FAM. CODE § 263.405(g) – Sufficiency of Evidence

Procedural History: The trial court terminated Palacios's parental rights to her children. The trial court found Palacios's appeal to be frivolous. The Fourth Court of Appeals concluded that Vaszuez's appellate point she should be granted a new trial because she was not present at trial was frivolous.

Facts: Palacios failed to appear at the termination hearing. The trial court terminated Palacios's parental rights to her children. Palacios argued she was entitled to a new trial because she had been detained by the county sheriff at the time of the termination hearing. However, Palacios had not been detained but had been afraid to attend the termination hearing because of an outstanding warrant.

Issues Presented: Whether Palacios's decision not to appear at the termination trial because of an outstanding warrant mandated a new trial.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(g) – Abuse of Discretion Standard of Review: An appellate court reviews a trial court's determination that an appeal would be frivolous for an abuse of discretion.

(2) § 263.405(g) – Decision Not to Appear at Trial Because of Warrant: Appellate court found that Palacios's decision not to appear at the termination hearing because of an outstanding warrant

did not mandate a new trial. The appellate court held that the trial court did not abuse its discretion in determining this appellate point frivolous.

(3) § 263.405(g) – Sufficiency of Evidence: At the hearing on the motion for new trial and statement of appellate points, Palacios's attorney did not attack the trial court's findings supporting termination or summarize for the trial court the evidence that was missing or insufficient to sustain the findings. The trial court did not abuse its discretion in determining Palacios's appellate points pertaining to sufficiency of the evidence were frivolous.

In re R.A.P., II
No. 14-06-00109-CV, 2007 Tex. App. LEXIS 471
(Tex. App.–Houston [14th Dist.] Jan. 25, 2007, pet. denied) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points on Appeal Required
TEX. FAM. CODE § 263.405(d) – Hearing on Whether Appeal Is Frivolous
TEX. FAM. CODE § 263.405(g) – Abuse of Discretion Standard of Review
TEX. FAM. CODE § 263.405(g) – Review of Frivolousness
TEX. FAM. CODE § 263.405(g) – Review Record of Termination Trial
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Purpose
TEX. CIV. PRAC. & REM. CODE § 13.003(b) – Substantial Question
TEX. R. CIV. P. 38.7 – Leave of Court to File Supplemental Brief
Hybrid Representation, No Provision for

Procedural History: The trial court terminated Haywood's parental rights and awarded sole custody to the father. The trial court found Haywood's appellate points were frivolous. The Fourteenth Court of Appeals affirmed the trial court's judgment.

Facts: Trial court terminated Haywood's parental rights. Haywood appealed and timely filed a statement of points. The trial court found Haywood's appellate points to be frivolous.

Issues Presented: Whether (1) the appellate court could consider Haywood's claim the trial court erred in denying her a jury during the termination hearing because that issue was not presented to the trial court in Haywood's statement of points and (2) the trial court abused its discretion in determining that Haywood's appellate points were frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) – Statement of Points on Appeal Required: An appellant in a state-initiated termination proceeding must file with the trial court no later than fifteen days after the date the final order is signed a statement of points on which she intends to appeal.

(2) § 263.405(d) – Hearing on Whether Appeal Is Frivolous: The trial court then must hold a hearing and determine, among other things, whether the appeal is frivolous.

(3) CRPC § 13.003(b) – Substantial Question Presented for Appellate Review: In making a determination as to whether an appeal is frivolous, the trial court may consider whether the appellant has presented a substantial question for appellate review under CRPC § 13.003(b).

(4) § 263.405(g) – Review of Frivolousness: If a trial court makes a frivolousness finding, the aggrieved parent can appeal, but the appeal is limited to the frivolousness issue.

(5) § 263.405(g) – Abuse of Discretion Standard of Review: An appellate court reviews a trial court's determination that an appeal would be frivolous for an abuse of discretion.

(6) § 263.405(g) –Review Record of Termination Trial: Appellate court's review of the trial court's frivolousness determination is limited to the evidence admitted at the termination hearing.

(7) § 263.405(i) – Failure to Preserve Complaint: Appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of points. Haywood filed a statement of points, but she did not mention anything regarding the denial of a jury trial. Thus, "we may not consider these issues."

(8) § 263.405(i) – Purpose: The legislature enacted § 263.405(i) to reinforce the consequences of filing an incomplete statement of points, or failing to file one at all, because some appellate courts had held that such a failure did not waive review of the relevant issues.

(9) TRAP 38.7 – Leave of Court to File Supplemental Brief: The appellate court declined to consider any additional arguments contained in Haywood's pro se briefs because she failed to secure leave of court to file them.

(10) Hybrid Representation, No Provision for: Haywood submitted two pro se supplemental briefs in addition to the brief filed by her appellate counsel. There is no provision in Texas for hybrid representation where both an appellant and her attorney may file separate briefs. Therefore, Haywood's pro se briefs present nothing for review.

In re R.B. and J.B.
200 S.W.3d 311 (Tex. App.–Dallas 2006, pet. denied)

Construing: TEX. FAM. CODE § 161.001(1)(E) – Mental/Physical Condition
TEX. R. APP. P. 33.1(a)
Best Interest – Mental/Physical Condition, Unable to Care for Child
Denial of Motion for New Trial
Enforcement of Rule 11/Mediation Agreement
Legal and Factual Sufficiency

Procedural History: The jury returned a verdict terminating Mother's parental rights. The trial court entered judgment accordingly. The Fifth Court of Appeals affirmed.

Facts: The children were first removed from Mother and father in October 2002 after a house fire of undetermined origin at their home. Father was a drug abuser and Mother was a recovering alcoholic who took several prescription medications for several conditions, including an arthritic condition and depression. The children were returned. However, were removed again after police discovered them outside with no supervision and Mother inside the house asleep. A few months later father died of an accidental drug overdose.

In 2004, Mother and CPS mediated the custody issue. A Mediated Settlement Agreement and Rule 11 Agreement was reached wherein CPS was named the children's PMC and Mother was a PC with visitation. Pursuant to the agreement, Mother was to execute an Affidavit of Relinquishment that would be kept under seal. The agreement spelled out a three step process whereby Mother would regain custody. Mother was first required to participate in an approved inpatient substance abuse program. Second, after completion of the program, she was required to participate for 90 days in all drug treatment aftercare recommendations and participate in counseling as recommended by her counselor. Third, upon completion of the requirements of those 90 days, a gradual return of the children to Mother would occur, ending in a 90 day monitoring of the family by CPS. The agreement stated that if Mother failed to comply with any step the relinquishment would be unsealed and an order terminating Mother's rights would be entered. If Mother completed all steps, the relinquishment would be destroyed and Mother named PMC of the children. The trial court entered an order incorporating the agreement.

Mother completed her inpatient treatment and requested that the Department pay for her outpatient services and counseling in a program called First Step. Mother was discharged from the First Step program for lack of attendance. CPS moved to enforce the agreement, requesting that the trial court find that Mother failed to participate in aftercare recommendations and terminate her parental rights. The trial court denied the motion without providing any reasons. The trial court subsequently ordered the parties to trial. Mother then filed her own motion for immediate enforcement of the agreement, claiming that she had completed the aftercare program and was entitled to a return of the children under the agreement. Mother sought an injunction against the trial setting, asserting that all matters between the parties were settled. The trial court denied the requested injunction. Mother moved for a new trial after the jury's verdict of termination. The trial court allowed the motion to be overruled by operation of law.

Issues Presented: The court was presented with the following issues: (1) whether the trial court erred in refusing to enforce the agreement in Mother's favor; (2) whether the evidence was legally and factually sufficient to support the jury's verdict; and (3) whether the trial court erroneously overruled Mother's motion for new trial.

Appellate Court's Reasoning and Conclusions:

(1) The Trial Court Did Not Err in Refusing to Enforce the Agreement in Mother's Favor: Mother argued that the trial court's denial of CPS's motion to enforce was an implied finding that she had complied with the obligations of the agreement. The court disagreed. The evidence before the court at the time of CPS's motion was that Mother had not complied with the Agreement as she had not completed aftercare in the time frame required by the Agreement. In addition, the trial court denied Mother's motion to enforce. As the trial court could not alter the terms of the parties' agreement, it had no choice but to deny Mother's motion. If the trial court denied CPS's motion because Mother had complied, it would not have denied Mother's motion. The court declined to speculate on the basis for the trial court's orders. The trial court could not simply excuse Mother's failure to comply with the agreed upon timetable. The trial court correctly refused to enforce the Agreement in Mother's favor.

(2) Legal Sufficiency Review: In a legal sufficiency review, the court views the evidence in the light most favorable to the judgment, disregarding only the evidence that a reasonable fact finder could have disbelieved or found to have been incredible.

(3) Factual Sufficiency Review: In a factual sufficiency review the court must give "due consideration" to all evidence the fact finder could reasonably have found to be clear and convincing. The court must also consider whether disputed evidence is such that a reasonable fact finder could not have resolved that disputed evidence in favor of the termination finding. Evidence is factually insufficient if, given the entire record, the disputed evidence that a reasonable could not have resolved in favor of the termination finding is so significant that a fact finder could reasonably formed a firm belief or conviction about the truth of the State's allegations.

(4) § 161.001(1)(E): At least once Father tested positive for cocaine and he abused Mother's prescription drugs. An officer testified that he had been to the residence at least twenty times due to reports of Father's violence or drug-related problems. Father was arrested for assault twice during this period and at least once for theft. He was in drug rehabilitation when he died. Two fires broke out during this period, both in the children's bedroom. After the second fire the children were removed, but permitted to return so long as Father did not live there. There was evidence that the children could open doors and repeatedly left the home unsupervised. On one occasion the police picked up the children eight or nine houses from their residence. They entered Mother's residence to inspect it and take pictures. Mother was found asleep. She did not wake up for fifteen minutes while the officers were in the home. Based on the incident Mother was charged with two counts of child endangerment. She was convicted

and placed on probation. Mother acknowledged that the above incident was not isolated. She testified that on other occasions the children would get out and she would have to find them. CPS advised her to put more effective locks on the door, however Mother could not afford them. CPS refused to buy the locks, deciding it was important for Mother to fix the problem. The problem was not addressed until Mother's father paid for a locksmith. Mother's health was a significant issue to CPS, the CASA volunteer, and the police officers who came in contact with her. Mother was diagnosed with a variety of physical and mental issues and was declared disabled by the Social Security Administration. At trial Mother was taking Lortab, Bextra, Prozac, and Xanax. At other relevant times Mother was taking taking Oxycontin, MS-Contin, and Paxil. Several witnesses testified that when they interacted with Mother she seemed to be under the influence of something. Witnesses testified that they could not carry on a conversation with her regarding the children. When officers entered her home after picking up the children they had trouble waking her. At the time of trial the children were in a foster home together, where they had asked to stay. The foster parents had indicated a desire to adopt.

The disputed evidence concerned the cleanliness of the home and visitation. CPS employees and police officers testified that the home was unsanitary and extremely dirty. Witnesses described rotting food, animal feces throughout the house, and garbage strewn about. The CASA volunteer discussed her concerns with Mother but Mother did not seem to understand the importance of keeping the house clean. Mother and her daughter testified that Mother kept a clean home. CPS employees testified that Mother often missed visits with the children or was late. Mother denied missing visits unless she or the children were ill. Mother further testified that she was late only once. The court assumed that the jury resolved disputed facts concerning the condition of the home and Mother's attendance of visits in favor of the judgment, because a reasonable fact finder could do so. The evidence was legally and factually sufficient to support a finding that Mother engaged in conduct that endangered the children.

(5) Best Interest: The evidence was legally and factually sufficient to support the jury's finding that termination was in the children's best interest. Substantial evidence established that the children's physical safety was jeopardized when their sole caretaker was unable to care for them. Termination would allow the children to be placed for adoption, possibly in a foster home where they were experiencing a safe and stable environment.

(6) The Trial Court Did Not Err in Overruling Mother's Motion for New Trial: Mother's new trial motion alleged that the trial court erred in admitting evidence that Mother pled to child endangerment when the evidence in question was actually a conviction. During trial Mother acknowledged that the judgment of conviction showed she pled guilty and received a probated sentence. When offered into evidence there was no objection. The first prerequisite to a complaint for appellate review is a timely objection in the trial court. In the absence of an objection, there is nothing to review. Mother's complaint was overruled.

In re R.C. and R.C.C., Jr.
No. 07-06-0444-CV, 2007 Tex. App. LEXIS 3208
(Tex. App.–Amarillo April 25, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(a) – Accelerated Appeal
TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Jurisdiction, Appellate Court Not Deprived of

Procedural History: The trial court terminated Fulcher's parental rights to her children. The Seventh Court of Appeals affirmed the trial court's termination.

Facts: Trial counsel failed to request a bench warrant from the trial court compelling Fulcher's appearance at trial. "There is little doubt" counsel knew of Fulcher's interest in attending given the trial was continued at one point so arrangements could be made to secure Fulcher's presence. The final order was signed October 6, 2006. On November 6, 2006, Fulcher's trial counsel filed a motion for new trial containing a statement of points.

Issues Presented: Whether the appellate court could address Fulcher's ineffective assistance of counsel claim when a timely statement of points was not filed.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(a) – Accelerated Appeal: Under § 263.405(a) the appeal of a final order rendered under TFC, subchapter E of chapter 263, is governed by the rules of the Supreme Court for accelerated appeals in civil cases and by the procedures set forth in that chapter.

(2) § 263.405(b) – Statement of Points Required: Under § 263.405(b) a party intending to appeal a final order rendered under subchapter E is required to file in the trial court a statement of points on which the party intends to appeal no later than fifteen days after the final order is signed.

(3) § 263.405(i) – Failure to Preserve Complaint: Section 263.405(i) does not deprive an appellate court of jurisdiction over the appeal if a statement of points is not timely filed. However, a timely statement of points is necessary to preserve a point of review on appeal. The appellate court found "the clear language of the statute prohibits appellate courts from considering points not properly preserved by the timely filing of a statement of points." The appellate court stated, "We recognize the application of this statutory limitation to the right of appeal can have harsh results. … Nevertheless, we do not believe that it is an appropriate function of this Court to create a means of recourse by fabricating an interpretation that would expand the legislatively created procedures for perfection of a statutorily-created right of appeal. To do so would amount to blatant legislating from the bench." The appellate court concluded it could not consider Fulcher's issues, "including the allegation that her counsel was ineffective by failing to timely file a statement of points on appeal raising ineffective assistance of counsel."

Comment: Both the majority opinion and Chief Justice Brian Quinn's concurrence express concerns with § 263.405(i). The majority opinion sets out in footnote 5 the "sister courts [that] have questioned the practical application and constitutional validity of this statute, particularly in the context of a claim raising the issue of ineffective assistance of counsel". In his concurring opinion, Chief Justice Quinn writes separately "to stress that Texas Family Code § 263.405(i) should be revisited by the legislature." Quinn writes that Fulcher was deprived of due process because her trial counsel failed to request a bench warrant to ensure her presence at trial. "When egregious wrong occurs, however, and we are barred from correcting it due to the application of a statute to situations which, most likely, no one intended, our legal system has failed in that instance. Such happened here." Chief Justice Quinn joins the other courts of appeals asking the legislature to reconsider the scope of § 263.405(i).

In re R.J.S. and M.S.
No. 05-05-01641-CV, 2007 Tex. App. LEXIS 2770
(Tex. App.–Dallas April 11, 2007, pet. filed) (mem. op.)

Construing: TEX. FAM. CODE Chapter 263, Subchapter E – Purpose
TEX. FAM. CODE § 263.405 – Purpose
TEX. FAM. CODE § 263.405(b) – Constitutionality, Equal Protection, Due Process
TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(b) – "Trap for the Unwary" *See* Comment
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – "Presenting" the Statement of Points
Constitutional Challenge

Procedural History: The trial court terminated mother's parental rights to her children. The Fifth Court of Appeals affirmed the trial court's termination.

Facts: Following termination, mother timely filed a notice of appeal pursuant to the accelerated timetable. However, mother did not file a statement of points. Mother filed her brief raising both evidentiary and sufficiency points of error. CPS filed a responsive brief contending mother had waived her points by failing to file a statement of points. Mother filed a reply brief asserting that § 263.405 violated her constitutional rights.

Issues Presented: Whether (1) the appellate court could address mother's evidentiary and insufficiency claims when no statement of points was filed and (2) the appeals requirements contained in § 263.405(b) violated mother's equal protection and due process rights.

Appellate Court's Reasoning and Conclusions:

(1) 263 TFC, Subchapter E – Purpose: Sole focus of subchapter E is the means by which a final order in a suit involving CPS is entered and appealed. One of the legislature's goals in enacting chapter 263 is to obtain a permanent home for a child under CPS care as quickly as possible.

(2) § 263.405 – Purpose: Section 263.405 was enacted in 2001 to reduce post-judgment delays and screen out frivolous appeals. Reducing post-judgment delays by avoiding meritless appeals plainly serves an underlying goal of termination proceedings, to find permanence for a child.

(3) § 263.405(b) – Statement of Points Required: The appeal requirements set forth in § 263.405(b) apply only to appeals of final orders under subchapter E. Filing a statement of points on appeal is required. The purpose of the requirement for a statement of points is to give the trial court an opportunity to correct any error and potentially avoid an appeal altogether.

(4) § 263.405(i) – Failure to Preserve Complaint: Subsection (i) was added to § 263.405 in response to decisions holding that failing to comply with § 263.405 was not fatal to an appeal. Cases construing subsection (i) appear to uniformly hold, albeit reluctantly, that an appeals court is barred from considering issues not raised in a timely filed statement of points. Mother timely filed her notice of appeal pursuant to the accelerated timetable. However, she did not file a statement of points either alone or combined with a motion for new trial. Mother's notice of appeal stated the particular trial court findings she desired to appeal. However, even if the appellate court viewed her notice of appeal as a statement of points, the appellate court cannot consider her sufficiency points because she failed to present them to the trial court. An appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of points.

(5) § 263.405(i) – "Presenting" the Statement of Points: "Presenting" the statement of points requires both timely filing the statement and requesting a hearing. Nothing in the record shows that the statements of what mother desired to appeal, contained in the notice of appeal, were considered by the trial court. There is no evidence that a hearing was conducted and a hearing is mandatory. Thus, under the circumstances of this case, the appellate court was "compelled to hold that [mother] has failed to present any issues for this Court's consideration."

(6) Constitutional Challenge: In addressing constitutional challenges, the appellate court begins with the premise that, if possible, the appellate court must interpret the statute in a manner that renders the statute constitutional. A party asserting a challenge to the constitutionality of a statute must establish that the statute always operates unconstitutionally. In reviewing a statute's constitutionality, the appellate court considers the statute as written, rather than as it operates in practice.

(7) Unconstitutionality of § 263.405(b) – Equal Protection and Due Process: Mother contends the appeal requirements contained in § 263.405(b) are unconstitutional in that they violate the Equal Protection and the Due Process Clause of the United States and Texas Constitutions. Mother claims her

right to equal protection is violated because the TFC provides unequal treatment for parents in private termination suits versus termination suits involving CPS. She contends that parents in private termination suits simply follow the accelerated timetable and avoid the additional appeal requirement of filing a statement of points within fifteen days of the final order. The appellate court rejected mother's assertion that generally parents involved in CPS terminations are indigent whereas parents in private terminations are not indigent; therefore, the "legislature has imposed a bar to indigent parents in [CPS] termination cases that litigants in private termination suits avoid." The appellate court notes that all parents involved in CPS terminations, whether indigent or non-indigent, must comply with the same appeal requirements of § 263.405. Thus, § 263.405(b) does not violate the Equal Protection Clause. The appellate court further concluded that under the facts of this case, mother's due process rights were not violated.

Comment: The Dallas Court of Appeals noted that although it concluded mother's failure to file a statement barred the court's consideration of her issues, "we feel compelled to address the trap for the unwary created by [§ 263.405(b)]". Termination grounds are listed in chapter 161 of the TFC. The general provisions of the TFC, § 109.002, provide that in appeals in which termination of the parent-child relationship is in issue the appeal is accelerated under the TRAP. "This provision appears to apply to all termination suits, *but there is no requirement to file a statement of points*." (emphasis added) Termination suits involving CPS fall specifically within chapter 263. Thus, the specific provisions to suits under 263 apply over the general provision contained in a completely different chapter of the family code. "*The appellate playing field needs to be fair. As the [TFC] currently stands, parents are at a severe disadvantage in knowing all the requirements for an appeal*." (emphasis added) "Although desperately needed, a further warning regarding parents' rights to appeal the termination of their rights is absent. The legislature should warn parents that if they fail to present the trial court with a statement of points within fifteen days of a final order, there will be nothing for the court of appeals to consider." "By failing to file the statement of points, parents are losing their right to appeal the termination of their parental rights. It appears the failure to file the statement of points is most often *not* intentional but rather, it is the result of the failure of the [TFC] to direct parents' attention to the provision" (emphasis in original) "*As it stands right now, section 463.405(b) is a trap for the unwary*." (emphasis added).

In re R.M.R.
No. 13-06-351-CV, 2007 Tex. App. LEXIS 2181
(Tex. App.–Corpus Christi March 22, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405 – Procedure to Appeal Parental Termination
TEX. FAM. CODE § 263.405(b) – Statement of Points on Appeal Required
TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concern with § 263.405
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint

Procedural History: Mother appealed the termination of her parental rights. The Thirteenth Court of Appeals affirmed the trial court's order.

Facts: Mother timely filed her notice of appeal. However, she did not file a statement of points, either standing alone or with a motion for new trial. By five issues, mother claimed (1) her due process rights were violated because she was not provided forty-five days' notice of the final hearing on termination; (2) the evidence is insufficient to support any ground of termination and to support that termination is in the child's best interest; and (3) counsel provided ineffective assistance.

Issue Presented: Whether the appellate court could address mother's claims that (1) her due process rights were violated because she was not provided forty-five days' notice of the final hearing on termination; (2) the evidence is insufficient to support any ground of termination and to support that termination is in the child's best interest; and (3) counsel provided ineffective assistance.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405 – Procedure to Appeal Parental Termination: Parental termination appeals are subject to the procedures provided in this section.

(2) § 263.405(b) – Statement of Points on Appeal Required: An appellant seeking review of a subchapter E final order is required to file with the trial court a statement of points on which appellant intends to appeal no later than fifteen days after the final order is signed. The statement may be filed separately or may be combined with a motion for new trial.

(3) § 263.405(i) – Failure to Preserve Error: "[B]ecause [mother] did not file a statement of points, we cannot consider her issues on appeal, even ineffective assistance of counsel."

Comment: The Thirteenth Court of Appeals joins a number of its sister courts of appeals "in questioning the practical applications and constitutional validity of this statute".

Ruiz v. TDFPS
212 S.W.3d 804 (Tex. App.–Houston [1st Dist.] 2006)

Construing: TEX. FAM. CODE § 161.001(1)(D)
TEX. FAM. CODE § 161.001(1)(E)
Appellate Court May Only Review Specific Grounds within Termination Order
Legal and Factual Sufficiency

Procedural History: The trial court terminated Ruiz's parental rights to the child under § 161.001(1)(D) and (E) and a finding that termination was in the child's best interest. The First Court of Appeals reversed the judgment and then granted rehearing. On rehearing, the Court again reversed the trial court's judgment.

Facts: CPS became involved after a referral that Ruiz was leaving the child with her grandmother for extended periods of time wherein Ruiz's whereabouts were unknown. There were also alleged cigarette burns on the child's arm. Ruiz did not give consistent explanations for the injury. The child was removed because Ruiz took the child from her grandmother's care after the initial referral and CPS could not locate her. A service plan was developed for Ruiz. Tammy Brown, a CPS caseworker, testified that Ruiz completed her parenting classes and a narcotics assessment, but did not have time to follow through with the recommended psychological evaluation. Ruiz did not complete anger management as she missed too many sessions.

The child was first placed with his paternal great grandmother, Hernandez. He was moved and placed with Marcella Chappa, Ruiz's counsin. Ruiz was not to be with the child unsupervised. Brown visited the Chappa home and found Ruiz alone with the child. The child had a soaked diaper, bruising on his face, and a gash over his eye. Brown felt the gash needed medical attention so she took the child to the clinic for assessment. There was no evidence in the record as to the medical assessment or whether the child needed medical attention. The child was returned to the Hernandez home. Ruiz told Brown that the child had fallen down, and that in Ruiz's opinion, the gash did not look serious.

Brown testified that termination was in the child's best interest because Ruiz did not have a stable lifestyle or place to live, did not have employment, there was possible domestic violence in her home, and she had not completed services as agreed in mediation. Hernandez informed Brown of an incident wherein police officers picked Ruiz up by the side of the road with a bruise on her face. Ruiz admitted to Hernandez that she and her boyfriend, Castone, were fighting. Brown stated that Ruiz admitted to her that there was domestic violence in the relationship. Brown felt it was too late for Ruiz to engage in services. Ruiz testified to the numerous places she had stayed since the child's birth, stating that she left the

child with Hernandez because it was the best placement for the child at the time. Ruiz and Hernandez had an agreement that the child would stay with Hernandez until Ruiz improved her situation. She would visit the child a few times a week. Ruiz stated that Hernandez informed her that the supposed cigarette burns were infected insect bites. Ruiz stated that she became interested in working services after initially being "stubborn." Ruiz also testified to the family members she lived with during the pendency of the case. Ruiz ultimately moved in with Castone.

Ruiz became pregnant by Castone. She was placed on bed rest and ultimately suffered a miscarriage. She visited the child three to four times. After her miscarriage, Ruiz began participating in services again. Ruiz did not work or pay rent, however, still failed to complete her services. Ruiz stated that the child's relatives loved him, that she had not provided a stable home for him, and that Hernandez had provided for the child's basic needs. Ruiz requested two more months in which to complete her service plan. She intended to marry Castone. She and Castone lived with Castone's parents, whom Ruiz requested the court consider as a placement. Ruiz stated that she treated the gash on the child's head with Neosporin and alcohol and that she thought the gash would be fine. She agreed the removal from Chappa's home was justified. Ruiz denied domestic violence in the home, testifying that she told Brown she had hit herself on a dresser while moving.

Regarding the psychiatric aspects of the service plan, Ruiz testified that she advised Mental Health and Mental Retardation Authority (MHMRA) that she was depressed, would benefit from assistance, and had experience with alcohol and drugs. Nevertheless, MHMRA stated she did not qualify for a psychiatric evaluation. Ruiz thought that this satisfied the service plan. Ruiz stated that she was involved in ongoing counseling, had completed parenting, and had learned skills from her classes. She stated that if she were to take a drug test, it would be clean. Ruiz admitted to being advised that failure to complete the service plan might result in losing her son, that she had reported that she was depressed, that she had drunk alcohol and smoked marijuana recently, and that her classes were not complete due to inconsistent attendance.

Mike Murray, a family therapist, testified that he had seen Ruiz in individual and couples therapy, and that he recommended reunification based on his experiences with Ruiz. His recommendation was based on her progression in counseling and his evaluation of her parenting abilities, including attitude, temper, and resources. His recommendation was also based on Ruiz's commitment to continue to see him. He stated that based on his interactions with Ruiz, he had no concern for domestic violence in the home. Jiminez, the child's great aunt, testified that police officers had previously brought Ruiz to her home. Ruiz advised Jiminez that she and Castone had gotten into an argument. Ruiz had a mark on her face and the police found her on the side of the road. Ruiz informed Jiminiez she was not going back to Castone. This corroborated earlier testimony of Brown. The child's appointed advocate testified that termination of the parent-child relationship and placement with Chris Levin, a paternal uncle, was in the child's best interest.

Issues Presented: The court was presented with the following issues: (1) whether there was sufficient evidence to support the trial court's predicate ground findings under § 161.001(1)(D) and (E); and (2) whether there was sufficient evidence to support the trial court's best interest finding.

Appellate Court's Reasoning and Conclusions:

(1) <u>Legal Sufficiency Review</u>: The court must determine whether the evidence, when viewed in the light most favorable to the finding, is such that a reasonable factfinder could have formed a firm belief or conviction as to the truth of the matter on which the State bore the burden of proof. The court assumes the factfinder resolved all disputed evidence in favor of the finding. All evidence which the factfinder could have disbelieved or found to be incredible is not considered.

(2) Factual Sufficiency Review: The court must determine whether a factfinder could have formed a firm belief or conviction about the truth of the matter on which the State bore the burden on proof. In reaching its review, the court considers the entire record, including all the evidence, both disputed and undisputed. The court considers disputed evidence for whether it is such that a reasonable factfinder could not have resolved the disputed evidence in favor of its finding.

(3) Appellate Court May Only Review Specific Grounds within Termination Order: CPS argued that the trial court could have made other implied findings not set forth in the termination order. Specifically, that Ruiz failed to comply with the provisions of a court order establishing the actions necessary for a return of the child. CPS argued that as Ruiz did not address the issue, she had waived it on appeal. This was the same argument that CPS made in *Cervantes-Peterson*. Essentially, CPS argued that in every termination case the court could uphold the termination on any of the nineteen grounds under 161.001(1) if the evidence was sufficient to support same and the parent failed to challenge on appeal grounds not in the order but supported by the evidence. The court rejected CPS's argument as it had already overruled both *Thompson* and CPS's theory in *Cervantes-Peterson*.

(4) § 161.001(1)(D) and (E): Under § 161.001(1)(D) the child's environment must be examined. Under 161.001(1)(E), the danger to the child must arise solely from the parent's conduct as established by the parent's actions or failures to act. A voluntary and deliberate course of endangering conduct is required. CPS argued that § 161.001(1)(D) and (E) were met because the child received cigarette burns and because the child was left with his great grandmother for extended periods of time. CPS also argued that Ruiz took the child after the initial referral, making it impossible for to investigate. CPS contended that a reasonable factfinder could conclude that Ruiz hid the child for a period of time to allow the burns to heal. CPS also asserted that a reasonable factfinder could conclude that Ruiz tried to hide the nature of the injuries as she herself never stated that the injuries were not cigarette burns.

CPS also argued that Ruiz was found alone with the child, in violation of the placement stipulation, and that the child had a soaked diaper, bruising and a gash over his eye. CPS contended that a reasonable trier of fact could have disbelieved Ruiz's explanation of the injuries and found her treatment of them inadequate. CPS also focused on Ruiz's admission that she used marijuana on April 14, 2003, when her parental rights were in jeopardy and she may have been pregnant and on bed rest as the pregnancy was high risk. Ruiz argued she made an agreement to leave the child with Hernandez because it was a better place for him to live. Ruiz stated she never left the child with anybody else and visited the child several times a week. She argued that there was no testimony in the record to indicate that she left the child in dangerous conditions or surroundings. She also contended that there was no testimony in the record that the alleged cigarette burns occurred while the child was in her care. In fact, she denied their occurrence while in her care. She argued that the cut above the child's eye was sustained in the "normal course of" daily activities and that there was no evidence otherwise.

The record only indicated that Ruiz could not explain the injuries. A reasonable factfinder could only interpret Ruiz's testimony as a denial that she was responsible for the alleged burns. The record did not even infer that Ruiz took the child to an unknown location so that the burns could heal after the CPS referral. Ruiz only testified that she took the child from the home for one week. There was no testimony that when Ruiz removed the child from Hernandez's home, it was in violation of a safety plan or an informal agreement with Hernandez. In addition, there was no evidence that Ruiz even knew a referral had been made when she removed the child. CPS relied on *J.P.B.* in arguing that Ruiz endangered the child. The court found the facts in *J.P.B.* to be "easily distinguishable". There was no evidence here that Ruiz caused the injuries or was present at their occurrences. There was no evidence that the injuries were a result of abuse. In addition, there was no evidence that Ruiz's treatment of the eye cut was inadequate or that the alleged deficient treatment was endangering. The evidence concerning Ruiz's alleged narcotics use was "extremely limited" and did not support a finding that she engaged in a course of endangering

conduct. There was no indication that Ruiz suffered from an ongoing narcotics problem. Thus, the evidence was legally insufficient.

In re R.W., II, K.W., C.W., and J.S.
No. 06-06-00106-CV, 2006 Tex. App. LEXIS 10084
(Tex. App.–Texarkana Nov. 22, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Appellate Courts' Concerns with § 263.405
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Jurisdiction, Appellate Court Not Deprived of

Procedural History: The trial court terminated Tripp's parental rights to her children. The Sixth Court of Appeals affirmed the trial court's termination.

Facts: Tripp filed an appeal from the termination of her parental rights. She did not file a statement of points to be raised on appeal, either standing alone or with a motion for new trial.

Issues Presented: Whether under § 263.405(b) and (i) the appellate court can consider any contention of error raised on appeal when no statement of points has been filed.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) – Statement of Points Required: Under § 263.405(b) a party must file a statement of points on which the party intends to appeal not later than the fifteenth day after a final order is signed.

(2) § 263.405(i) – Failure to Preserve Complaint: Section 263.405(i) does not terminate an appellate court's jurisdiction over the appeal if a statement of points is not filed. However, where no statement of points on appeal exists, under the express terms of the statute, "there is no contention of error that can be raised that we may consider on appeal."

Comment: The Sixth Court of Appeals notes that her sister courts "have questioned the practical applications and constitutionality of this statute."

In re S.A.C.
No. 02-05-141-CV, 2006 Tex. App. LEXIS 6833
(Tex. App.–Fort Worth Aug. 3, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.401(b) – Jurisdiction to Render Order
TEX. FAM. CODE § 263.405(d) – Frivolousness, Review of
Ineffective Assistance of Counsel – Failing to Obtain Ruling

Procedural History: The trial court terminated Christina's parental rights to the child. The trial court found her appeal frivolous. The Second Court of Appeals affirmed.

Issues Presented: The court was presented with three issues: (1) whether the trial court had jurisdiction to render the termination order; (2) whether the appeal was frivolous; and (3) whether Christina's trial counsel was ineffective.

Appellate Court's Reasoning and Conclusions:

(1) § 263.401(b); The Trial Court Had Jurisdiction to Render its Order: Christina argued that the trial court was without jurisdiction to render the termination order because the order was not filed

by the mandatory dismissal date set forth in § 263.401. In the instant case, the termination suit was filed on October 3, 2003. On July 23, 2004, and again on September 30, 2004, the trial court entered orders that: (1) S.A.C. needed to remain in care as neither Christina nor the child's father had demonstrated adequate or appropriate compliance with the service plan; (2) the appointment of CPS as the child's TMC continued to be in the child's best interest; and (3) extended the dismissal date until April 2, 2005. April 2, 2005 was not more than 180 days after October 3, 2003. The trial court rendered its termination order on March 24, 2005. As such, the trial court's orders, including the termination order, complied with § 263.401. The trial court did not lose its jurisdiction.

(2) § 263.405(d); The Trial Court Did Not Err in Finding Christina's Appeal Frivolous: An appeal is frivolous if it does not present a substantial question for appellate review. A trial court's determination that an appeal is frivolous is reviewed for an abuse of discretion. In its termination order, the trial court found clear and convincing evidence to support grounds under § 161.001(1)(D), (E), (F), and (O) and best interest. Christina challenged only the predicate termination ground findings. Christina claims that there was an arguable basis for appeal because at the motion for new trial hearing the trial court stated, "You have done a wonderful job and beat the drugs," to which CPS agreed. The court wrote that the statement was taken out of context. In addition, the record contained clear and convincing evidence that Christina failed to comply with her court-ordered service plan by not regularly attending counseling, not maintaining stable employment so that she could provide for the child's needs, failing to pay child support, and failing to attend numerous NA meetings. The evidence was sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation that Christina failed to comply with court-ordered services. As such, the evidence is legally and factually sufficient to establish this ground for termination by clear and convincing evidence. The trial court did not abuse its discretion in finding Christina's factual sufficiency ground frivolous.

(3) Christina's counsel was not ineffective: Christina complains that her trial counsel was ineffective for failing to obtain a ruling on her special exceptions to CPS's termination petition and for failing to exercise "due diligence" in her request for a court-appointed psychologist. Aside from her assertion that "no legitimate trial strategy" would cause the alleged failures, Christina offered no attempt to explain how counsel was ineffective or how the result would have been different but for counsel's alleged inaction. Therefore, the court assumed that counsel's conduct fell within the wide range of reasonable professional assistance.

In re S.A.S. and M.I.S.
200 S.W.3d 823 (Tex. App.–Beaumont 2006, pet. denied)

Construing: TEX. FAM. CODE § 161.001(1)(O) - Constitutionality of
Ineffective Assistance of Counsel – Failure to Object to Jury Charge

Procedural History: The jury returned a verdict terminating Angela's and her husband's parental rights to the children. The trial court entered judgment accordingly. The Ninth Court of Appeals affirmed.

Facts: After the trial court entered its termination, Angela filed a motion for new trial which was denied. Shortly thereafter, Angela filed her notice of appeal and a first amended motion for new trial. The amended motion for new trial was denied as well.

Issues Presented: The court was presented with two issues: (1) whether the trial court erred in instructing the jury that it could consider violations of the service plan, § 161.001(1)(O), as a ground to terminate Angela's parental rights; and (2) whether Angela's counsel was ineffective for failing to preserve error by objecting to the jury charge.

Appellate Court's Reasoning and Conclusions:

(1) § 161.001(1)(O); Facial Constitutionality: Angela asserted that § 161.001(1)(O) was unconstitutional and its inclusion caused her harm. She claimed that she could not demonstrate the harm because the jury charge included her failure to comply with the service plan as one of several potential termination grounds upon which the jury could have terminated her parental rights. Generally, a party must make an objection to a proposed jury charge at trial to avoid waiving complaints about the charge. Absent a recognized exception, even a constitutional complaint is waived if not preserved properly in the trial court. Angela did not object to the jury charge at trial but was complaining of § 161.001(1)(O) on appeal. To avoid waiver, Angela contended that the statute was facially unconstitutional, and in the alternative, contended that the court should review the constitutionality of the statute under the Fourteenth Amendment for procedural due process or the fundamental error doctrine.
The court found that even if a facial challenge is an exception to the general rule regarding error preservation, a matter the court termed as "arguable," Angela's argument was not persuasive. A facial challenge is the most difficult challenge to mount as the challenger must establish that no set of circumstances exists under which the statute will be valid. The challenger must establish that the statute always operates unconstitutionally. A court presumes a statute's constitutionality. The party challenging the statute carries the burden of proving its unconstitutionality. When possible, the court is to uphold the statute and "interpret legislative enactments in a manner to avoid constitutional infirmities."

Angela failed to demonstrate that no set of circumstances existed under which the section could be valid. If reasonable standards are in place to guide the agency, the legislature's delegation of power to various agencies to enforce and apply laws is necessary and proper. The Texas Family Code requires the trial court to review and approve the plans of service developed by CPS for "reasonableness, accuracy, and compliance." Angela's contention that CPS could require a parent to complete impossible tasks was insufficient to demonstrate that the statute always operated unconstitutionally.

(2) § 161.001(1)(O); Fundamental-Error Doctrine: Despite her failure to object at trial, Angela also requested that the court review the constitutionality of the statute under the "fundamental-error doctrine." Generally, a reviewing court may not determine constitutional questions when the court can resolve the issue on nonconstitutional grounds. In *B.L.D.*, the Texas Supreme Court held that error must be preserved to save a complaint that a statute is unconstitutional. The Court refused to extend the fundamental-error doctrine to areas of family law, ruling that "the fundamental-error doctrine does not permit appellate review of the complaint of unpreserved charge error" in termination cases. As such, the fundamental-error doctrine does not operate to preserve Angela's charge complaint. *In re B.L.D.*, 113 S.W.3d 340, 351 (Tex. 2003).

(3) § 161.001(1)(O); Due Process: Angela also asserted that due process required the court to review her unpreserved error concerning the jury charge. As a general rule, due process does not require that appellate courts review unpreserved complaints of charge error in termination cases. The Texas Supreme Court concluded in *B.L.D.* that the *Mathews v. Eldridge* factors did not rebut the presumption that preservation rules comport with due process. As such, a review of unpreserved charge error is not required. The court held that when Angela's attorney made no objection to the charge at trial, due process did not require the court to review the complaint.

(4) Ineffective Assistance of Counsel: Angela argued that because her attorney did not object to the jury charge she was denied effective assistance of counsel. To prevail on her ineffective assistance claim, Angela was required to show that her counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability existed that, but for counsel's errors, the result would have been different. The court must indulge in the strong presumption that counsel's conduct fell within

the wide range of reasonable professional assistance. Conduct is ineffective only when no competent attorney would have engaged in it.

Angela did not show her counsel's performance was deficient. No Texas court has held § 161.001(1)(O) unconstitutional. Angela bore the burden of showing that the statute is unconstitutional as applied to her. She failed to specify what portion of the service plan was unreasonable or impossible for her to satisfy. Angela had the opportunity to object to the terms of service plan but did not. The trial court reviewed the plan and found it reasonable. Angela provided no evidence that the service plan was unconstitutional as applied to her. The evidence at trial demonstrated that Angela violated some of the terms of the service plan. It is not ineffective for an attorney not to make objections to a charge that have no arguable basis.

In re S.C.
No. 06-07-00051-CV, 2007 Tex. App. LEXIS 3217
(Tex. App.–Texarkana April 27, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(b) – Statement of Points Required
TEX. FAM. CODE § 263.405(i) – Failure to Preserve Complaint
TEX. FAM. CODE § 263.405(i) – Jurisdiction, Appellate Court Not Deprived of

Procedural History: The trial court terminated Collins's parental rights to her child. The Sixth Court of Appeals affirmed the trial court's termination.

Facts: Collins filed an appeal from the termination of her parental rights to S.C. Collins did not file a statement of points on appeal, either standing alone or with a motion for new trial.

Issues Presented: Whether under § 263.405(b) and (i) the appellate court can consider any contention of error raised on appeal when no statement of points has been filed.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(b) – Statement of Points Required: Under § 263.405(b) a party must file a statement of points on which the party intends to appeal not later than the fifteenth day after a final order is signed.

(2) § 263.405(i) – Failure to Preserve Complaint: Section 263.405(i) does not terminate an appellate court's jurisdiction over the appeal if a statement of points is not filed. However, where no statement of points on appeal exists, under the express terms of the statute, "there is no contention of error that can be raised that we may consider on appeal."

In re S.C.M., Jr.
No. 04-06-00514-CV, 2007 Tex. App. LEXIS 331
(Tex. App.–San Antonio Jan. 19, 2007, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(g) – Frivolousness, Review of – *Anders* Brief

Procedural History: Trial Court terminated Moody's parental rights to S.C.M., Jr. The Fourth Court of Appeals affirmed the trial court's judgment.

Facts: The trial court terminated parental rights. Moody appealed the trial court's order determining that an appeal of the termination order would be frivolous. Moody's court-appointed appellate attorney filed an *Anders* brief containing a professional evaluation of the record and demonstrating that there are no arguable grounds to be advanced. Counsel's brief concludes that the appeal is without merit. A copy of counsel's brief was delivered to Moody who was advised of his right to examine the record and to file a pro se brief. No pro se brief was filed.

Issues Presented: Whether Moody's appeal is frivolous and without merit.

Appellate Court's Reasoning and Conclusions:

§ 263.405(g): Appellate court has duty to review record to determine whether the appeal is frivolous and without merit. In reviewing whether an appeal is frivolous when an *Anders* brief has been filed, the appellate court reviews only the record and does not address the merits of any issues raised in the statement of appellate points when the appellant files an *Anders* brief in an appeal from an order determining those points to be frivolous.

Shaw v. TDFPS
No. 03-05-00682-CV, 2006 Tex. App. LEXIS 7668
(Tex. App.–Austin Aug. 31, 2006, no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(E)
TEX. FAM. CODE § 161.001(1)(O)
TEX. FAM. CODE § 263.401(b) – Refusal to Extend Dismissal Date
Best Interest
Legal and Factual Sufficiency

Procedural History: The trial court terminated Shaw's parental rights to the child, finding that Shaw engaged in conduct as set forth in § 161.001(1)(D), (E), and (O), and that termination was in the child's best interest. The Third Court of Appeals affirmed.

Facts: Shaw was seventeen years old and in TYC when she gave birth to the C.O. Shaw and C.O. lived in TYC until Shaw's release in March 2004. In September, 2004, Shaw was arrested during an incident wherein she, her sister Erica, and their respective boyfriends, kicked open a door injuring Erica's baby's father. They had gone to retrieve Erica's child. Shaw had brought C.O. and left him in the car. Shaw grabbed Erica's baby but was arrested before she could drive away. C.O. was sent to a children's shelter as the police could not locate a placement for him. A bag of marijuana was found in his diaper.

In September 2004, CPS was appointed TMC of C.O. The trial court ordered Shaw to complete a parenting class, a protective parenting class (different from the first parenting class), an anger management class, and a drug and alcohol assessment. Shaw was also required to undergo a psychological evaluation, take three drug tests a week, attend five AA or NA meetings a week, and maintain safe and stable housing and employment. Shaw was placed on deferred probation for the assault incident described above. She was later incarcerated again between February and April 2005 when she pled no contest to theft by check. In April she was released on probation. Shaw's probation terms required her to submit to drug testing, undergo drug treatment, attend three AA or NA meeting a week, take parenting classes, work towards a high school diploma, and locate and maintain stable employment.

Slayton, one of CPS's caseworkers, testified that until February 2005 Shaw made no progress on the services in her case. Shaw missed several visits with the child and was kicked out of parenting classes and anger management for poor attendance. In addition, she missed her psychological evaluation and never complied with CPS drug testing. Slayton stated that Shaw did not visit the child or contact CPS between January 11 and April 26. A meeting was arranged to restart visitation. Shaw did not attend. The meeting was rescheduled and again Shaw did not attend. The meeting was again rescheduled and Shaw did not appear. Slayton did not remember Shaw attempting to contact her between April 26 and May 18, the eventual day of the meeting. Shaw consequently missed the next week's visit. Slayton did not believe that Shaw had taken any responsibility for CPS's involvement. Slayton testified that termination and adoption would be in C.O.'s best interest as the parents had not made any significant progress, there had

been no significant changes in their lifestyle, and a lack of participation in services. Slayton further testified that C.O. needed permanence and that Shaw had endangered him through her conduct.

Shaw testified that she had smoked marijuana since she was twelve or thirteen but didn't think she had a drug problem. She said she smoked due to her emotions and that she chose to stop. She stated her drug tests for probation in April, May, July, and August of 2005 were negative and that she had last used marijuana in February 2005. However, Shaw's probation officer testified that her results from a drug test the week before trial were positive. Shaw denied using but stated that she might have been around someone who did. She was ordered to return the next day for a drug test but did not. CPS argued that Shaw's compliance with probation drug tests did not satisfy her compliance with CPS drug tests. After being kicked out of parenting, Shaw contacted CPS to reschedule but was again discharged for non-attendance due to transportation issues. Shaw finally did complete parenting classes, but was discharged from anger management for missing classes.

Oldaker, the child's father and Shaw's ex boyfriend, testified that he had a history of domestic violence against his older child's mother, that he was arrested several times for assaulting her, and that she had obtained a protective order against him. After her release from TYC, Shaw and the child moved in with Oldaker. In June 2004, Oldaker assaulted Shaw, pushing her to the ground, hitting her, and locking her in a closet. Even though she obtained a protective order against him, Shaw reunited with Oldaker and lived with him after she was released from jail in April 2005 until July 2005. The probation officer noticed bruises on her in June 2005 which Shaw attributed to an old boyfriend she had left.

By the time of trial, Shaw had moved around often. Sometimes Shaw stayed with her grandmother, her sister, or in motel rooms with Oldaker, even though they weren't a couple. When asked what she would do if C.O. was in her care, Shaw replied that she was looking for an apartment, and that if that didn't happen, then they could go to her grandmother's. Before incarceration Shaw worked at a fast food restaurant for a couple of months. She worked at Denny's a month and half before trial but quit, claiming her court-ordered classes were creating problems with the management. She claimed her work hours conflicted with visiting C.O., but that she had tried to contact CPS to reschedule, albeit unsuccessfully. Shaw was not employed at trial but was going to look for a job and take classes on resume preparation through probation. Shaw admitted to issues with authority figures and acting on impulse. She said she loved C.O. and believed she could care for him with the skills she had learned, and would never act rashly toward him or call him names. Shaw did admit to several missed visits. CPS records showed that she did not visit C.O. between January 11 and May 18, 2005. Shaw stated that after her release in April she was told that she would have to have a meeting with CPS before visits would start again. She did nothing and relied on Oldaker to set up the meeting.

Shaw underwent a psychological evaluation with Dr. William Dubin. Shaw told Dubin that she had been abused and molested as a child and that she ran away from her grandmother's house and from several foster homes. She told Dubin she smoked marijuana to ease stress and that she used it almost daily after C.O.'s removal. She did not believe she had a substance abuse problem. Dubin determined that Shaw met the "diagnostic criteria" for anti-social personality disorder. He further determined that Shaw had an anxiety disorder, marijuana dependence, and borderline intellectual functioning. In response to a question regarding her ability to care for a child, Dubin responded that her poor judgment and her anti-social and intellectual issues made it problematic for Shaw to provide a safe environment for the child. In addition, Dubin stated Shaw's test was uninterpretable regarding her relationship with C.O. because her "lie score was so high". Dubin thought there to be a good bond but was not sure.

C.O.'s guardian ad litem, Carolyn Hansen, testified that C.O. needed parents who would give him the love and attention he craved. Hansen stated that at visits Shaw did not play with C.O. but gave him "orders." She did not believe that Shaw was using any of the skills she learned in classes. Hansen testified

that C.O. was doing well in the placement and his speech had greatly improved. Shaw ignored Hansen's advice to get to work on her services if she wanted C.O. Hansen stated that she did not believe Shaw needed more time to complete services and that more time would hurt C.O.

Issues Presented: The court was presented with the following issues: (1) whether the evidence was legally and factually sufficient to support the trial court's predicate and best interest findings; and (2) whether the court erred in denying Shaw's request for an extension of the dismissal date.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: In reviewing the legal sufficiency of the evidence, the court considers all of the evidence in the light most favorable to the trial court's finding and asks whether a reasonable fact-finder could have formed a firm belief or conviction that the finding was true.

(2) Factual Sufficiency Review: In a factual sufficiency review, the court considers all of the evidence and asks whether a reasonable fact-finder could have resolved any evidentiary disputes in favor of a finding that the State's allegations are true. The court maintains appropriate deference to the trial court's role as fact-finder by assuming that it resolved evidentiary conflicts in favor of its finding when reasonable to do so, and by disregarding evidence that it reasonably could have disbelieved.

(3) § 161.001(1)(O): Shaw was ordered to participate in services through two separate orders. She did not begin to effectively comply until after her release from prison in April 2005, more than six months after the child was removed. She failed to submit to CPS drug tests, to complete anger management, or to complete protective parenting classes. Despite negative drug tests throughout the case she tested positive for marijuana the week before trial. She had not begun her drug treatment program for probation. Shaw had no stable housing, and even though she was employed as of trial, had not begun work yet. She had an unstable job history. The evidence was legally and factually sufficient evidence to find Shaw had not complied with court-ordered services despite her recent efforts.

(4) § 161.001(1)(E): The evidence was also legally and factually sufficient to support the finding that Shaw engaged in conduct which endangered the child's physical or emotional well-being. She brought him to the scene of a crime, engaged in other criminal conduct that led to her 2005 imprisonment, and continued to stay with a physically abusive man.

(5) Best Interest: Slayton and Hansen testified they believed termination to be in the child's best interest. His speech development was improving and he was happy and healthy. They testified that C.O. needed permanence, which would best be accomplished through adoption. Despite Shaw's testimony to the contrary, Slayton and Hansen stated that Shaw had not made progress in her parenting skills or her compliance with the court's orders. In the year before the child's removal, Shaw did not have stable employment or housing. Dubin was concerned that Shaw would have trouble providing C.O. with a safe and stable home. The evidence was legally and factually sufficient to show termination to be in the child's best interest.

(6) § 263.401(b); The Trial Court Did Not Err in Refusing to Extend the Dismissal Date: Shaw sought an extension of the dismissal date before the trial court arguing that the deadline should be extended because she had begun to make progress on her service plan. CPS and C.O.'s guardian ad litem objected to the continuance, contending that Shaw had not shown extraordinary circumstances. The trial court denied her motion. A trial court's denial of a motion for continuance is reviewed for an abuse of discretion. Shaw knew the requirements necessary to regain the child. She did not try to comply with services until April 2005, roughly eight months after the child's removal. Even more so, she did not begin attending AA/NA meeting until July 2005 and did not take parenting until a month before trial. Shaw

failed to show that needing more time after failing to make progress for the first eight month's of the court's order amounted to "extraordinary circumstances" requiring a continuance. The court did not abuse its discretion in denying her continuance.

In re S.K. and S.K.
198 S.W.3d 899 (Tex. App.–Dallas 2006, pet. denied)

Construing: TEX. FAM. CODE § 161.001(1)(D) – Explained/Limited Progress After Services
TEX. FAM. CODE § 161.001(1)(E) – Explained/Limited Progress After Services
Best Interest – *Holley* Factors
Factual and Legal Sufficiency

Procedural History: The trial court terminated parents' parental rights under § 161.001(1)(D) and (E) and best interest. The parents appealed, claiming that the evidence was legally and factually insufficient to support the trial court's findings. The Fifth Court of Appeals affirmed.

Facts: Mother and Father were the parents of five children: E.K., D.K., Sh. K, Sa. K., and M.K. Mother and Father previously relinquished parental rights to E.K. and D.K. Mother also relinquished her parental rights to A., who is not Father's child. CPS became involved in the instant case after being contacted by the children's daycare director. Sa., an eight month old boy, had a red bruise across approximately one-half of his face. The director did not accept Mother's explanation for the bruise and called CPS to take the child to the doctor. Mother gave inconsistent accounts to several different individuals of how the bruise occurred. CPS removed Sa., Sh., and M.K. On the day they were removed, the children had lice and were wearing the same clothes and diapers as the day before. The daycare director testified that despite advising Mother of the children's lice, their dirtiness, and "offensive stench," Mother did nothing. The daycare was required to purchase baby wash, etc. to address the issues. The children had to use other childrens' diapers and when asked to bring some for Sa. and Sh., Mother replied that she did not have the money. The daycare director testified that Mother was not effective in handling her children's sanitary needs.

The daycare director stated that she thought that Sa. was developmentally delayed and that she advised Mother of same. Mother stated in reply "the doctor said he was fine." The director further testified that Mother acted unstable and paranoid. In addition, a man not the children's father, accompanied Mother to pick the children up on three or four occasions. Mother identified him as the father anyway. The director testified that she never saw Father at the daycare. Mother's family members even advised the CPS caseworker that Mother was "lazy" and "negligent," and that the children often had lice, were dirty, and looked like nobody took care of them.

Daycare employees testified that Sh., nineteen months, was speech delayed and would not play with other children. Jacelyn Revland, an early childhood specialist, testified that Sh. should have had a vocabulary of about seventy-five words. Sh. knew few words, was not speaking in two word phrases and was unintelligible. Revland testified that at the time of trial, Sh. was speaking in three to four word sentences and could be understood "age appropriately." The foster mother who adopted E.K. and D.K. testified that E.K. was learning delayed and that D.K. had a severe speech delay when they entered her home. Through her working with them the children had improved. Nancy Hitsfelder, M.D., an early developmental disability specialist, testified that her tests of Sa. at twenty-one months of age indicated that he was mentally retarded and his delays indicated a "genetic syndrome." Sa.'s fine motor and visual motor functions were at a ten month old level. Sa. also scored roughly half his age in language. Hitsfelder testified that despite improvement, he remained delayed in all areas and likely would always be delayed for his chronological age. As such, a parent would have to interact with him accordingly. Sa.'s foster mother testified that when placed with her at nine months of age Sa. had developmental delays as he could not stand, sit,

crawl, pull himself up, or "jabber." He could say two words. A few months before trial Sa. started walking and pulling himself up. There were indications that Sa. needed occupational therapy, which addressed muscle tone, motor movement, and manipulation of objects.

Mother was provisionally diagnosed with Asperger's Disorder by V.J. Lair, Psy.D., a clinical psychologist. Asperger's is a "pervasive developmental disorder," characterized by significant impairment of an individual's social skills and "over-focus" on certain behaviors. Lair recommended further evaluation and long-term treatment but mother refused it. Lair also conducted a drug and alcohol assessment on Father. Lair stated that Father informed her that he used marijuana and had once driven the children in a car after smoking it. Father denied the driving incident as a "total fabrication." Father told Lair he drank a twelve pack of beer every Friday and Saturday night but was not intoxicated, just "mellowed." Lair also testified that Father told her he smoked marijuana and drank alcohol "to manage his anger," and he often raises his voice, curses, had put his fist through a wall and gotten into physical fights when angry. Lair diagnosed Father with marijuana and alcohol abuse and recommended outpatient drug and alcohol treatment and anger management. Father disagreed, stating that he had two recent negative drug tests. Lair testified that the absence of support and his drug and alcohol abuse could impact his parenting. Lair also testified that her testing revealed that Father "reversed the parent-child relationship" as he saw the child meeting his needs rather than vice-versa.

Mother and Father received counseling both individually and together from Lorna Loeckle, Ph.D. Mother and Father told Loeckle the children were fine. Loeckle felt Mother needed supportive employment from Texas Work Force where she could be placed in a job and receive intervention by a caseworker between her and the employer. Mother gave Loeckle inconsistent information about employment. According to Loeckle, Father had difficulty making decisions regarding the children and did not understand why they had been removed from Mother's care. Father misrepresented to Loeckle that he had his GED and could not account for his income as Father gave her inconsistent employment information as well.

The caseworker, Martinez, testified that service plans were completed for Mother and Father. Mother completed all four service plans. The evidence was that Mother's employment was "sporadic" and "unstable." Mother did not develop a positive support system and there was evidence that she herself had a troubled history with her own mother. Martinez stated that even after the services, Mother's and Father's interaction and discipline remained limited. Martinez testified that Mother "did not appear to understand the issues involved in her CPS history" and that Mother did not agree with her diagnosis of Asperger's.

Father did not complete his anger management or drug treatment provided in his service plan. Father complied with the employment requirement by maintaining employment for six months, but did not provide paycheck stubs as required. In addition, Father did not have stable housing. Father lied about his living with Mother in Section 8 housing to Martinez and the housing authorities. Martinez testified that Father does not "comprehend his role in CPS involvements"; saw no need for change as he felt Mother should care for the children; and despite his cooperation with her, was hesitant to follow the recommendations of the service providers. Father testified he did not agree with Hitselder's diagnosis of Sa. and wanted "a second opinion."

Substantial testimony was heard regarding Mother and Father's relinquishment of the older children. Those children were removed after CPS found them in the street three times and after one of the children was burned at the maternal grandmother's house. Testimony was heard that the parents and other family members had no "insight" into what went wrong with the older children's care.

There was undisputed evidence that: Mother and Father loved the children and showed them affection; Mother's home was clean; Mother took the children for routine medical care; and other than Sa.'s bruise, the children showed no signs of physical injury.

The action regarding M.K. was severed from the case.

Issues Presented: The court was presented with the following issues: (1) whether the evidence was legally and factually sufficient to support termination of Mother's and Father's parental rights under § 161.001(1)(D) and (E); and (2) whether the evidence was legally and factually sufficient to support the trial court's finding that termination of the parent-child relationship between Mother and the children was in the children's best interest.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: In reviewing the legal sufficiency of the evidence to support a termination finding, the court looks at all the evidence in the light most favorable to the termination finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction about the truth of the matter on which the State bears the burden of proof. The court assumes that the factfinder resolved any disputed facts in favor of its finding, if a reasonable factfinder could so do, and disregards all evidence that a reasonable factfinder could have disbelieved or found incredible. The court does not disregard undisputed evidence that does not support the finding.

(2) Factual Sufficiency Review: In reviewing the factual sufficiency of the evidence, the court must give "due consideration" to any evidence the factfinder could reasonably have found to be clear and convincing. The court must consider the disputed evidence and determine whether a reasonable factfinder could have resolved that evidence in favor of the finding. If the disputed evidence is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually sufficient.

(3) § 161.001(1)(D) Explained: Section 161.001(1)(D) requires clear and convincing proof that the parent knowingly placed or knowingly allowed the child to remain in conditionns or surroundings which endangers the physical or emotional well-being of the child. This section refers only to the acceptability of the child's living conditions.

(4) § 161.001(1)(E) Explained: Section 161.001(1)(E) requires clear and convincing evidence that the parent engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child. This section only refers to the parent's conduct as evidenced by their actions and/or failures to act (omissions). The conduct to be considered includes what the parent did both before and after the child's birth.

(5) § 161.001(1)(D) and (E): Mother and Father argued that the evidence showed that the children's issues were genetic and thus not caused by Mother's conduct or the environment she provided. The evidence, however, showed that Mother and Father lacked insight into the children's delays and did nothing to remedy them. There was evidence that even after completing counseling and parenting classes, Mother and Father exhibited limited parenting skills, didn't understand the issues involved in the developmental needs of the children, and CPS personnel saw no changes in their pattern of behavior throughout the course of CPS involvement. In addition, the evidence was undisputed that the children were regularly dirty and often had lice and that Father saw them yet did nothing. Father continued to leave the children in Mother's care. Father failed to complete court-ordered anger management classes and drug treatment. In addition, several witnesses testified to Mother's dishonesty. The court termed it a "close case," but found that the trial court could reasonably have reasonably formed a firm belief or con-

viction that Mother engaged in conduct and Father knowingly placed the children with a person who engaged in conduct that endangered the physical or emotional well-being of the children.

(6) Best Interest: There was evidence of both Sh.'s and Sa.'s emotional and physical needs now and in the future as they were developmentally delayed and would need intervention. Regarding the parenting abilities of the custody seeker, there was evidence that Mother reported she was "overwhelmed" with the children's care and either did not acknowledge or understand their developmental needs. Even with the parenting programs available to assist Mother, there was evidence that she was unable to apply the information she learned. The foster mother testified that she implemented ECI's programs and that they were "repetitious and time consuming," but that she, her husband, and her cousin would do "anything that's necessary." Concerning the stability of the home or proposed placement, there was evidence that Mother and Father's relationship had been "on and off" since they were in high school. After the children were removed, Father lived with Mother even though he wasn't supposed to. CPS planned to place the children with the cousin of E.K. and D.K.'s foster mother, who was a CPS caseworker, and her husband. The children would see each other at family reunions. Regarding the acts or omissions indicating the parent-child relationship is not a proper one, Mother underwent counseling and parenting classes but had trouble keeping the children clean, disciplining them, and responding to their needs. In addition, she was dishonest about her living situation and employment. Concerning any excuses for Mother's acts or omissions, Lair testified that Asperger's Disorder has a significant impact on parenting young children with delays because the disorder involves difficulty understanding and interpreting nonverbal language. Thus, a person with Asperger's might be "challenged" to meet the needs of a young child who cannot identify their own needs and relies on the parent for such. The trial court could reasonably have formed a firm belief or conviction that termination of the parent-child relationship between Mother and the children was in the children's best interest.

Steadman v. TDFPS
No. 01-05-00120-CV, 2006 Tex. App. LEXIS 5552
Tex. App.–Houston [1st Dist.] June 29, 2006, no pet.) (mem. op.)

Construing: *Anders* Procedure

Procedural History: The trial court terminated Steadman's parental rights under § 161.001(1)(D), (E), and (N). Steadman's appellate counsel filed an *Anders* brief, sent a copy to appellant, and advised her of her right to file a pro-se brief. Steadman filed a pro se notice of appeal. The First Court of Appeals affirmed the termination.

Facts: Steadman gave birth to J.A.F. in October 2003. In April 2004, CPS sought temporary emergency conservatorship of J.A.F. and for termination of Steadman's parental rights. At trial Steadman was represented by counsel.

Harris, the CPS caseworker, testified that in March and April 2004, CPS received four referrals implicating Steadman for various allegations of neglect and/or abuse. Steadman, who was 18 years of age, told Harris that she was living at a shelter and that she had previously lived in a couple of shelters. Steadman also informed Harris that a doctor had diagnosed her with depression but she did not take medication. Steadman also admitted to using marijuana while homeless.

A service plan was created for Steadman that included counseling, a psychological assessment, a drug and alcohol assessment, and parenting classes. Steadman failed to participate in the plan at the time and refused to submit to drug testing. She completed a parenting class in Forth Worth approximately three weeks prior to trial.

Steadman had a second child in early December. After a court hearing in July, Steadman moved to the Dallas/Forth Worth area. Steadman visited J.A.F. one time after the July hearing. Steadman testified that she attempted to call J.A.F. several times when a calling card was available to her, but had trouble reaching the foster parents. Steadman did not inform Harris she had moved away from Harris County until November 22 when she missed a court date. At that time, Harris sent Steadman information about resources in Forth Worth regarding counseling and a psychological evaluation. CPS also performed a background check on J.A.F.'s father's mother, Mary, whom Steadman claimed she was residing with. The check revealed that CPS had removed a child from Mary due to endangerment.

Steadman testified that she moved to a shelter at seventeen as she was pregnant and her father was abusive to her. She did not complete her education beyond the eighth grade. Steadman admitted that at J.A.F.'s removal she did not have a stable place to live, had no job, had been diagnosed with depression, did not take medication for it, and agreed it was "fair to say she was not capable of taking care of the child." Prior to J.A.F.'s birth she had suicidal thoughts.

At trial appellant was unemployed and lived with Helen, the paternal grandmother of her second child. The second child was hospitalized. Appellant did not know where she was going to live after trial, had no means of support, and admitted that she had made no living arrangements for J.A.F. An aunt Steadman indicated as a potential place to stay testified that she was willing to provide Steadman, J.A.F., and J.A.F.'s father a place to live. A second caseworker testified that J.A.F. was doing very well in his foster placement.

Issue Presented: Was the appeal frivolous?

(1) *Anders* Procedure: Steadman's counsel stated that in his professional opinion, no arguable ground for reversal of the trial court's judgment existed, thus the appeal lacked merit. Counsel's brief met *Anders* as it presented a professional evaluation of the record and represented that no arguable grounds for appeal existed. Counsel sent a copy of the brief to appellant and advised her of her right to the appellate record and to file a brief. Counsel also filed a motion to withdraw.

In a case where court-appointed counsel asserts that no arguable ground for appeal exists, the court independently conducts a review of the entire record, keeping in mind that the termination of parental rights involves fundamental constitutional rights and that the State must meet its burden of clear and convincing evidence. If the court determines that arguable grounds for appeal exist, the appeal is abated and remanded to the trial court to allow the court-appointed attorney to withdraw. The trial court then either appoints another attorney or allows the appellant to proceed pro se. In the alternative, if the appeal is determined frivolous, the court may affirm the trial court's judgment. The finding that an appeal has no arguable ground is subject to review by the Texas Supreme Court.

(2) The Appeal Was Frivolous: The court reviewed counsel's brief and the trial record. Without discussion the court concluded that no arguable ground for appeal existed and affirmed the trial court's judgment. The court further permitted counsel's withdrawal.

In re T.C. and G.C.
200 S.W.3d 788 (Tex. App.–Forth Worth 2006, no pet.)

Construing: TEX. FAM. CODE § 263.405(d)(f)(g) – Constitutionality of – Indigent Status
TEX. FAM. CODE § 263.405(d) – Frivolousness, Review of
TEX. CIV. PRAC. & REM. CODE § 13.003 – Constitutionality of
Less than Unanimous Jury Finding

Procedural History: The jury rendered a verdict terminating the parental rights of Mother and Father. The trial court signed a judgment to that effect. At the required § 263.405 hearing, the trial court found the parents' appeal to be frivolous. The Second Court of Appeals affirmed.

Facts: On appeal, Mother and Father argued that Section 263.405 violated the Equal Protection Clause and Due Process Clause of the United States and Texas Constitutions. Father further argued that CPRC 13.003 violated his right to due process of law. Both parents argued that § 263.405 treated indigent and non-indigent parents differently because it makes a distinction between private termination cases and those brought CPS. Specifically, they argued that the statute permitted a trial judge to deny an indigent parent a record while a non-indigent parent could afford one, and that a parent whose rights had been terminated by CPS is subject to a frivolous test by the trial court under § 263.405 while a parent whose rights were terminated in a private proceeding was free to appeal without the necessity of a frivolousness test.

In addition, both appellants argued that their appeals were not frivolous.

Issues Presented: The court addressed two issues: (1) whether § 263.405 and CPRC 13.003 are constitutional as they apply to indigent parents *vis-à-vis* non-indigent parents; and (2) whether the appeal was frivolous.

Appellate Court's Reasoning and Conclusions:

(1) § 263.405(d)(f)(g); CPRC 13.003: Constitutional as Applied to Both Indigent and Non-Indigent Parents: If possible, the court must interpret § 263.405 in a manner that renders it constitutional. In addition, a court must consider the statute as written rather than how it operates in practice. A party raising a facial challenge to the constitutionality of a statute must show that the statute always operates unconstitutionally.

When considered together, § 263.405 and CPRC 13.003 make a trial court's determination that an appeal is frivolous have two consequences. First, it limits the scope of the appellate court's review to whether the appeal is frivolous. Second, it denies an appellant the right to a free clerk's record and reporter's record on appeal.

The court held that the interplay of § 263.405 and CPRC 13.003 guarantee an appellant the same limited review of the trial court's finding of frivolousness whether indigent or not. Once the trial court determines that the appeal is frivolous, the scope of appellate review is statutorily limited to that finding. § 263.405(g) requires that the record of the frivolousness hearing be provided for free. Nothing in § 263.405 states that a non-indigent appellant has the right to file anything with the appellate court other than the frivolousness hearing transcript and clerk's record. As such, an appellant is guaranteed the same limited review regardless of indigency status.

The court also found the parents' argument regarding private termination versus CPS termination to be without merit. If an appellant seeks a free record under CPRC 13.003 after a private termination case, and if the trial court finds the appeal to be frivolous, that appellant is not entitled to a free record. Again, that appellant would be entitled to a free record of the frivolousness finding so that same could be reviewed by the appellate court. Thus, the indigent parent in a private termination whose appeal is found to be frivolous has exactly the same right to the frivolousness record as the indigent parent whose rights have been terminated by CPS.

The court also found that the parents were not denied of a meaningful appeal because they were denied a full record. In this case, the court ordered the full record from the trial after viewing the record from the frivolousness hearing. Thus, the court fully examined the issues in their appeal.

(2) <u>The Appeal Was Frivolous</u>: In considering whether an appeal is frivolous, the trial court may consider whether appellant has presented a substantial question for appellate review. Further, a proceeding is frivolous when it lacks an arguable basis in law or in fact. A trial court's finding of frivolousness is reviewed for an abuse of discretion.

The court rejected the parents' argument that an arguable basis was established as the jury rendered its verdict upon ten votes instead of twelve. The law permits such. In addition, the reporter's record and evidence from the trial showed that mother and father both abused drugs, got into physical fights, did not maintain a stable home for their children, did not maintain stable employment, abandoned their children when they moved cross country, left their children with people who were violent and known drug users, and did not pay child support. In addition, the mother was in jail at the time of trial and had participated in several criminal acts, the father had done essentially nothing on his service plan, and the children suffered from aggression, developmental delays, and anxiety issues as a result of being moved around and neglected. The court held that based on the above evidence any appeal from the judgment would not present a substantial question for appellate review.

In re T.G.
No. 04-06-00882-CV, 2007 Tex. App. LEXIS 4187
(Tex. App.–San Antonio May 30, 2007, no pet. h.) (mem. op.)

Construing: TEX. FAM. CODE § 263.405(g) – Review of Frivolousness
TEX. R. APP. P. 33.1(a) – Preservation of Error

Procedural History: Trial court terminated Gangemi's parental rights to T.G. The Fourth Court of Appeals affirmed the trial court's judgment.

Facts: The trial court terminated parental rights. Gangemi timely filed a notice of appeal and a motion for new trial and statement of appellate points. The trial court held a hearing on Gangemi's motion and statement of points. The trial court denied the motion for new trial and found Gangemi's appellate points frivolous; the trial court found Gangemi indigent and appointed appellate counsel.

Issues Presented: Whether (1) the trial court abused its discretion in determining that Gangemi's appellate points were frivolous and (2) evidence adduced at trial was inadmissible hearsay.

Appellate Court's Reasoning and Conclusions:

(1) <u>§ 263.405(g) – Review of Frivolous Finding</u>: Appellate court has the duty to review the record and determine whether the trial court abused its discretion in determining that Gangemi's appellate points were frivolous. In making this review, the appellate court looks only to the statement of appellate points and the record from the § 263.405(d) hearing on the statement of appellate points.

(2) <u>Rule 33.1(a) – Preservation of Error</u>: At the hearing on the motion for new trial, Gangemi's attorney did not argue, much less establish, that trial counsel had objected at trial that the evidence offered was in-admissible hearsay. Gangemi failed to preserve this complaint for appellate review. Even if error was preserved, there was nothing in the record of the § 263.405(d) hearing to establish that the complained-of evidence was hearsay or otherwise inadmissible.

In re T.L.S. and R.L.P.
170 S.W.3d 164 (Tex. App.–Waco, 2005, no pet.)

Discussing: Protective Orders, Family Violence
Future Conduct Inferred by Past Conduct
Family Violence Committed by Non-Parent
Impermissible Stacking of Inferences

Procedural History: CPS filed a termination suit against mother. The children's guardian *ad litem* filed an application for a family violence protective order against mother and Dismuke, mother's former boyfriend. The court heard both matters in the same proceeding. At trial, mother voluntarily relinquished her parental rights and agreed to be subject to a permanent injunction prohibiting her from any further contact with the children. Trial proceeded against Dismuke. After the trial concluded, the court issued a family violence protective order against Dismuke. Dismuke appealed. The Tenth Court of Appeals affirmed.

Facts: Mother, her two children, and Dismuke lived together. In late 2003, CPS removed the children because of severe injuries, including a spiral fracture to the tibia of R.L.P. and blunt force trauma to the abdomen of R.L.P. resulting in loss of blood and the removal of approximately 24 inches of R.L.P.'s small intestine. Evidence established that mother and Dismuke had engaged in an ongoing pattern of serious physical abuse of the two children, including burns to various parts of the body, arm fractures, cuts and tears to bodily tissue including a torn frenulum, eye injuries, compression fractures to back vertebrae, and probable sexual abuse.

Issue Presented: Dismuke complained on appeal that the evidence was legally and factually insufficient to support the finding that he is likely to commit family violence in the future because (1) there was no direct evidence he will commit family violence in the future; and (2) the likelihood of future contact between Dismuke and the children is remote because he is not the biological father of the children, he is not married to mother, and mother's parental rights have been terminated and she has been permanently enjoined from further contact with the children.

Appellate Court's Reasoning and Conclusions: The central issue in this case is whether evidence of past family violence will support a finding of a likelihood of future family violence.

(1) <u>Future Conduct Inferred by Past Conduct</u>: During the last decade, a principle has emerged in parental termination and child custody cases that recognizes evidence a parent has engaged in abusive or neglectful conduct in the past permits an inference the parent will continue this behavior in the future. This principle should apply in family violence protective order cases as well.

(2) <u>Likelihood Non-Parent Will Commit Future Family Violence</u>: The Tenth Court of Appeals "reject[s] outright" Dismuke's contentions about not being the biological father of the children and not being married to mother, noting, "his non-parent status and his marital status did not stop him from committing family violence against the children in the past." Because neither Dismuke nor mother testified, no evidence existed in the record from which the court could infer they will have no future contact with each other. The court could only speculate mother will comply with the injunction. To infer from this speculation Dismuke therefore will have no future contact with the children "would constitute an impermissible stacking of inferences." The court properly could infer from the evidence Dismuke will likely commit family violence in the future.

Comments: Although this case involves a family violence protective order, it cites to parental termination and child custody cases regarding past and future conduct. This case and the cases cited within it are relevant to (E) ground and to several of the best-interest factors, including emotional and physical danger to the child now and in the future.

Toliver v. TDFPS
217 S.W.3d 85 (Tex. App.–Houston [1st Dist.] 2006, no pet.)

Construing: TEX. FAM. CODE § 161.001(1)(E) – Drug Use
TEX. FAM. CODE § 161.002(b)
Best Interest
Legal and Factual Sufficiency

Procedural History: The trial court terminated Toliver's parental rights to her three children. The trial court also terminated Holloway's and Martin's parental rights to their respective children. The First Court of Appeals affirmed the termination of Toliver's and Martin's rights but reversed the termination of Martin's parental rights.

Facts: Katy Leacroy, a CPS caseworker, testified that CPS originally became involved with Toliver in July 2003 due to allegations of medical neglect, drug use, and domestic violence. The child D.H. had a severe disorder known as "brittle bone," which confined him to a wheelchair and caused his bones to break easily. The reports were that Toliver was using cocaine and did not take D.H. to the hospital after he broke his legs at school. Counselors from Turning Point, a substance abuse program, made visits to Toliver's home to conduct random drug tests on multiple occasions. Toliver refused several tests. When finally tested in August 2004, Toliver tested positive for cocaine on three different occasions.

Leacroy testified that on Sepetmber 14, 2004, Toliver, Holloway, and CPS entered into an agreement wherein CPS was named PMC of the children. Toliver was to pay child support, follow the recommendations of a drug evaluation, and take a drug test that day. If the test was positive, she was to go to inpatient treatment. The agreement stated that her parental rights could be restricted or terminated if she failed to provide the children with a safe and secure environment. On October 14, 2004, the trial court ordered her to take a drug test. If positive Toliver was to submit to inpatient treatment, and, if negative, attend NA meeting seven days a week. On cross examination, Leacroy acknowledged that Toliver was not at school when D.H. broke his legs and that she had completed parenting classes.

Sherri Brewster, a second CPS worker, testified to records from ADA Women's Center, an inpatient drug facility. The records were admitted into evidence and reflected that Toliver was discharged due to threats, noncompliance, and hostile behaviors. The records indicated that Toliver had only joined the program because CPS required it. A CPS progress report was introduced which stated that Toliver had not been visiting the children on a regular basis, that all visits had to be at the CPS office because of tensions between Toliver and the placement, and that Toliver had lost control at a permanency planning meeting and had to be escorted out of the building by security. The trial court again ordered Toliver to take a drug test, and also to take anger management and attend victim classes. A second permanency report admitted into evidence showed that: (1) Toliver was discharged from a second drug treatment facility and had tested positive for cocaine on three more occasions; (2) she attended a visit and appeared to be "high"; (3) she was unlikely to benefit from services as she was unlikely to make significant changes; (4) Toliver was aggressive with her counselor; and (5) Toliver was disruptive during anger management classes and would not be receiving a certificate of completion. A second permanency hearing order found that Toliver had not displayed adequate compliance with the service plan. Again the court ordered her to go to inpatient treatment. The trial court advised her it would grant an extension if she completed inpatient treatment which she did. Toliver attended outpatient follow-up treatment at Gulf Coast Center where she tested positive for cocaine and PCP, and admitted to drinking alcohol daily. Toliver's progress stalled and she had angry outbursts and was threatening. Toliver left the treatment, without CPS's permission, stating that she did not want services. Brewster stated Toliver had not seen the children in approximately a year and she had never paid any child support. Toliver was on probation for misdemeanor assault.

The children were in foster homes and visited each other regularly. D.H.'s foster parents intended to adopt him and one of his sisters. CPS intended to place the second sister in the home to give the child time to adjust and address behavioral issues. D.H. was receiving a special bone treatment for his condition. Brewster did not know until trial that Shirley Joseph, Holloway's mother, was a potential placement and that she had seen the child through a court ordered visitation. Brewster still sought termination. Brewster agreed on cross-examination that Toliver completed anger management, a psychological evaluation, and that she went to counseling. Stacy Faught, D.H.'s foster mother, testified that she and her husband had bonded with D.H. and that he was involved in a special baseball league. Faught also stated that she had special training in caring for D.H.

Toliver testified that she went to treatment for thirty days, attended anger management, and did victim awareness and parenting classes. She also received counseling. Toliver had moved to Houston and obtained an apartment and a job. She admitted to a drug problem and last used when she left treatment. She wanted her children placed with Joseph while she got things together. She testified that she had special training to care for D.H. and that prior to CPS's involvement she was his primary caretaker. She was employed at Sonic and had a one-bedroom apartment. Joseph testified that she was present at D.H.'s birth and that he knows she is his grandmother. She had training to care for the child, and expected a home study to be performed on her which was never done. She admitted to living in a one-bedroom apartment and paying her bills with help from the county. She was currently unable to work, but planned to return. She thought that she could get help with childcare, finances, and transportation for D.H.'s bone fusion treatment through the county and family members. Joseph admitted that her two daughters had children who were removed by CPS and that she did not pass a home study then.

CPS offered evidence that Holloway had been convicted of robbery and sentenced to two years. Since October 2004, Holloway had not visited the children, nor requested one. Brewster alleged that Holloway had constructively abandoned the children. Brewster conceded on cross-examination that Holloway had contacted CPS previously regarding Toliver's treatment of D.H. in an attempt to remove the child from a dangerous situation. Holloway testified that he had received special training for the care of D.H. He had contacted CPS on multiple occasions to report Toliver's treatment of D.H., and the child had actually been placed with him for a period before being returned to Toliver. He was participating in classes and an early release program while incarcerated. Holloway had received probation for the robbery, but it was revoked due to testing positive for cocaine. He stated he loved his child and had signed papers giving PMC to his mother so that the children could stay together.

Brewster testified that Martin was an alleged father. He never visited the child during the case, nor did he request one. Martin had been served with citation and did not timely file an answer nor had he paid any child support. Brewster had never seen Martin until he appeared at trial. She agreed he was not a party to the mediation agreement. Martin testified that he had never been adjudicated Z.M.'s father, but was involved with her for most of the child's life. He stated that he was the child's father. He loved his daughter and had provided a few things for her. He did not contact CPS because he didn't have any contact numbers and he didn't know he could see the child. Martin stated that he had relatives who were interested in raising the child. He wanted the children to stay together and would sign conservatorship over to Joseph. He was willing to work and pay child support upon his release from prison. Martin admitted on cross-examination that he had several pending criminal charges and that he had no contact with the child while in prison. He had been in jail five or six times during the eight years of the child's life and was in prison from 1997 to 2000. He visited the child every weekend between September 2004 and June 2005 knowing that the child was in CPS custody. After visiting with D.H. in chambers, the trial court terminated all three. Toliver's parental rights were terminated on a best interest finding and conduct under § 161.001(1)(E), (F), (N), and (O). Holloway's parental rights were terminated on a best interest finding and conduct under § 161.001(1)(D), (F), (N), and (O). The court terminated "any parental relationship"

between Martin and Z.M. on best interest and that he failed to timely file an admission or counterclaim of paternity after being served with citation.

Issues Presented: Whether there was legally and factually sufficient evidence to support the trial court's predicate ground findings and best interest finding as to Toliver, Holloway, and Martin.

Appellate Court's Reasoning and Conclusions:

(1) Legal Sufficiency Review: In a legal sufficiency review the court must determine whether the evidence, viewed in the light most favorable to the finding, is such that the factfinder could reasonably have formed a firm belief or conviction about the truth of the matter on which the State bore the burden of proof. The court assumes that the factfinder resolved all disputed evidence in favor of the finding, and disregards all evidence the factfinder could have disbelieved or found incredible.

(2) Factual Sufficiency Review: In conducting a factual sufficiency review, the court considers the entire record, including both disputed and undisputed evidence contradicting the finding, to determine whether a factfinder could have reasonably formed a firm belief or conviction about the truth of the matter on which the State bore the burden of proof. The court considers whether the disputed evidence is so significant that a reasonable factfinder could not have resolved the disputed evidence in favor of the finding.

(3) § 161.001(1)(E): Narcotics use in certain circumstances may give rise to termination under § 161.001(1)(E). Evidence of narcotics use and its effects on a parent and her ability to parent may establish endangering conduct. Here, Toliver refused several drug tests before testing positive for cocaine. Toliver either refused treatment or was discharged several times throughout the case. CPS introduced reports that she had made no progress as she continued to use drugs, could not maintain a safe and stable home for the children, and had not complied with the service plan. The evidence shows that Toliver engaged in long term, substantial drug use. Evidence of her drug use is even more significant given D.H.'s special needs and the behavioral issues of Z.M. who poses a threat to D.H. if not properly supervised. Toliver continued her drug use even after she knew that her relationship with the children was in jeopardy. Toliver's assertion that there was no evidence that she used drugs around the children was contradicted by the record. She appeared for a visit seeming to be "high." In addition, Toliver testified that she was the children's primary caregiver and there was no evidence that either father provided any meaningful supervision. The evidence was legally sufficient to support the trial court's finding that Toliver engaged in conduct under § 161.001(1)(E).

Regarding factual sufficiency, Toliver testified that she went to inpatient for thirty days and that she last used drugs when she left treatment in Galveston. However, almost immediately after completing treatment she tested positive for drugs. She was discharged from several programs. She was advised to seek treatment after moving to Houston, however failed to do so or to contact CPS. Toliver did not even request that the children be placed in her home. The court concluded that the evidence was factually sufficient to support the trial court's finding under of Toliver's conduct under § 161.001(1)(E).

Holloway only challenged the sufficiency of the evidence as to the trial court's finding of conduct under § 161.001(1)(D). The trial court entered termination of his parental rights based on three additional grounds under § 161.001(1). Holloway waived his complaint as to those findings. As only one predicate ground is necessary for termination, the court did not need to address this issue.

(4) Best Interest; Toliver: There was evidence in the record of D.H.'s and Z.M.'s special needs. D.H. was receiving special medical care he never received with Toliver. The foster family was willing to adopt two of the children and keep Z.M. as a foster child while providing a safe environment

for all the children. The family was still considering adoption of Z.M. Toliver stated that she could not take the children and had not seen them since Easter 2005. Toliver did not seek drug treatment in Houston and had not been tested since leaving treatment. Although Joseph wished to take the children, she did not provide any details of how she planned to provide for the children or transport D.H. to receive his treatments. The trial court could also have considered Toliver's frequent and long-term drug use. Toliver completed a treatment program only to test positive in follow-up treatment. She was discharged for severe behavioral problems and never addressed her long-term drug addiction. The evidence was legally and factually sufficient to support the finding that termination was in the children's best interest.

(5) Best Interest; Holloway: Holloway argued that his mother, Joseph, had requested all three children, which would allow the children to remain together. He also had special training in caring for D.H. and had tried to remove D.H. from Toliver's care three times. D.H. was receiving special medical care he never received with Toliver. The foster family was willing to adopt two of the children and keep Z.M. as a foster child while providing a safe environment for all the children. The family was still considering adoption of Z.M. The foster mother was trained in caring for D.H. and the family was bonded to him. Joseph admitted she could not work and seemed to agree that she would need help in caring for the children. She did not provide details on who would help her. Holloway was incarcerated. Neither Joseph nor Holloway had given any thought as to how they would protect D.H. from Z.M. In addition, Joseph did not provide information as she planned to provide for the children. The evidence was legally and factually sufficient to support the trial court's finding that termination was in the child's best interest.

(6) § 161.001(2); Trial Court Erred in Terminating Martin's Parental Rights: Martin argued that CPS was required to pursue termination of his parental rights on grounds under § 161.001(1) as he appeared at trial, admitted paternity, and requested that his rights not be terminated. Section § 161.002(b)(1) allows a trial court to summarily terminate the rights of an alleged father who does not assert his paternity by timely filing an admission of paternity or counterclaim. Martin was served with citation and never responded by filing an admission of paternity or counterclaim, however he appeared at trial and stated that he was Z.M.'s father. He testified that he had been involved in her life and that he loved her. Martin stated that he didn't contact CPS because he didn't have any numbers and did not know he could contact Z.M. § 161.002 does not prescribe a specific formality for "filing an admission." The court applied "strict scrutiny" to the termination statute, and held that Martin's appearance at trial and admission that he was Z.M.'s father triggered his right to require CPS to prove he engaged in conduct under a provision of § 161.001(1) before termination could occur. CPS failed to do that. Accordingly, the trial court erred in terminating Martin's parental rights.

In re T.S. and S.A.S.
No. 14-05-00348-CV, 2006 Tex. App. LEXIS 5129
(Tex. App.–Houston [14th Dist.] June 15, 2006, no pet.) (mem. op.)

Construing: Best Interest – *Holley* Factors
Legal and Factual Sufficiency
Request for Directed Verdict
Submission of Jury Question on Joint Managing Conservatorship
Trial by Consent

Procedural History: The jury returned a verdict terminating Wilson's parental rights. The Fourteenth Court of Appeals affirmed.

Facts: In late April 2004, Wilson, who admitted to daily cocaine use until May of 2004, learned that she had a warrant for her arrest. Wilson left the child T.S. with friends temporarily as she feared the results if she were arrested with the child. Wilson's mother was supposed to come from Oklahoma to pick up the

child. Wilson called to check on the child and gave the placement clothes, food, and money. Wilson did not turn herself in because she was waiting on her mother to come from Oklahoma. Her mother never showed. Wilson was arrested on May 20, 2004. Her friends contacted CPS to come take the child after learning of Wilson's incarceration. When a caseworker visited Wilson in jail, Wilson advised the worker that she had a second child, S.A.S., who was placed with an "aunt." Wilson advised the caseworker that the aunt did not want T.S. CPS removed T.S. from Wilson's friends on May 21, 2004. The home was inappropriate as there was debris and mud in the yard and men drinking in the driveway. The child was barefoot, dirty, had small cuts on his hands and feet, and large ringworms on his legs that had scabbed over.

Wilson left the child S.A.S. with Denise Sambrano, a longtime friend of Wilson's mother. Wilson did not mention T.S. to Sambrano at that time. When Sambrano went to pick up S.A.S. from Wilson she noticed a "burnt tar" smell coming from inside the apartment, which she believed to be the odor of crack cocaine. Sambrano took the child as she wanted to remove the child from the situation. Both Wilson and Sambrano executed a handwritten, notarized document which left the care and custody of the child to Sambrano. The child stayed with Sambrano for nineteen months. Wilson visited and cared for the child a few times while the child was with Sambrano. CPS removed the child from Sambrano, reasoning that she did not have legal custody and could not consent to the child's medical care. There was also testimony that the child's clothes were too big and that she had a sippy cup with soda in it and mold around it. The child was placed in foster care with her brother.

At trial, Wilson testified that she could not decide whether to give Sambrano full custody of S.A.S. Wilson admitted to telling Sambrano to take S.A.S. because "you're her mommy," however, also told Sambrano that S.A.S. was "my heart." Wilson denied that the comments she made constituted a custody agreement, but stated it was her intent to give Sambrano full custody of the child when she made them. The jury found that Wilson's parental rights should be terminated to the child T.S. under § 161.001(1)(D) and (E) and that termination was in the child's best interest. The jury found that Wilson's parental rights to the child S.A.S. should be terminated under § 161.001(1)(E) and (A) and that termination was in the child's best interest.

Issues Presented: The court was presented with the following issues: (1) whether the trial court erred in refusing Wilson's motion for directed verdict; (2) whether the trial court erred in refusing to submit a question to the jury on joint managing conservatorship; and (3) the sufficiency of the evidence to support the jury's best interest finding.

Appellate Court's Reasoning and Conclusions:

(1) <u>Trial Court Did Not Err in Refusing Wilson's Directed Verdict</u>: At the close of CPS's case, Wilson's attorney moved for a directed verdict arguing that CPS had not proved by clear and convincing evidence that Wilson had engaged in conduct under § 161.001(1)(D). The attorney ad litem agreed, and requested a directed verdict at least as to S.A.S. CPS argued that § 161.001(1)(D) was one of several ground upon which it sought termination, that there was evidence that Wilson left T.S. in dangerous surroundings, and that Wilson left S.A.S. with individuals who could not consent to her medical care. The trial court denied the motion.

A trial court may direct a verdict when a plaintiff fails to present evidence raising an essential fact issue to the plaintiff's right of recovery. A trial court's action on a motion for directed verdict is reviewed as in a claim of legally insufficient evidence. The court considers all the evidence in the light most favorable to the finding and determines whether a reasonable factfinder could have formed a firm belief or conviction that its finding is true. Here, there was legally sufficient evidence that Wilson knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered their physical or

emotional well-being. Wilson admitted to daily cocaine use prior to her arrest in May 2004, and admitted that she had not had one day of sobriety outside prison. Sambrano smelled what she though was cocaine when picking S.A.S. up from Wilson's apartment. Wilson left T.S. in dirty, possibly dangerous conditions. The child had ringworm scabs and was very dirty. Another caseworker testified to the child playing with roaches that called out of his stuffed toy bag when removed.

(2) Trial Court Did Not Err in Refusing Jury Question/Trial by Consent: Wilson sought to admit a question asking whether CPS and Wilson, CPS and the Sombranos, or the Sambranos and Wilson should be appointed as joint managing conservators. No pleading raised the issue, however the trial court found that the issue had been tried by consent. The trial court refused to submit the issue on JMC.

Persons appointed as joint managing conservators share parental rights and duties. Joint managing conservatorship is typically presumed to be in the best interest of the child when determining conservatorship incident to a divorce. Joint managing conservatorship does not generally apply to termination cases. First, a parent against whom termination is sought can only be appointed JMC if CPS fails to prove its case. Second, in an original suit for conservatorship, possession and access, a court may not appoint JMCs if credible evidence is presented of a history or pattern of past or present child neglect, or of physical or sexual abuse by one parent directed against the other parent, a spouse, or a child. The submission of jury questions is reviewed for an abuse of discretion. A trial court must submit all questions raised by the pleadings and any evidence. It may not submit a jury question that is neither supported by the pleadings nor tried by consent. Here, no pleading raised this issue. Thus, the court must examine the record for evidence of trial of the issue to determine whether it was tried by consent. Trial by consent is intended to cover only the exceptional cases where it is clear that the parties intended to try the unpleaded issue. Trial by consent is inapplicable when evidence relevant to an unpleaded matter is also relevant to a pleaded issue because admitting the evidence is not calculated to elicit an objection and, therefore, does not demonstrate a clear intent by all parties to try the unpleaded issue. Here, the court could not say that the parties impliedly tried the JMC issue by consent. All evidence of the Sambranos home went equally to the issue of § 161.001(1)(D) as CPS was trying to prove that Wilson left S.A.S. in a dangerous situation. The Sambranos testimony regarding their intent to adopt the child and their involvement with CPS was relevant to whether they should be named sole managing conservators. CPS requested the appointment of itself or another as PMC if the children could not be returned to Wilson. The trial court submitted a question on sole managing conservatorship. There was also no evidence that the Sambranos, Wilson, or CPS would consider, or be able, to share parental rights and duties as JMCs. Rather, the evidence showed repeated miscommunications between Sambrano and CPS. Sambrano stated that she understood adoption meant a termination of Wilson's rights and that Wilson would be allowed no contact with the children if she adopted. Neither party pled for JMC and it was not tried by consent.

(3) Legal Sufficiency Review: The court looks at the evidence in the light most favorable to the finding and determines whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. The court assumes disputed facts were resolved in favor of the finding, and disregards all evidence that could be reasonably disbelieved. The court does not disregard evidence that does not support the finding.

(4) Factual Sufficiency Review: The court gives due consideration to the evidence that jury could reasonably have found to be clear and convincing, and examines whether the evidence is such that a reasonable factfinder could form a firm belief or conviction that the allegations were true. The court considers whether the disputed evidence is such that the factfinder could reasonably resolve it in favor of its finding.

(5) Best Interest:

Children's Desires: There was no evidence as to Wilson's relationship with the children. S.A.S. lived with Sambrano for nineteen months and Wilson told Sambrano to keep the child because she was "mommy." T.S.'s foster father testified that "mommy" to T.S. is a general term. He stated that neither child was aware that Wilson was their mother. Wilson was in jail, and despite writing three letters, had not seen the children in nine months prior to trial. The evidence weighed in favor of the jury's finding.

Present and Future Emotional and Physical Needs and Dangers to the Children: Both children were described as confused and angry. Children need permanence and security. At the time of trial, Wilson was incarcerated and unable to provide for the children. A parent's imprisonment or voluntary absence from her children's lives can negatively impact their emotional well-being. T.S. was left in an inappropriate environment. S.A.S. cried and was upset when removed from the Sombranos. Permanency is critical in these children's lives and Wilson had shown that she could provide it. The factor weighed in favor of the jury's finding.

Parenting Abilities of Those Involved: Wilson admitted to a daily drug habit outside prison. There was evidence that the children were often left with others. Sambrano testified that she knew Wilson's drug use to be extensive. Wilson had a criminal history including criminal trespass, evading arrest, tampering with a government record, fleeing a police officer, and possession of a controlled substance. Wilson had never worked and relied on boyfriends for drug money. There were prior reports of physical neglect by Wilson. The factor weighed in favor of the jury's finding.

Programs Available to Help the Parent: CPS did not offer Wilson services as she was incarcerated. Wilson participated in substance abuse and parenting classes and began working on her GED. Wilson testified that she loved her children and wrote letters asking how they were. Despite her efforts, there was no evidence that she was able to free herself from her lengthy drug dependency so that she could provide a safe and stable home for the child. In addition, there was no evidence that she completed any of the programs she claims she participated in while in jail. This factor weighed in favor of the jury's findings.

Wilson's Acts or Omissions Indicating Relationship Not Proper/Excuses for Same: Wilson had several arrests and had violated probation more than once. Her drug use and criminal activity interfered with her ability to provide the children with a stable environment. She left the children with others and used cocaine on a daily basis. Wilson's excuses were that she was young and had a drug addiction. However, she never completed a drug abuse program or made any progress while incarcerated. The children's risk of exposure to the lifestyle remained.

Plans for the Child/Stability of Proposed Placement: CPS planned to complete a home study on the Sombranos and a psychological evaluation on Frank Sombrano before allowing the children to live with them. There was only positive testimony regarding the Sombranos. It is where Wilson wanted the children placed following the termination trial. The evidence was both legally and factually sufficient to support the jury's best interest finding.

Wall v. TDFPS
No. 03-04-00716-CV, 2006 Tex. App. LEXIS 4744
(Tex. App.–Austin June 2, 2006 no pet.) (mem. op.)

Construing: TEX. FAM. CODE § 161.001(1)(K) – Voluntary Execution of Affidavit Waiver of Claim on Appeal

Procedural History: The district court terminated Wall's parental rights. The court initially overruled her issues in a first brief, but abated the appeal so that the trial court could hold the mandatory hearing on appellant's motion for new trial. The district court denied her motion. Appellant was permitted to file a supplemental brief regarding any issues related to the new trial. The Third Court of Appeals affirmed the trial court.

Facts: Wall brought two issues on appeal. First, she challenged the constitutionality of Section 161.103(e). Under 161.103(e) an affidavit naming CPS as permanent managing conservator is irrevocable, whereas relinquishment in any other affidavit is generally revocable, and may provide that it is irrevocable for no more than sixty days. She claimed 161.103(e) is inconsistent with the constitutionally recognized bond between parent and child.

Second, Wall contended that she established by a preponderance of the evidence that her execution of her affidavit of relinquishment was due to coercion, fraud, deception, undue influence or overreaching, and therefore the district court erred by overruling her motion for new trial. She specifically claimed that her attorney was only recently appointed and that she was told she could not win at trial.

Issues Presented: The court addressed two issues whether (1) Wall waived her constitutional complaint; and (2) Wall established that she did not execute her affidavit of relinquishment voluntarily.

Appellate Court's Reasoning and Conclusions:

(1) Wall Waived Her Constitutional Claim: Wall did not raise her constitutional challenge before the district court or in her first brief. Generally, a party may not raise an issue, even a constitutional claim, for the first time on appeal. As Wall did not raise this constitutional argument until her supplemental brief, it is waived.

(2) § 161.001(1)(K): Wall claimed that the district court erred in overruling her motion for new trial as she executed the relinquishment as a result of coercion, fraud, deception, undue influence or overreaching. At the hearing on the motion for new trial, Wall testified that she was eight months pregnant at the mediation where she signed the relinquishment. She stated she was sick, hungry, and tired by the time she signed the affidavit. She testified that she signed the affidavit because she was told she would lose at trial, that if she relinquished her rights to the children CPS would be "out of her life," and that CPS promised to place the children with one of two persons she named as adoptive placements. Wall testified she didn't understand the documents but signed them because "I was tired and I wanted to hurry up and go to the house." That evening she contacted her attorney and expressed a desire to revoke the relinquishment. She later signed affidavits attempting to revoke same.

CPS established that Wall was represented by an attorney at the mediation. In fact, for several hours she was represented by two attorneys. Participants in the mediation stated: Wall appeared healthy, she seemed clear headed, it seemed as if her focus was on her unborn child, and it appeared as if "she was trying to move on with her life." CPS witnesses denied making any promises to Wall that were not included in the Rule 11 Agreement, including saying that CPS would not become involved with her unborn child. The mediator acknowledged that she might have told Wall that an involuntary termination of her parental rights could be statutory grounds to terminate her parental rights to the unborn child, but did not tell Wall that CPS would definitely take the baby once it was born.

There was also a dispute over whether CPS had fulfilled its promises in the Rule 11. Wall alleged that CPS promised her visitation that she did not get, and promised to place the children with persons named by Wall if CPS found them qualified. Witnesses attributed the lack of visitation to scheduling problems. Further, the record shows that Wall never submitted any names of potential adoptive parents to CPS.

The court held that Wall failed to establish by a preponderance of the evidence that her relinquishment was obtained through coercion, duress, fraud, deception, or undue influence. Her testimony regarding promises was directly contradicted by other witnesses. More importantly, she was represented by a lawyer. Courts routinely reject claims that a relinquishment was involuntary when the party was represented by an attorney at the time the affidavit was signed. In addition, Wall did not challenge her counsel's effectiveness in protecting her interests at mediation. The inherent pressures in the relinquishment process do not alone establish that Wall's actions were involuntary. Wall was represented by counsel and reached a bargained-for-agreement with CPS. Further, the voluntariness of her consent to the agreement is not implicated by scheduling problems in visitation and Wall's failure to provide names of potential adoptive placements. The trial court's judgment was affirmed.