

# RECENT SUPREME COURT CASES CHILD PROTECTION ATTORNEYS SHOULD KNOW

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**5 SUBJECTS – 11 CASES**  
**2019/20**

- 1) Custody/access proof by Nonparent
- 2) Parental termination proof
- 3) Admonishments for Indigent Parents
- 4) De Novo Review
- 5) Appellate Review & Briefing

## I. CUSTODY/ACCESS PROOF BY NONPARENT

### A. Modification requires nonparent overcome “fit parent” presumption

*C.J.S.*, 603 S.W.3d 804 (Tex. 2020) (Opinion by Bland) (Concurrence Lehrmann)

### B. Modification against parent (not previously served) applies TFC 153.131(a)

*F.E.N.*, 579 S.W.3d 74 (Tex. 2019) (per curiam)

\*(Suggested reading by presenter: *Danet v. Bhan*, 436 S.W.3d 793))

## II. PARENTAL TERMINATION PROOF

### A. **L GROUND**: Crime may infer serious injury proof

*Z. N.* 602 S.W.3d 541 (Tex. 2020) (per curiam)

### B. **K GROUND**: Collateral challenge limited to 161.211(c) even when ch.152 involved

*D.S.*, 602 S.W.3d 504 (Tex. 2020) (Opinion by Guzman) (Concurrence Lehrmann)

### C. **O GROUND**: Indigence does not conclusively preclude finding under due process

*L.G.*, 596 S.W.3d 778 (Tex. 2020) (per curiam)

### D. **BEST INTEREST EVIDENCE** *C.W.*, 586 S.W.3d 405 (Tex. 2019) (per curiam)

## III. FAILURE TO ADMONISH PARENT MAY SUPPORT ERROR *B.G.*, 592 S.W.3d 133 (Tex. 2020) (per curiam)

#### **IV. DE NOVO REVIEW DOES IS NOT TRIAL DE NOVO & DOES NOT IMPLICATE RIGHT TO JURY**

*A.L.M.-F*, 593 S.W.3d 271 (Tex. 2019) (Opinion by Guzman)

#### **V. APPELLATE REVIEW & BRIEFING REQUIREMENTS**

##### **A. REVIEWING D/E FOR SUFFICIENCY WHEN OTHER GROUND PROVEN**

1. Must review sufficiency D/E even if sufficient proof of other ground

*N.G.*, 577 S.W.3d 230 (Tex. 2019) (per curiam)

2. Concurrence finds required for Anders briefing but not if jury charge broad form

*E.K.*, 63 Tex. Sup. Ct. J. 382, 2020 WL 501712 (Tex. 2020) (concurrency Green/Boyd)

##### **B. BRIEFING WAIVER**

1. Issue not asserted in appellate court not available in Supreme Court

*L.G.*, 596 S.W.3d 778 n. 1 (Tex. 2020) (per curiam)

2. Abandoning issue by not including in brief on merits in Supreme Court

*C.W.*, 586 S.W.3d 405 n. 1 (Tex. 2019) (per curiam)

3. Even if point on appeal only challenges O, encompasses (d) defense if argued

*ZMM*, 577 S.W.3d 541 (Tex. 2019) (per curiam)

7 per curiams; 2 opinions-Guzman; 2 concurrences-Lehrmann (2022), 1 opinion-Bland  
concurrency Green-R/Boyd (2020)

# **CUSTODY/ACCESS PROOF BY NONPARENT**

C.J. S., 603 S.W.3d 804 (Tex. 2020)

F.E.N., 579 S.W.3d 74 (Tex. 2019) (per curiam)

# C.J.S. – MODIFICATION NONPARENT V. PARENT

Temporary order in Modification Suit After one Parent's Death

No parental presumption applied to other parent (JMC)

Ordered possession rights to Nonparent in parental-like role

Question:

Was parental presumption applicable?

ANSWER: YES –  
*BUT*

1. Does not overrule *V.L.K.*, 24 S.W.3d 338 (Tex. 2000) (TFC ch 153's *parental presumption not in TFC ch156*).
2. Unknown what proof under Troxel's fit parent presumption nonparent must prove for possession/access when nonparent has parent-like role for significant time. (CONCURRENCE)

F.E.N. – modification nonparent v. parent (not previously served) applies TFC 153.131(a)

ORIGINAL SUIT - 2011

Dept sues mom/alleged dad (child @ 1) for neglect/drugs

dad gets mom atty but stays out of

Agreed judgment appoints Dept SMC & mom PC w/ no findings on alleged dad not served (though on birth certificate)

MODIFICATION -2012-2017

Dept files motion to modify 2012

Dad gen'l denial; files AOP

Mother relinquishes

May 2017 at trial, Dad says wants Child w/family & Girlfriend to watch Terminated parents/ Dept SMC, Dad terminated C, E, F, N

APPEAL – 2018-2019

COURT OF APPEALS

reverses SMC applying 153.131(a)

to dad & remands MC

SUPREME COURT

denies review w/per curiam

“do not agree” w/SMC analysis

\*note child w/same foster family 8 years



COURT OF APPEALS FINDS  
TO OVERCOME 153.131(A) PRESUMPTION PARENTAL  
ACT/OMISSION MUST HARM CHILD

- Courts generally require the nonparent to “present evidence that a parent's conduct would have a detrimental effect.” ..That evidence must support a logical inference that the parent's “specific, identifiable behavior or conduct **will probably result in the child being emotionally impaired or physically harmed.**” ...link between the parent's conduct and harm to the child may not be based on evidence which merely raises a surmise or speculation of possible harm.. Such evidence usually includes a showing of “physical abuse, severe neglect, abandonment, drug or alcohol abuse, or very immoral behavior on the part of the parent.”
- Appellate Court finds absent affirmative proof of an act or omission by the Father
- that would cause harm, parental presumption cannot be overcome.
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# SUPREME COURT COMMENTS CONDUCT PROOF NEED NOT BE OF CERTAIN TYPE/NATURE

While held TFC §153.131(a) places burden on nonparent to establish parent's appointment would result in significant impairment and, *Lewelling*, held should include acts or omission demonstrating that result:

**we did not address whether the parent's conduct must be of a certain type or nature; we held only that, to overcome the parental presumption, a nonparent seeking custody is “required to identify some act or omission committed by [the parent] which demonstrates that naming [the parent] as managing conservator will significantly impair [the child’s] physical health or emotional development”**

Interest of F.E.N., 579 S.W.3d 74, 77 n. 5 (Tex. 2019)

# RECOMMENDED READING

## **DANET v. BHAN, 436 S.W.3d 793 (Tex. 2014)**

**JURY INSTRUCTION**: “Significantly Impair” means the non-parent must affirmatively prove by a preponderance of the evidence through specific action or omissions of the parent that demonstrate that an award of custody to the parent *would result in physical or emotional harm to the child*.

## **BUT SUPREME COURT’S FOOTNOTE 1:**

TFC 153.131(a) does not require “specific actions or omissions” resulting in significant impairment *though this jury charge did*

# PARENTAL TERMINATION PROOF

L GROUND

Z. N. 602 S.W.3d 541 (Tex. 2020)(pc)

K GROUND:

D.S., 602 S.W.3d 504 (Tex. 2020)(Guzman)

O GROUND:

L.G., 596 S.W.3d 778 (Tex. 2020)(pc)

BEST INTEREST

CW, 586 S.W.3d 405 (Tex. 2019) (pc)

# L GROUND: IN Z.N. 602 S.W.3D 541 (TEX. 2020)

## CRIME MAY INFER SERIOUS INJURY PROOF

- Serious injury may be inferred from conviction of particular offense based on nature of offense and that injury will likely result so long as inference reasonable & logical in light of conviction & evidence.
- Indecency w/child (per Penal Code 21.11) provides basis *to infer* serious injury from offense because involves sexual activity with child.
- But, parent may controvert existence of serious injury proof

## K GROUND

D.S., 602 S.W.3D 504 (TEX. 2020)  
LIMITED COLLATERAL CHALLENGES

Challenging Relinquishment by Bill of Review based on erroneous home state decision under Ch. 152 (UCCJEA)

CAN'T BRING THAT CHALLENGE per TFC 161.211(c)  
“even if ...determination implicates [s/m] jurisdiction”

**ONLY: fraud, duress or coercion**

# CONCURRENCE LEHRMANN

## **UCCJEA is not Subject Matter Jurisdiction Scheme**

1. Prioritizing jurisdiction to home states but letting proper court decline unlike subject matter jurisdiction.
2. “Voidable” effect to non-CCJ not like subject matter jurisdiction. TFC 152.104(b)
3. Reluctance in child custody cases to view statutory requirements as matters of subject matter jurisdiction
4. Recognizes other states conflicted on this
5. Agrees not jurisdictional under modern trend that favors finality over uncertainty absent clear intent.

L.G., 596 S.W.3d 778 (Tex. 2020) (per curiam)

## O GROUND: When parent indigent

Father claimed O ground violated US and TX constitution as applied to him because his indigence condition impaired his ability to comply w/ court order.

Agreed w/appellate court that proof showed his poverty did not prevent his compliance: i.e. he stopped counseling when he got angry, did not maintain phone contact despite phone access & did not do online classes available.

Indigence does not conclusively preclude O finding



## 1. BEST INTEREST EVIDENCE

In Re CW, 586 S.W.3d 405 (Tex. 2019) (per curiam)(18-1034 from 594 SW3d 360)

Held appellate court's analysis/detail thorough & agreed correctly found legal sufficient proof for best interest.

evidence showed

child *likely* sexually abused,

mother *likely* forcing child into prostitution,

child did not wish to live w/mom in homeless shelter,

believed mother would pose threat to child if in her care

1. Only 2 witnesses at trial: ICU worker & caseworker
2. “*Alleged*” child forced in prostitution and homelessness
3. Evicted after mom’s boyfriend had “*physical altercation*” with child
4. After eviction, mom stayed w/boyfriend & child not enrolled in school
5. Child standoffish, did not open up about sexual abuse or neglect –  
*just said she had friendships w/older males to help her mom financially;*
6. Child liked foster care as she did not have to worry about where her meals came from and could go to school regularly.

## INEFFECTIVE ASSISTANCE OF JUDGE CLAIM?

*Court of Appeals* reversed on parent's claim court erred in failing to appoint her counsel under TFC 107.013 on record showing she opposed & was likely indigent.

*Supreme Court* disagrees with appellate court, but affirms remand because agrees with Mother's unaddressed alternative claim that her right to counsel was impaired by judge's failure to give her TFC 263.0061(a) admonishments.

*B.G.*, 592 S.W.3d 133 (Tex. 2020) (per curiam)

## IMPORTANT POINTS IN BG, 592 SW3d 133 (Tex.2020)

### 1. Affidavit required for Indigence Decision:

“Filing an affidavit of indigence is a necessary prerequisite to a determination that the parent is indigent.”

### 2. Claim of admonishment error MUST be raised and shown.

“Mother raised the trial court's noncompliance with section 263.0061(a) in her appellate brief but the court of appeals did not reach that issue.”

“*Mother argues, and the record shows,*” admonishments not given.

### 3. Failure to dispute indigence & circumstances may show harm

“Given *these circumstances, & absent a dispute that Mother truly is indigent,*” this noncompliance *not harmless* & reversal required.

# DE NOVO REVIEW IS NOT TRIAL DE NOVO AND DOES NOT IMPLICATE RIGHT TO JURY

*A.L.M.-F*, 593 S.W.3d 271 (Tex. 2019) (Guzman)

# **Scope Appellate Review of Parental Termination**

**Includes review of sufficiency challenges to D & E grounds even if other ground sufficient for result**

***N.G.*, 577 S.W.3d 230 (Tex. 2019) per curiam)**

**Concurrence comments D/E review required for review of Anders brief unless not found in charge**

*E.K.*, 63 Tex. Sup. Ct. J. 382, 2020 WL 501712 (Tex. 2020) (concurrence Green/Boyd)

# **BRIEFING WAIVER**

**1. Issue not asserted in appellate court brief not subject to review in Supreme Court**

*L.G.*, 596 S.W.3d 778 n. 1 (Tex. 2020)

**2. Omission of issue in brief on merits waives issue**

*C.W.*, 586 S.W.3d 405 n. 1 (Tex. 2019)

**3. Appellate brief that challenges O may encompass (d) defense if argued**

*ZMM*, 577 S.W.3d 541 (Tex. 2019)



## SUMMARY POINTS

1. In modification proceedings, a nonparent's burden of proof for custody/access must apply a fit parent presumption, however, the parental presumption standard in TFC 153.131(a) is not statutorily applicable
2. In original custody proceedings, the TFC 153.131(a) parental presumption standard applies but Supreme Court has not required the parental acts/omissions identified under this standard to be of a specific type or nature.
3. Element of "serious injury" may be established by inference based on nature of crime for TFC 161.001(b)(1)(L) finding.
4. A collateral challenge to a parental termination judgment based on a relinquishment is limited to the challenges under TFC 161.211(c) even if a challenge is made to the proof for priority jurisdiction under the UCCJEA.
5. Indigence does not conclusively preclude a finding under O.
6. Proof parental termination is in best interest of a child may include proof that infers sexual abuse likely occurred to child.
7. If a parent challenges the court's failure to provide statutory admonishments for court appointed attorney to indigent parent, this could support reversal on appeal if it was properly challenged and the circumstances indicate harm resulted.
8. De Novo Review is not a de novo trial and does not implicate a right to a jury trial.
9. An appellate court must review a challenge to the sufficiency of proof under D and E Grounds (at TFC 161.001(b)(1)) even if sufficient proof for parental termination established under another Ground
10. If judgment grants parental termination on jury verdict that considers D and E grounds, but does so in a broad form jury charge with other grounds, review of D/E grounds probably not required so long as another ground supports termination.
11. Issues not asserted in the appellate court will not generally be available for review in the supreme court.
12. Supreme Court will not consider an issue raised if the petitioner did not include that issue in its brief on the merits.
13. If a point challenges the proof in support of an O ground, it may encompass challenge to the support under the Subsection (d) defense if can be construed from arguments stated in briefing.

**NOTE: BE WATCHING:  
IN RE J.J.R.S. & L.J.R.S., NO. 20-175**