NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

IN THE INTEREST OF J.O., J.O., & J.O., CHILDREN

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF TEXAS
CAUSE NO. 19-0693

EXPLANATION OF FILING

Dear Clerk, U.S. Supreme Court:

Below, please find attached a declaration showing that all opposing parties or their counsel have been served, pursuant to Rule 29; an original and ten copies of a motion for leave to proceed *in forma pauperis*, pursuant to Rule 39; and an original and ten copies of a petition for writ of certiorari, each with an appendix consistent with Rule 14.

By: _____
Gurney F. Pearsall III
Texas Bar No. 24100690
Counsel of Record for Petitioner

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Supreme Court Rule (SCR) 29.5(b), that on this 2nd day of December, 2019, true copies of the following Petition and the Motion for Leave to Proceed *In Forma Pauperis* were mailed in an envelope to the Clerk, U.S. Supreme Court, One First Street, N.E., Washington, D.C. 20543; that all parties required to be served were served; and that the Attorney General of Texas has been notified that a provision of the Texas Constitution has been drawn into question, pursuant to SCR 14.1(e)(v).

EXECUTED this 2nd day of December, 2019.

By: _____
Gurney F. Pearsall III
Texas Bar No. 24100690
Counsel of Record for Petitioner

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner respectfully requests leave to file the enclosed petition without prepayment of costs and to proceed *in forma pauperis*, in accordance with SCR 39, and Title 18, U.S.C. 3006A(d)(6). This filing is a continuation of the *ad litem* representation of Petitioner under Section 107.002 of the Texas Family Code. Per U.S.C. 3006A(d)(6), no SCR 39 affidavit need be filed.

Wherefore, Petitioner prays for leave to proceed *in forma pauperis*.

Respectfully submitted this 2nd day of December, 2019.

By: _____
Gurney F. Pearsall III
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Counsel of Record for Petitioner

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QUESTION PRESENTED FOR REVIEW

Does Article V, Section 6 of the Texas Constitution violate Due Process Clause of the Fourteenth Amendment of the U.S. Constitution when its distinction between legally sufficient and factually sufficient evidence requires litigants to satisfy the same burden of proof twice on appeal?

LIST OF PARTIES

Parties	Trial Counsel	Appellate Counsel
Father *Petitioner* Father of the Children Petitioner on Appeal Respondent at Trial	**Quiency S. Brennan** PO Box 160284 San Antonio, TX 78280 210-646-4508	**Gurney Pearsall** 11107 Wurzbach Rd., Ste. 602 San Antonio, TX 78230 210-324-8255
Mother *Did not appeal* Mother of the Children Respondent at Trial	**Jennifer Harris** 607 E. Blanco Rd., #457 Boerne, TX 78006 817-239-1900	**(None)**
Texas Dep't of Family and Protective Services *Respondent* Respondent on Appeal Petitioner at Trial	**Dennis Arriaga** 3635 S.E. Military Dr. San Antonio, TX 78223 210-337-3002	**Eric Tai** 2401 Ridgepoint Dr., Bldg. H2 Austin, TX 78754 512-929-6532
J.O., J.O., and J.O. The Children of this Suit	**Debra Fuller** 819 Water St, Ste. 151 Kerrville, TX 78028 210-472-3900	**(Same)**

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PETITION FOR WRIT OF CERTIORARI

To enter this Court, a person must walk under a towering frieze engraved with the phrase, "Equal Justice Under Law." Equal justice under law is more than a phrase, of course; it is one of the Constitution's guiding principles, enshrined in the Fourteenth Amendment, with historical precedent echoing back to ancient Greece.[1] This right offers a guarantee that before the State deprives a person of life, liberty, or a property interest, the person must receive notice, an opportunity to be heard, and a non-arbitrary decision from a neutral decisionmaker.

The last aspect of those due process guarantees lies at the heart of this petition. Petitioner's fundamental parenting rights were permanently severed by court order. On appeal, the court of appeals analyzed that termination of parental rights according to whether the evidence was legally and factually sufficient, pursuant to a legal/factual distinction that Article V, Section 6 of the Texas Constitution requires.[2] These two analyses are almost indistinguishable at face value, and become indistinguishable under a heightened standard of review. It unduly burdens a litigant's due process rights and denies that litigant equal protections if they must satisfy the same burden twice on appeal.

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[1] *See* Thucydides, *The History of the Peloponnesian War* (Richard Crawley, Trans., (1874)) ("Our constitution does not copy the laws of neighbouring states…If we look to the laws, they afford equal justice to all in their private differences…").

[2] Because 28 U.S.C. Section 2403(b) may apply, Petitioner has notified the Office of the Attorney General of Texas of this challenge.

While the Texas Supreme Court hears all civil appeals in Texas, the Texas Court of Criminals Appeals (CCA) hears all criminal appeals in Texas. The CCA has ruled that when the burden of proof is beyond a reasonable doubt, there is no meaningful distinction between legal sufficiency and factual sufficiency. *Brooks v. State*, 323S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.). Accordingly, the courts of appeal in Texas do not apply the legal/factual distinction to their analysis of criminal cases. Petitioner contends that the same result must extend to cases such as the instant one, involving the heightened clear and convincing burden of proof, and further contends that the failure to extend this reasoning would render the aforementioned clause of the Texas Constitution unconstitutional as applied to cases in Texas involving the termination of parental rights.

OPINION AND ORDER BELOW

The Texas Supreme Court's denial of Petitioner's petition in Appeal No. 19-0693 is included in the Appendix at C.

STATEMENT OF JURISDICTION

On November 20, 2018, the trial court heard the instant case and rendered judgment in favor of the State of Texas, terminating Petitioner's parental rights. Petitioner sought a trial *de novo*. At the final hearing on January 15, 2018, the *de novo* court rendered judgment in favor of the State of Texas, terminating Petitioner's parental rights. On July 24, 2019, the Fourth District Court of Appeals of Texas

affirmed the trial court's judgment. No motion for rehearing was filed, as the decision to appeal came after the deadline to file such a motion had passed. Petitioner filed a petition for review in the Texas Supreme Court, which was denied on August 23, 2019. On October 4, 2019, the Texas Supreme Court denied Petitioner's motion for rehearing. On November 4, 2019, Petitioner filed the instant petition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1651(a), Rule 20, and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to SCR 13.1.

RELEVANT STATUTORY PROVISIONS

The Fourteenth Amendment of the U.S. Constitution states, in relevant part: "No state shall…deprive any person of life, liberty, or property, without due process of law…"

STATEMENT OF THE CASE

This case concerns a father whose fundamental constitutional rights to parent his children were permanently severed by court order in Texas. That father challenged the sufficiency of the evidence presented to the trial court. Texas law requires that appellate courts review evidentiary sufficiency for legal as well as factual sufficiency, which is a requirement that Petitioner challenges as a due process violation when appellants in cases like these must satisfy a heightened clear and convincing burden of proof.

REASONS FOR GRANTING THE WRIT

Rule 10

Petitioner has exhausted his ability to seek relief from the state courts of Texas, and therefore submits this petition under SCR 10(c), arguing that a state court has decided an important question of federal law that conflicts with this Court's ruling in *Nelson v. Colorado*, 137 S. Ct. 1249, 1257 (2017).

Legal Background: The Legal and Factual Sufficiency Analysis

The natural bonds that connect the family constitute a fundamental liberty interest for parents and children alike. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This bond is sacred, and far more precious than any property right. *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982). As such, it is afforded with heightened protections when the State seeks to not only interfere with this right, but to end it entirely, in a manner that this Court describes as "traumatic, permanent, and irrevocable." *In re G.M.,* 596 S.W.2d 846, 846 (Tex. 1980). Indeed, this Court "cannot think of a more serious risk of erroneous deprivation of parental rights than when the evidence, though minimally existing, fails to clearly and convincingly establish in favor of [the factfinder's] findings that parental rights should be terminated." *In re M.S.*, 115 S.W.3d 534, 549 (Tex. 2003).

Accordingly, Texas law imposes a strong presumption that a child's best interest is served by remaining with their parent, termination proceedings must be

strictly scrutinized, involuntary termination statutes must be strictly construed in favor of the parent, and termination of the natural parent-child bond can never be justified without the most solid and substantial reasons. *See, e.g., Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (quoting *State v. Deaton*, 54 S.W. 901, 903 (1900)); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam)); *In re E.R.,* 385 S.W.3d 552, 563 (Tex. 2012).

As termination is a drastic remedy and any significant risk of erroneous termination is unacceptable, a court must keep the family intact unless it finds clear and convincing evidence that the parent committed a predicate act and that termination serves the child's best interest. *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002); *Texas Dept. of Human Services v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

Evidence is "clear and convincing" if it produces in the mind of the factfinder a firm belief or conviction as to the truth of the allegations. *In the Interest of C.H.*, 89 S.W.3d 17 (Tex. 2002). Evidence is not clear and convincing merely by the literal weight of the evidence, via witnesses, exhibits, and pages of transcript; it is, instead, the probative force of the evidence before the factfinder. *In re V.V.*, 349 S.W.3d 548, 552–55 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (en banc). Conclusory testimony, even if uncontradicted, does not amount to more than a scintilla of evidence. *In re A.H.*, 414 S.W.3d 802, 807 (Tex. App.—San Antonio 2013, no pet.). Testimony offered with no basis or underlying facts to support its conclusion, it is

merely conclusory and cannot be considered probative evidence, even if not objected to or disputed. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex.1996) (per curiam); *Gunn v. McCoy*, 554 S.W.3d 645, 662 (Tex. 2018). After all, both the parent and the child have a substantial interest in the accuracy and justice of a well-documented decision. *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003).

Due to the Texas Constitution's Factual Conclusivity Clause and Government Code Section 22.225, a distinction is made in Texas between legal and factual evidentiary sufficiency. *In re A.B.*, 437 S.W.3d 498, 502 (Tex. 2014); *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 619-21 (Tex. 2004). Under this distinction, this Court and the courts of appeals review evidence for legal sufficiency, only the courts of appeals have jurisdiction to review the evidence for factual sufficiency, and that factual sufficiency analysis may be reviewed by this Court to ensure that the court of appeals adhered to the correct legal standard. *A.B.*, 437 S.W.3d at 502. This Court applies this distinction to cases involving the termination of parental rights because the termination of parental rights implicates fundamental liberty interests and requires a higher standard of proof, by clear and convincing evidence instead of by a mere preponderance of the evidence. *A.B.*, 437 S.W.3d at 502.

"In a legal sufficiency review, a court should look at 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." *Id*. at 266.

"To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *Id*. "A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id*. "This does not mean that a court must disregard all evidence that does not support the finding." *Id*.

"Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence." *Id*. Ultimately, if, "after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belie for conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient." *Id*. "Rendition of judgment in favor of the parent would generally be required if there is legally insufficient evidence." *Id*.

In a factual sufficiency review, "the inquiry must be 'whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations.'" *J.F.C.*, 96 S.W.3d at 266. "A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *Id*. "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, then the evidence is factually insufficient." *Id*.

"A court of appeals should detail in its opinion why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of the finding." *Id*. at 266-67. Notably, when conducting a factual-sufficiency review, reviewing courts do not review the evidence in a neutral light. Rather, "[i]n reviewing termination findings for factual sufficiency, a court of appeals must give due deference to a jury's fact-findings, and should not supplant the jury's judgment with its own[.]" *In re H.R.M*., 209 S.W.3d 105, 108 (Tex. 2006) (per curiam).

Legal Background: Due Process

The U.S. Constitution and the Texas Constitution guarantee that a person will not be deprived of liberty or property interests without due process of law. U.S.C.A. Const. Amend 14, §1; Vernon's Ann. Texas Const., Art. I, §19. The two constitutions use different language, but the same analysis applies to both claims, namely the analysis that, "[a]t a minimum, a person who may be deprived of a liberty or property interest to be provided notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995). Accordingly, if a party lacks notice of a hearing, then a court order

depriving that person of a liberty interest is void for lack of jurisdiction and for violating due process. *Ex parte Rollie Bryan Keith*, No. 04-17-00641-CV (Tex. App. – San Antonio 2003) (memo. opinion).

Procedural due process is a fundamental requirement of fairness, requiring not only the right to present evidence but also a reasonable opportunity to be notified of the claims of the opposing party and to face them at a hearing. *Mathews v. Eldridge*, 424 U.S. 319 (1976). To satisfy due process, service of process must be reasonably calculated to apprise interested parties of the pendency of the action and let them present their objections at a hearing. Accordingly, due process rights are implicated if a governmental actor deprives a person of a protected liberty or property interest without first affording that person constitutionally sufficient notice and a hearing. *Bd. of Regents v. Roth,* 408 U.S. 564, 569 (1972).

Substantive due process is a fundamental requirement of fairness, requiring that laws be clearly defined in order to be enforceable. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1983). This is because vague laws do not give individuals fair notice of the conduct proscribed, engender the possibility of arbitrary and discriminatory enforcement, and defeat the intrinsic promise of a constitutional regime in which the laws are applied equally to all. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *accord Groyned v. City of Rockford*, 408 U.S. 104, 108 n. 3 (1972). The Supreme Court of Texas has found a substantive due

process violation when legislation permits the arbitrary exercise of the delegated authority, for instance by not setting forth specific requirements or guidance. *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454,466-67 (Tex. 1997); *Proctor v. Andrews*, 972 S.W.2d 729, 737 (Tex. 1998).

The Legal/Factual Distinction Violates Procedural Due Process

Petitioner does not contend that the legal/factual distinction is facially unconstitutional. However, that distinction does operate in a manner that violated Petitioner's due process rights, because its scheme creates an unacceptable risk of due process deprivation. *Nelson v. Colorado*, 137 S. Ct. 1249, 1257 (2017) (invalidating a Colorado statute on due process grounds for creating an unacceptable risk of due process deprivations by requiring convicted persons to prove their innocence to be refunded certain fines). This unacceptable risk of due process deprivation results from the fact that the two standards are barely distinguishable from one another under any burden of proof, and become essentially the same standard under a heightened burden of proof.

The two standards are barely distinguishable from one another under any burden of proof because both standards, a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding *if* the factfinder reasonably disregarded the disputed facts. Thus, under either standard, a reviewing court must consider the quality of disputed facts and second-guess the trial court's decision to

disregard those disputed facts. If no reasonable factfinder could have disregarded a disputed fact, then it is equally legally and factually insufficient. What, then, is the substantive difference between the standards of review? Indeed, while Texas courts of appeal have occasionally found the evidence to be legally sufficient but factually insufficient, counsel of record for Petitioner cannot find a case where the court of appeals found the evidence to be legally insufficient but factually sufficient.

Accordingly, the legal/factual distinction, as applied to the heightened burden of proof of clear and convincing evidence operates in a manner that violated Petitioner's due process rights, because its scheme creates an unacceptable risk of due process deprivation by requiring appellants like Petitioner to satisfy the same burden twice. While this alone imposes an arbitrary and excessive burden on the litigants' due process rights, this also has important consequences to an appellant's conservatorship rights. Counsel of record for Petitioner can find only one instance of a Texas court of appeals reversing the trial court's termination order while also reversing the trial court's conservatorship order. *In re M.K.,* No. 05-18-01297-CV, 2019 LEXIS 4383, 2019 WL 2283886 (Tex. App. – Dallas, May 29, 2019) (memo op.). This is because the courts of appeal will not reverse the trial court's conservatorship order unless the evidence is both legally **and** factually insufficient – this, despite the fact that both standards become indistinguishable under a heightened standard of proof.

CONCLUSION

Accordingly, Petitioner respectfully requests that this Court grant certiorari on the grounds that the Supreme Court of Texas has decided an important question of federal law that conflicts with this Court's ruling in *Nelson v. Colorado*.

_____
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Appendix A

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00037-CV

IN THE INTEREST OF A. N., ET AL., CHILDREN

From the 38th Judicial District Court, Medina County, Texas
Trial Court No. 18-01-24656-CV
Honorable Cathy O. Morris, Judge Presiding[1]

Opinion by: Irene Rios, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: July 24, 2019

AFFIRMED

Following a bench trial, Father's parental rights were terminated as to his three children, Jessie, Jason, and Joey.[2] The trial court then appointed the children's maternal great-grandmother as managing conservator and Mother as possessory conservator. The only issue presented by Father on appeal is whether the evidence is legally and factually sufficient to support the trial

[1] The Honorable Cathy O. Morris, Associate Judge, presided over the trial on the merits, and the Honorable Camile G. DuBose presided over the de novo hearing.

[2] To protect the identity of a minor child in an appeal from an order terminating parental rights, we refer to the parents as "Mother" and "Father" and to the children using aliases. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8(b)(2). The trial court's order implicated the parental rights of Mother, A.N.'s father, and appellant Father. Only appellant Father appeals the trial court's order. Here, all three children who are the subject of this appeal have the initials J.J.O. We refer to the children as "Jessie," "Jason," and "Joey." A.N. is not the child of appellant Father, and is, therefore, not a subject of this appeal.

court's finding that termination was in the children's best interest. We affirm the trial court's order.

BACKGROUND

On January 22, 2018, the Texas Department of Family and Protective Services ("Department") filed a petition to terminate parental rights. A bench trial was held before an associate judge on November 20, 2018, following which the associate judge signed an order terminating Father's parental rights to Jessie, Jason, and Joey. Thereafter, Father requested a de novo hearing, which was held on January 15, 2019. At the de novo hearing, the trial court took judicial notice of the reporter's record and exhibits from the initial hearing.[3] The trial court also heard additional testimony. On March 6, 2019, the trial court signed a Final De Novo Order of Termination of Parental Rights terminating Father's parental rights to Jessie, Jason, and Joey.

STANDARD OF REVIEW AND STATUTORY REQUIREMENTS

To terminate parental rights pursuant to section 161.001 of the Texas Family Code, the Department has the burden to prove by clear and convincing evidence: (1) one of the predicate grounds in subsection 161.001(b)(1); and (2) that termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. §§ 161.001, 161.206(a); *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). In this case, the trial court found evidence of three predicate grounds to terminate Father's parental rights.[4] The trial court also found termination of Father's parental rights was in the best interest of the children.

[3] The Family Code provides that "[t]he referring court may also consider the record from the hearing before the associate judge, including the charge to and verdict returned by a jury." TEX. FAM. CODE ANN. § 201.015(c).

[4] The trial court found evidence Father

> knowingly placed or knowingly allowed the child[ren] to remain in conditions or surroundings which endanger the physical or emotional well-being of the child[ren],[;] … engaged in conduct or knowingly placed the child[ren] with persons who engaged in conduct which endangers the physical

When reviewing the sufficiency of the evidence, we apply the well-established standards of review. *See* TEX. FAM. CODE ANN. §§ 101.007, 161.206(a); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (factual sufficiency); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (legal sufficiency).

BEST INTERESTS

When considering the best interest of the child, we recognize the existence of a strong presumption that the child's best interest is served by preserving the parent-child relationship. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). However, we also presume that prompt and permanent placement of the child in a safe environment is in the child's best interest. TEX. FAM. CODE ANN. § 263.307(a) (West 2014).

In determining whether a child's parent is willing and able to provide the child with a safe environment, we consider the factors set forth in Family Code section 263.307(b). *See* TEX. FAM. CODE ANN. § 263.307(b). We also apply the *Holley* factors to our analysis.[5] *See Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). These factors are not exhaustive. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). "The absence of evidence about some of these considerations would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child." *Id*. In analyzing these factors, the court must focus on the best interest of

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> or emotional well-being of the child[ren],[; and] … failed to comply with the provisions of a court order … [.]

See TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O).

[5] These factors include: (1) the child's desires; (2) the child's present and future emotional and physical needs; (3) any present or future emotional and physical danger to the child; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist the individuals seeking custody to promote the child's best interest; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper; and (9) any excuse for the parent's acts or omissions. *See Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976); *In re E.C.R.*, 402 S.W.3d 239, 249 n.9 (Tex. 2013).

the child, not the best interest of the parent. *Dupree v. Tex. Dept. of Protective & Regulatory Servs.*, 907 S.W.2d 81, 86 (Tex. App.—Dallas 1995, no writ).

Evidence that proves one or more statutory ground for termination may also constitute evidence illustrating that termination is in the child's best interest. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002) (holding same evidence may be probative of both section 161.001(b)(1) grounds and best interest, but such evidence does not relieve the State of its burden to prove best interest). "A best interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as the direct evidence." *See In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied). "A trier of fact may measure a parent's future conduct by his past conduct and determine whether termination of parental rights is in the child's best interest." *Id*.

DISCUSSION

Father contends the evidence is legally and factually insufficient to support the trial court's determination that termination of his parental rights is in Jessie's, Jason's, and Joey's best interest.

On January 19, 2018, the Department received a referral alleging that A.N. made an outcry of domestic violence, stating that Mother attempted to stab Father. Detective Sergeant Brandon Teer of the Hondo Police Department testified that a forensic interview was conducted with A.N. at the Bluebonnet Child Advocacy Center. During A.N.'s interview, Center officials locked the Center doors because Father caused a disturbance in the parking lot, which required intervention from patrol officers.

As part of the investigation, Department Investigator Joe David Sanchez attempted to meet with and interview Father but Father informed Sanchez that he did not want to cooperate with the Department or the investigation. Sanchez testified Father was resistant throughout the entire investigation. When Sanchez attempted to establish a family safety placement with Mother, Father

advised Mother to disregard the safety placement and the Department. Sanchez additionally testified that Father indirectly threatened him via phone calls after the investigation concluded.

Detective Sergeant Teer confirmed that Father has had "extensive involvement with the Hondo Police Department." Detective Sergeant Teer described that involvement as "disturbances" involving domestic violence, including an extensive history of domestic violence between Father and Mother, as well as physical altercations between Father and other men. Mother testified Father did not physically abuse her but that there was "name calling, making me feel unwanted" and teaching their young daughter to call Mother a "beach." Mother specifically described an incident during which Father exhibited "road rage" toward her as she was driving on the highway. Mother testified Father drove beside her, yelled at her, called her names, and ordered her to pull over. Father also threw rocks at her car window while she was on the phone with the caseworker. Father verified on cross-examination that police had been called when he discharged a firearm on his property within the city limits. Father also verified he had been involved in physical altercations with the family of A.N.'s father, one of which resulted in Father being stabbed. When confronted with an offense report in which it was alleged Father "threw" Mother to the ground when she was six months pregnant and resulted in an arrest, Father responded "that was just something told to the officers." Detective Sergeant Teer confirmed that on many occasions, Mother and Father refused to pursue charges against each other. *See In re A.M.*, 495 S.W.3d 573, 581 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (relying in part on "history of assaultive conduct between the mother and father" in affirming best-interest finding); *see also In re C.H.*, 89 S.W.3d at 28 (noting that a history of assault is probative to the issue of a child's best interest).

Department caseworker Jennifer Clark became involved with the case at the time of the children's removal and took part in developing Father's service plan. Clark testified Father was required to undergo individual counseling, including drug and alcohol assessment ("OSAR") if a

drug test returned with a positive result. According to Clark, OSAR was scheduled for Father five times, but Father failed to comply or attend those sessions. Additionally, conservator worker Christie Knopp, who attempted to administer a drug test to Father on one occasion, testified that when she requested that Father submit to the drug test, Father "was very fidgety, and … refus[ed] to take the drug test." When Knopp pressed Father to take the test, Father responded "F[] it, it's dirty." Additionally, Mother testified she had walked in on Father as he was about to use methamphetamine, which resulted in an altercation between Mother and Father, because Father had told her "he wasn't going to do it again." Clark also testified Father had a previous family-based services case with the Department relating to drug issues. *In re L.G.R.*, 498 S.W.3d 195, 204 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("A parent's drug use supports a finding that termination is in the best interest of the child.")

Father was required to take part in the Batterers Intervention Prevention Program ("BIPP") because of the incidents of domestic violence and Father's pending criminal charge for family violence in which Mother was the complainant. Additionally, Father was ordered to undergo psychosocial examination and take parenting classes or address parenting in his counseling sessions. Clark arranged for the counselor to meet with Father at his father's home or elsewhere in Hondo. Clark testified Father completed five sessions of individual counseling but was unsuccessfully discharged from counseling because he arrived more than thirty minutes late or would verify attendance but then not attend counseling sessions. Clark then arranged counseling through a second provider but Father did not engage at all with the second provider. Clark further testified BIPP sessions could only be attended in San Antonio and that she arranged a referral for Father three times but Father did not attend orientation or classes. *See In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013) (evidence that the appellant failed to comply with the court-ordered service plan supported the trial court's best-interest determination); *see also In re S.B.*, 207 S.W.3d 877,

887-88 (Tex. App.—Fort Worth 2006, no pet.) (considering the parent's drug use and failure to comply with a family-service plan in holding the evidence supported the best-interest finding).

Having reviewed the record and considered all the evidence in the appropriate light for each standard of review, we conclude the trial court could have formed a firm belief or conviction that termination of Father's parental rights was in the children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *In re H.R.M.*, 209 S.W.3d at 108; *In re J.P.B.*, 180 S.W.3d at 573; *see also generally In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014) (recognizing an appellate court need not detail the evidence if affirming a termination judgment).

CONCLUSION

For the foregoing reasons, we affirm the trial court's order terminating Father's parental rights.

Irene Rios, Justice

Appendix B

NOTICE: THIS DOCUMENT
CONTAINS SENSITIVE DATA

CAUSE NO. 18-01-24656-CV

IN THE INTEREST OF	§	IN THE DISTRICT COURT OF
§		
[redacted]	§	
[redacted]	§	MEDINA COUNTY, TEXAS
[redacted]	§	
[redacted]	§	
§		
CHILDREN	§	38TH JUDICIAL DISTRICT

FINAL DE NOVO ORDER OF TERMINATION OF PARENTAL RIGHTS

On January 15, 2019, the Court heard this case de novo.

1. Appearances

1.1. The Department of Family and Protective Services ("the Department") appeared through **JENNIFER CLARK**, caseworker, and by attorney, **DENNIS ARRIAGA** and announced ready.

1.2. Respondent Mother [redacted] appeared through attorney of record **JENNIFER HARRIS** and announced ready.

1.3. Respondent, Presumed Father [redacted], represented by **MARIAN OVERSTREET**, did not request a de novo review of any issues and was not required to appear.

1.4. Respondent, Presumed Father [redacted], appeared in person and through attorney of record **QUIENCY SMITH BRANNAN** and announced ready.

1.5. **DEBRA FULLER**, appointed by the Court as Attorney and Guardian Ad Litem for the children the subject of this suit, appeared and announced ready.

2. Findings

2.1. The Court finds that a *Final Order in Suit Affecting the Parent-Child Relationship and Termination of Parental Rights*, was ministerially signed by the associate judge on January 8, 2019, and filed on the same date, after a hearing conducted on November 20, 2018.

2.2. The Court finds that on December 3, 2018, [redacted], as

Movant, filed a *Request for De Novo Hearing* specifying the issues to be presented to this Court and requesting review of that part of the *Final Order in Suit Affecting the Parent-Child Relationship and Termination of Parental Rights*, which found by clear and convincing evidence that [redacted] has:

2.2.1. knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child, pursuant to § 161.001(b)(1)(D), Texas Family Code;

2.2.2. 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, pursuant to § 161.001(b)(1)(E), Texas Family Code;

2.2.3. failed to comply with the provisions of a court order that specifically established the actions necessary for the father to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child, pursuant to § 161.001(b)(1)(O), Texas Family Code;

2.2.4. And that termination of the parent-child relationship between [redacted] and the children [redacted], is in the children's best interest.

2.3. The Court, having examined the record and heard the evidence and argument of counsel, finds that this Court has jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case.

2.4. The Court, having examined the record and heard the evidence and argument of counsel, finds that the State of Texas has jurisdiction of this case pursuant to Subchapter C, Chapter 152, Texas Family Code, by virtue of the fact that Texas is the home state of the children.

3. Record

The record of testimony was duly reported by the court reporter for the 38th Judicial District Court of MEDINA County.

4. Termination of Respondent Father [redacted] Parental Rights

4.1. The Court, having examined the record and the exhibits and heard the evidence and argument of counsel, finds by clear and convincing evidence that termination of the parent-child relationship between [redacted] and the child [redacted], is in the child's best interest.

4.2. Further, the Court, having examined the record and the exhibits and heard the evidence and argument of counsel, finds by clear and convincing evidence that [redacted] has:

4.2.1. knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child, pursuant to § 161.001(b)(1)(D), Texas Family Code;

4.2.2. 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, pursuant to § 161.001(b)(1)(E), Texas Family Code;

4.2.3. failed to comply with the provisions of a court order that specifically established the actions necessary for the father to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child, pursuant to § 161.001(b)(1)(O), Texas Family Code;

4.3. **THEREFORE,** the *Final Order in Suit Affecting the Parent-Child Relationship and Termination of Parental Rights* is **AFFIRMED** and it is **ORDERED** that the parent-child relationship between [redacted] and each of the children, [redacted] is terminated.

4.4. The *Final Order in Suit Affecting the Parent-Child Relationship and Termination of Parental Rights* is **AFFIRMED** and it is **FOUND** that, in accordance with §161.001(c), Texas Family Code, the order of termination of the parent child relationship as to [redacted] is not based on evidence that [redacted]:

4.4.1. homeschooled the child;

4.4.2. is economically disadvantaged;

4.4.3. has been charged with a nonviolent misdemeanor other than:

4.4.3.1. an offense under Title 5, Penal Code;

4.4.3.2. an offense under Title 6, Penal Code; or

4.4.3.3. an offense that involves family violence, as defined by §71.004 of this code;

4.4.4. provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169, Occupations Code; or

4.4.5. declined immunization for the child for reasons of conscience, including a religious belief.

4.5. In accordance with §161.001(d), Texas Family Code, the Court finds that [redacted] did not prove by a preponderance of evidence that [redacted]: (1) was unable to comply with specific provisions of a court order; and (2) the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent.

5. Associate Judge's Judgement

5.1. The *Final Order in Suit Affecting the Parent-Child Relationship and Termination of Parental Rights* is ADOPTED as to all remaining matters not specifically presented as an issue for this Court to consider pursuant to §§ 201.015 and 201.2042, Texas Family Code.

This Final Order of Termination of Parental Rights was judicially pronounced and rendered on January 15, 2019, further noted in the Court's docket sheet on

the same date and ministerially signed on March 6, 2019 **,**
2019.

PRESIDING JUDGE

APPROVED AS TO FORM:

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4.4.5. declined immunization for the child for reasons of conscience, including a religious belief.

4.5. In accordance with §161.001(d), Texas Family Code, the Court finds that [redacted] did not prove by a preponderance of evidence that [redacted]: (1) was unable to comply with specific provisions of a court order; and (2) the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent.

5. Associate Judge's Judgement

5.1. The *Final Order in Suit Affecting the Parent-Child Relationship and Termination of Parental Rights* is ADOPTED as to all remaining matters not specifically presented as an issue for this Court to consider pursuant to §§ 201.015 and 201.2042, Texas Family Code.

This Final Order of Termination of Parental Rights was judicially pronounced and rendered on January 15, 2019, further noted in the Court's docket sheet on the same date and ministerially signed on _____, 2019.

_____
PRESIDING JUDGE

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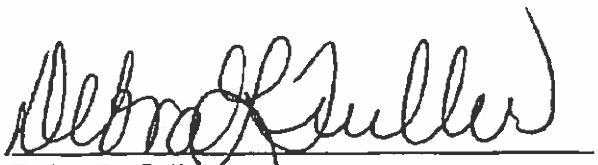

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Appendix C

FILE COPY

RE: Case No. 19-0693 DATE: 8/23/2019
COA #: 04-19-00037-CV TC#: 18-01-24656-CV
STYLE: PT CASE: IN RE J.O., J.O., & J.O., CHILDREN

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. GURNEY PEARSALL III
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* DELIVERED VIA E-MAIL *

Appendix D

FILE COPY

RE: Case No. 19-0693 DATE: 10/4/2019
COA #: 04-19-00037-CV TC#: 18-01-24656-CV
STYLE: PT CASE: IN RE J.O., J.O., & J.O., CHILDREN

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

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