COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00132-CV

IN THE INTEREST OF L.S.

FROM THE 431ST DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 16-06395-431

MEMORANDUM OPINION[1]

Appellant P.M. (Father) appeals from the trial court's order terminating his parental rights to L.S. (Luke).[2] He argues that the trial judge's conduct, clearly shown on the face of the record, revealed a bias that resulted in the violation of Father's rights to due process and an impartial fact-finder. Based on the

[1]*See* Tex. R. App. P. 47.4.

[2]We use fictitious names to refer to the parties as necessary to protect the minors' identities. *See* Tex. Fam. Code Ann. § 109.002(d) (West 2014); Tex. R. App. P. 9.8(b).

exceptional and singular facts that are clearly shown in the record here, we agree that the trial judge ceased to be a neutral and unbiased fact-finder, acting instead as an advocate, which probably resulted in the rendition of an improper judgment and probably prevented Father from properly presenting the case to this court. *See* Tex. R. App. P. 44.1(a).

I. BACKGROUND

A. BEFORE LUKE'S BIRTH

When Father and his girlfriend Holly were fifteen, Holly became pregnant and gave birth to a daughter, Brynn.[3] Holly and Father dropped out of high school, and Father began working two jobs to help support Brynn. At the time, Father would regularly smoke marijuana and take Xanax and would occasionally drink alcohol. Holly moved in with Father when she turned eighteen, and because Father would take sleeping pills or combine Nyquil with alcohol, she would have to wake him up to ensure he would get to work. Because of this, Holly did not feel comfortable leaving Father alone with Brynn. But Father was involved with Brynn while she and Holly lived with him. Shortly thereafter, Holly and Father split and they signed "custody papers" that allowed Father to see Brynn "every other weekend and every Wednesday." Father reliably showed up for his weekend visits but not for the Wednesday visitations. In December 2015 when Brynn was four years old, Holly moved five hours away from Father.

[3]Brynn was born in approximately 2011.

Father initially would see Brynn one weekend a month, but those visits quickly "faded out." When Father would take Brynn, which was usually for a week at a time, he "sometimes" would return her unbathed and would not return her to Holly on time. Father paid child support for Brynn only "a handful of times."

After splitting from Holly, Father, who was nineteen, began a relationship with seventeen-year-old Mother, who had one child—Chris—and was pregnant with a second. Mother's second child, Pam, was born in March 2015. Father consented to be listed as Pam's father on her birth certificate because he did not want Mother to put Pam up for adoption. *See* Tex. Fam. Code Ann. § 160.204 (West Supp. 2016) (providing presumption of paternity requires more than inclusion on birth certificate). Father and Mother's relationship was sporadic, with Mother and her two children moving in with Father and then moving out multiple times.

On May 9, 2015, the Department of Family and Protective Services (DFPS), the appellee, received a referral regarding Pam "alleging that the legal father, [Father], had overdosed on Xanax[, Nyquil,] and alcohol. It was stated that [Father] appeared to lack the protective capacities to care for the three vulnerable children [i.e., Chris, Pam, and Brynn] in the home." During its investigation, DFPS "received another referral on July 12, 2015. It stated that [Pam], three months old at the time, was seen with rashes and bites on her body. This report was eventually ruled out." On October 23, 2015, DFPS received a third referral:

> It stated concerns with the children's living conditions, specifically with the children being exposed to marijuana use. [DFPS] staff discovered that the children were living in a home where a home member was a regular user of marijuana. [Mother] did not appear to be using marijuana, but was unable to secure a stable and safe living situation for her family.

DFPS removed Chris and Pam from Father and Mother's care in November 2015 and placed the children with a foster family—Fran and Mike Smith and their two children.[4] DFPS placed Mother and Father under a service plan in December 2015. Father agreed to and did initially participate in the recommended services even though he was neither Chris's nor Pam's biological or presumed father. Indeed, Father participated in a substance-abuse evaluation in June 2015 that concluded there was a "High Probability" Father had a "Moderate to Severe Substance Use Disorder." But Father soon stopped his participation in the services because "there was no reason . . . to do them because . . . [he] wasn't gonna get any type of custody over [Chris or Pam]." He also said he stopped because Mother "wasn't doing everything that she was supposed to be doing."

Also in December 2015, Mother told Father that she was pregnant, with conception having apparently occurred in September or October 2015 shortly after DFPS's investigation began. Father stated that the pregnancy was an accident. Father also stated that he was involved with Mother's prenatal care and took her to two or three doctor's appointments. But the only prenatal care Mother received was one visit with a nurse when she was five months pregnant.

[4]The Smiths are related to Chris's biological father.

Mother smoked throughout her pregnancy, which Father knew and did not stop. In fact, Father also smoked. Mother gave birth to Luke in June 2016.

B. AFTER LUKE'S BIRTH

Although Father stated he was not in a relationship with Mother when Luke was born,[5] Father was at the hospital for Luke's birth, and several members of his family also came to the hospital. Father was involved with Luke's care, changing diapers and helping with "anything that the hospital wasn't taking care of." But Father told hospital staff members the day Luke was born that he wanted a paternity test. He suspected he was not Luke's father because Mother had not been living with Father "the whole time."

DFPS investigator Julia Cabin was called to the hospital soon after Luke's birth based on Mother and Father's "open conservatorship case where there were some concerns about providing [for] the safety and well-being" of Chris and Pam. Father told Cabin that he wanted a paternity test but stated that he "would still be in [Luke's] life if he wasn't" Luke's father. Cabin discovered that neither Mother nor Father had completed the services in the case involving Chris and Pam even though the plan had been in place since December 2015.

At the time of Luke's birth, court orders in the case regarding Chris and Pam prohibited Mother and Father from having unsupervised contact with children under sixteen. Thus, Mother and Father voluntarily agreed to place

[5]At the time of Luke's birth, Mother was living with Father and had been since May 2016.

Luke with the Smith family, and the Smiths took Luke home from the hospital on July 3, 2016. *See id.* § 161.108 (West Supp. 2016). Father visited Luke four times in July 2016 but stopped after that, choosing instead to drop off Mother for the scheduled visits. Shortly after Luke's birth, however, Father bought Mother a bus ticket to Louisiana because "[s]he was lazy" and he did not want her living with him anymore. On July 22, 2016, Father tested positive for codeine and opiates.

C. PETITION TO TERMINATE, PATERNITY ISSUE, AND SERVICE PLAN

On August 12, 2016, DFPS filed a petition seeking temporary managing conservatorship of Luke with a goal of reunification, but alternatively seeking to terminate Mother's and Father's parental rights to Luke based on twelve alleged statutory acts or omissions. *See id*. § 161.001(b)(1)(D)–(E), (G), (I)–(Q) (West Supp. 2016). On August 15, 2016, the trial court ordered that Luke would continue to live with the Smiths "until [DFPS] determines the placement is no longer in the child's best interest or until further order of this Court." On August 25, 2016, the trial court signed an agreed order for paternity testing, directing Father to submit to a parentage test on a date directed by DFPS. *See id.* § 160.502(a) (West 2014). Around this same time, Mother and Father voluntarily relinquished their parental rights to Pam and consented to DFPS being named her managing conservator.[6] Father stated that after Mother relinquished her

[6]The record does not reflect whether Mother relinquished her parental rights as to Chris as well, but he was still with the Smith family in 2017.

parental rights to Pam, Father did as well because he "didn't realize that [Mother] wasn't a good parent and [Pam] was most likely better off where she was"—with the Smiths. In September 2016, Father was ticketed for public intoxication after he had approximately six beers over the course of two hours.

On September 14, 2016, the trial court held an adversary hearing, at which neither Mother nor Father personally appeared.[7] The trial court then entered temporary orders, which appointed DFPS as Luke's temporary managing conservator, listed the actions Mother and Father were to take to obtain Luke's return, and granted them supervised access to Luke. At the hearing, the trial court recognized that Father had been ordered to submit to a paternity test, heard evidence about only Mother's failure to cooperate with DFPS, and noted that he would sua sponte "expedite[]" a termination trial as to Mother and "not play[] the normal year game" because of her noncompliance and instability. *See, e.g.*, *id.* § 105.004 (West 2014) (allowing trial court to grant motion filed by party, amicus attorney, or child's attorney ad litem and give termination case precedence if ordinary scheduling practices will affect child's best interest), § 262.2015 (West Supp. 2016) (allowing court to accelerate trial schedule if parent subjected child to "aggravated circumstances"). On September 26, 2016, Father submitted to a paternity test. On October 11, 2016, Mother filed an affidavit of voluntary relinquishment of her parental rights to Luke. *See id.*

[7]As mentioned earlier, Mother was living in Louisiana at this point, but her court-appointed attorney did appear at the adversary hearing.

§ 161.103 (West Supp. 2016). The paternity-test result came back October 12, 2016, confirming that Father was Luke's biological father.

On October 13, 2016, Father signed a service plan with DFPS, agreeing to several services and actions he should complete to gain reunification with Luke, which was DFPS's stated primary goal at the time it filed its petition.[8] *See id.* § 263.103 (West Supp. 2016). These services were similar, but not identical, to those that were in the December 2015 service plan regarding Chris and Pam. The trial court entered temporary orders, approving the service plan and adjudging Father to be Luke's biological parent. *See id.* § 160.636 (West Supp. 2016). At a status hearing held that same day, Father stated that he planned to file an application for a court-appointed attorney that day and that his intention was to complete the services and "get [Luke]." The trial judge pointed out that Father had "been through this process for more than a year" regarding Pam and that Father had relinquished his parental rights to her, questioning why Father would "think that it is going to be any different this time around." The trial judge then instructed DFPS to seek a trial date close in time to the February 2, 2017 permanency hearing:

> I will note that this case is set for a permanency hearing February 2nd, 2017, but under the circumstances I am going to deviate from that standard schedule. . . . I am going to direct [DFPS] to obtain a

[8]Father previously had not agreed to a service plan or visited Luke before his paternity was established because he got "a bad reaction" from the trial court when he previously participated in court-ordered services for Pam before he and Mother voluntarily relinquished their parental rights to her.

> jury trial setting on this case around the same time, depending on whatever is available, and that will be roughly halfway into the case from the time the child was taken into [DFPS's] care. And in the event, [Father], your participation in services is going well and it appears to me that you have made a good faith effort to engage in those services and to put yourself in a position to make that showing, I will reset the trial date for sometime later down the road. But, based upon your poor performance of services in the last case, I am frankly not holding my breath and I don't think it is in [Luke's] best interest to delay the inevitable if you are not going to do any more - - to stabilize yourself, much less demonstrate that you can provide a safe and stable environment for your child in this case. So I am going to go ahead and set the case for trial and we will see how it goes, with the ability to reset that farther down the road if you are doing well and need more time to complete services, okay.

When DFPS stated to the trial judge that Father's application for a court-appointed attorney was complete except for "one more line," the trial judge stated, "You will have to bring it back at another time when I can spend some time possibly looking over that and then asking you if I have any follow-up questions." The next day—October 14, 2016—the trial court's administrator notified Mother and Father that trial had been set for February 27, 2017.

On December 21, 2016, Father presented a financial affidavit to the trial court and requested a court-appointed attorney. The trial court found Father indigent based on his sworn application, which reflected that Father had no monthly income, and appointed counsel to represent him—Cynthia Burkett. *See id.* § 107.013(a), (d) (West Supp. 2016). In the order, the trial court reiterated that the permanency hearing was set for February 2, 2017, and noted that final trial was set for February 27, 2017.

On January 27, 2017, DFPS filed a permanency report again noting that its primary goal was reunification. In the report, DFPS noted that Father was at least partially compliant with some of the recommended services, including submitting to drug testing and testing negative, but that he had no record of paying the court-ordered child-support or medical payments; was noncompliant with visitation and counseling; consistently missed visitation appointments; and had not provided proof of stable employment or housing. Luke's guardian ad litem's report, filed January 31, 2017, noted the same deficiencies by Father and further reported that Father continued to consume alcohol to intoxication, missed twenty-one of twenty-four possible counseling sessions, and had started a new job on January 19, 2017. As did DFPS, the guardian ad litem stated that her primary goal for Luke was family reunification.

D. Permanency Hearing and Continuance Requests

On February 2, 2017, twenty-five days before the scheduled trial date and six weeks after Burkett's appointment, the trial court held the permanency hearing. Luke's DFPS caseworker testified that Father was participating in the service plan:

> [Father] has started his counseling. . . . [H]e has completed four or five sessions that I have record of. And so he's actively completing that. He had scheduled his psychological [evaluation] for December; however, the provider needed to reschedule. . . . He did provide a sign-in sheet for NA meetings today. They are not five in a week, but he has been participating . . . .

> He has been on and off on looking for a job. I believe he has found one recently, but I do not have a current paystub. He has been drug tested . . ., all were negative.
>
> In the previous [DFPS case regarding Chris and Pam,] he had completed a drug assessment [in June 2015] . . . . [W]e would recommend a new drug assessment be completed . . . .

But she also stated that he was inconsistent with visits, taking advantage of only six of fifteen visitation opportunities with Luke. Father testified that he had not worked consistently but that the last time he consumed alcohol had been "[a] few months ago." At the end of the hearing and after the trial judge reminded the parties that trial was set "at the end of this month," DFPS stated that "the current goal is family reunification. [Father] has started making progress on his services. It is not as far as [DFPS] would like, but at this point we do not have grounds for termination."

Burkett, Father's appointed attorney, then stated that she had a scheduling conflict with the week the trial was set, which she had previously disclosed to DFPS. The trial judge "interrupt[ed]" Burkett and stated, "You are gonna have to be removed and we will appoint a new attorney." The trial judge then reaffirmed that the termination trial nevertheless would begin on February 27, 2017:

> Your client [i.e., Father] basically thumbed his nose at all this and said I'm not doing services until I know that it is my child. So he caused delay in performing services and then he waited until last month to come in and ask for - - I'm sorry, of December [2016] to ask for an appointed attorney when he could have made that request much earlier and any possible scheduling issues that would create could have been addressed.

So at this late date we are just gonna have to get somebody new in the case. And the case is set for trial at the end of this month, and what happens happens. But based on what I've heard today, when I set this on a short leash for trial, my intent was to see how [Father] is doing, and if there appears to be a miraculous turnaround then we can always push that out. I'm not hearing a miraculous turnaround.

In fact, the visits, we'll fix that little problem, there are no visits. I'm suspending possession until after the trial. And we are going to keep the trial date. That's not to say anybody can't file a motion for continuance. . . . But this does not, based on what I have heard, at least, classify as one of those extreme circumstances that will justify a continuance or extension of the case. I know we are not there yet, but the same logic applies. Bottom line is, [Father] is the one that elected to put himself in the corner, put his back against the wall. I think the child's permanency is an overriding concern and I'm gonna continue to focus on that.

. . . .

. . . I will substitute appointed counsel and we will make sure it is somebody that's available for a trial on that date in the event the case proceeds to trial. But I can't allow a parent's decisions, being fully advised that those decisions may put their back against the wall with respect to the schedule that the case is on and the need for permanency that their child has, to then dictate the way all the rest of us are going to proceed.

. . . .

. . . And [DFPS] can nonsuit this case at any time if it wishes to. Bottom line is, when a parent has already had their rights to two other children terminated, and they take the position that [Father] has taken in this case and, frankly, from what I hear he is not capable of looking out for himself right now, much less a child. To me, that is grounds for termination. . . .

I don't know what you need, but I don't know why we're having these cases at all if the expectation isn't for parents to actually do the things they are ordered to do. And if [DFPS] is not going to expect the parents to follow the orders and, unless they commit some cardinal sin, not going to pursue the case to termination, I, for

> one, don't want them in my court anymore. . . . I don't like jerking around with these cases and parents that aren't gonna do the things that they are ordered to do. And I had a one-on-one conversation with [Father], you understand you can wait and not do services until you are sure that this is your child.[9] But if you do that, you are gonna be wasting every day, every week, every month it takes to get those paternity test results back, and that's what he chose to do. I am not letting that decision back the rest of us into a corner.
>
> So . . . [DFPS] needs to decide what they want to do, because apparently [DFPS's] expectations are not consistent with my own. . . .

In the resulting permanency order, the trial judge noted that Father "is participating and needs to continue to participate to demonstrate adequate and appropriate compliance with the service plan" but allowed Father supervised visitation.[10] The next day—February 3, 2017—the trial court appointed Kelly Robb to represent Father.

On February 9, 2017, six days after she was appointed to represent Father, Robb filed a verified motion for continuance of the trial date. She argued a continuance was necessary because (1) DFPS's goal was reunification, rendering a trial premature; (2) she needed additional time to prepare; and (3) mediation would be "advantageous." She also noted that Luke's guardian ad litem did not oppose the continuance and that a statutory extension would not be

---

[9]This "one-on-one conversation" does not appear in the appellate record.

[10]In a February 28, 2017 report to the court, the guardian ad litem stated that Father's visitation had "been suspended." Thus, it appears that notwithstanding the contrary language in the trial court's February 2, 2017 permanency order allowing Father supervised visitation, the parties and the trial court proceeded thereafter as if Father had no visitation rights.

required based on the September 18, 2017 dismissal date. *See* Tex. Fam. Code Ann. § 263.401(a) (West Supp. 2016). On February 13, 2017, DFPS also moved for a continuance and noted that the dismissal date was not until September 18, 2017. Both motions were set for a hearing on February 23, 2017, four days before the scheduled start of the trial. At the beginning of the hearing, the trial judge stated that he was not inclined to continue the trial date primarily based on the prior termination case regarding Chris and Pam:

> I want to give you all an idea where I'm coming from. It would be one thing just to look at the immediate cause and consider where we are in the motion for continuances in the context of this case, but I think that would be wholly insufficient. I am [sua sponte] taking judicial notice also of [the case regarding Chris and Pam] and the contents of the court's file in that case as well, because what that reveals is that [Father] has had two children before the court, including the one in the instant case. And that the child in the instant case was born during the pendency of the 2015 case.
>
> The 2015 case resulted in the removal of the children [i.e., Chris and Pam] by [DFPS], one of whom was [Father's]. It eventually resulted in the entry of a temporary order on November 4, 2015 following an adversary hearing, at which time [Father], although he had been served, did not appear. In other words, knowing that [Pam] had been removed by [DFPS], and that his parental rights were at risk, he simply didn't even bother coming to court and defaulted. He was ordered to perform services, and during the pendency of that case that began in October of 2015 he wholly failed at satisfactorily completing services.
>
> And while he voluntarily relinquished his right to [Pam], I guess you could say to his credit he did so, the handwriting was really on the wall. We were up against a trial setting in that case and it was clearly headed towards termination. Frankly, he did the right thing in relinquishing his rights to that child, based on his complete failure to demonstrate that he was capable of providing a safe and stable environment supporting his child. And that final order of

> termination was entered October 3rd, 2016 during the pendency of the immediate case. . . .
>
> So, backing up, the child in the instant case is born in June of 2016 at a point in time where we're kind of at the tenth hour in the case involving the older child, and at a point where he's wholly failed to do services and to work in any way productively towards reunification of his relationship and retention of his rights to that child.
>
> And it is really against that backdrop that this proceeding has taken place to this point in time, and against that backdrop for which I'm considering the merits of the motions for continuance and the trial setting next Monday. In other words, this isn't new and independent from all of that, and I don't think it would be appropriate for me, or the Court of Appeals if they were to second guess me down the road, to look at this in a vacuum without also considering all of that other history in that other unrelated but intertwined case involving a different child and sibling of the child before me today.
>
> . . . .
>
> . . . [Father] has had the opportunity to do services for well over a year. He failed to in the other case, so he shouldn't be credited in this case because he needs more time to complete services. All of that was at a time when he knew this child was on the way. And then after the child was born, that he knew he may be the father of this child, he chose to even then delay any consideration of services until after a DNA test proved that he was the father.
>
> So, in my view and in my perspective, it would be nothing but rewarding him for his indifference, his flippant attitude about bettering himself for the benefit of his children in this case, to disregard his opportunity to have been doing that since 2015.

DFPS challenged the trial judge, pointing out that Luke had not been in its care for nine months, which was a requirement for one of the alleged termination grounds, and that whether it would request termination of Father was uncertain if the trial began on February 27, 2017. *See id.* § 161.001(b)(1)(O). DFPS further

noted that it agreed with Robb that mediation should be scheduled. The guardian ad litem stated that she also supported a continuance because she needed DFPS to be "an active partner" in seeking termination as opposed to reunification and because "there are some other issues that could potentially come back and create instability in the permanency situation." Robb then stated that she did not file Father's continuance motion to give Father more time to comply with the service plan but did so to request mediation and to allow her time for trial preparation, especially after the trial judge stated he would consider the case involving Chris and Pam as well. She averred that Father would not be "getting adequate representation at trial if we go next week." The guardian ad litem likewise pushed for a continuance so the case could go to mediation because she was "also a little fearful of potential outcomes of a trial at this point." The trial judge then continued beginning Father's portion of the trial until March 6, 2017—one week—because of an unwillingness "to set it more than a month out"; however, he required the parties to appear on February 27 to try the case as to Mother.

On February 24, 2017, the guardian ad litem filed a motion to refer the case to mediation. The next Monday—February 27—the trial court granted the motion and ordered the mediation to take place no later than March 5, 2017—that Sunday.

E. TRIAL REGARDING MOTHER[11]

The same day that it ordered the case regarding Father to mediation—February 27, 2017—the trial court called the case for trial and began hearing evidence regarding Mother. Both Robb and Father appeared at trial. The trial court recognized that Mother had signed a voluntary relinquishment in October 2016 and heard evidence that termination of her parental rights would be in Luke's best interest. After sua sponte taking judicial notice of "the entirety of the Court's file" in the termination case regarding Chris and Pam, the trial court entered an interlocutory order terminating Mother's parental rights at the end of the hearing and reaffirmed that the evidence regarding Father would begin to be heard "this following Monday, March 6th, 2017." The guardian ad litem then informed the court that the case would be mediated the next day—February 28, 2017.

F. TRIAL REGARDING FATHER

On February 28, 2017, the guardian ad litem filed a report with the trial court in which she noted that Father had completed a parenting program, had submitted to the paternity test as ordered, had verified that he did not "qualify" for a domestic-violence program, had attended counseling since November 2016, had tested negative for drugs, and was scheduled for a psychological evaluation

[11]No party requested a jury; therefore, DFPS's termination petition as to Mother and Father was tried in a bench trial. *See* Tex. Fam. Code Ann. § 105.002(a) (West 2014); *see also* Tex. R. Civ. P. 216.a.

that day. But she also noted that Father was not paying child support or medical support, had an unstable housing history, was not participating in a twelve-step program such as Narcotics Anonymous, and had not maintained stable employment. The guardian ad litem stated that it was her "understanding" that DFPS's "goal [was] Kinship Adoption [by the Smiths] with concurrent goal of Family Reunification" and that she recommended the same:

> [Father's] actions show that he is not prepared to be a stable parent to [Luke]. [Father] has missed many visits with his son, even while he was not employed. On February 2, 2017, [Father's] visitation rights were suspended. [The guardian ad litem] is greatly concerned about [Father's] inability to establish and maintain a stable home and stable employment, and his lack of accountability in not working his services. [Father] signed relinquishment papers on his adjudicated daughter, [Pam] who was removed by [DFPS] on October 26, 2015. [Father] was ordered to complete services in this case as well but neglected to meet many of the requirements on that case.

On Friday, March 3, 2017, DFPS filed an amended termination petition requesting that Father's parental rights be terminated as being in Luke's best interest[12] and narrowing the alleged grounds supporting the requested termination from the twelve alleged in the original petition to three: (1) engaged in conduct or knowingly placed Luke with persons who engaged in conduct that endangered the physical or emotional well-being of Luke; (2) executed, before or

[12]DFPS's amended petition, which for the first time solely sought termination and not reunification, was filed the Friday before evidence regarding Father was presented the next Monday; one month after the trial judge had stated that if DFPS did not seek termination, he did not "want them in [his] court anymore"; and one month after DFPS told the trial judge that it did not have grounds to terminate Father's parental rights as to Luke.

after the suit was filed, an unrevoked or irrevocable affidavit of relinquishment of parental rights as to Luke; or (3) constructively abandoned Luke, who had been in the permanent or temporary managing conservatorship of DFPS for not less than six months and (i) DFPS made reasonable efforts to return Luke to Father, (ii) Father did not regularly visit or maintain significant contact with Luke; and (iii) Father demonstrated an inability to provide Luke with a safe environment. *See id*. § 161.001(b)(1)(E), (K), (N). DFPS did not plead for termination in the alternative to reunification regarding Father, but did so plead regarding Mother.

1. First Day of Father's Trial

The trial regarding Father began on Monday, March 6, 2017.[13] At the start, the trial judge again took "judicial notice of the entire contents of the court's file" in the termination case regarding Chris and Pam.[14] No party had requested the trial court to take judicial notice of this separate proceeding, and the record was not introduced into evidence.

Father's counselor, Cheryl Culberson, testified that he had problems staying off drugs and alcohol, maintaining employment and housing, managing his anger, and following through on his promises. Father attended counseling as ordered, but Culberson eventually discharged him from the program because he failed to show up for several appointments. Culberson recognized that although

[13]Again, this was the second day of trial on DFPS's petition to terminate.

[14]Indeed, DFPS employees testified to Father's actions and inactions in the case involving Chris and Pam.

Father had moved into more stable housing by living with his grandmother[15] and had obtained a job "in the last month," he was "slow" to connect with the services she recommended for him. In fact, Culberson referred Father for outpatient, drug-abuse treatment based on his positive drug test in July 2016 and his abuse of alcohol and over-the-counter medications; however, Father did not follow up on the referral, believing that the prior chemical-dependency evaluation he completed in 2015—finding that he abused alcohol, marijuana, and opioids—was invalid. Culberson was concerned about Father's willingness to change based on the fact that he missed several scheduled sessions and failed to complete treatment even though he had been involved with DFPS since the beginning of the case involving Chris and Pam.

Although Father reported to Culberson that he had not had any alcohol since September 2016, Holly testified that Father told her he was driving drunk in December 2016 and hit a mailbox with his car. She also stated that Father did not consistently pay child support for Brynn, making his last payment in the summer of 2016. In fact, Father told her he would quit his job because he could not make enough money to pay child support and his expenses. But when Father and Holly still lived together, Father cared for Brynn, and Holly's only concern with Father taking care of Brynn by himself was the fact that he was difficult to wake up.

[15]Culberson stated that although living with his grandmother provided a supportive environment, he was isolated and not coping with his stressors.

Myla Welch, the DFPS conservatorship worker who had handled Luke's case since October 2016, testified that Father was inconsistent with his scheduled visitation appointments. She visited Father's grandmother's house on Friday, March 3, 2017, and saw that no preparations had been made for Luke to stay there. Father told Welch, however, that either his uncle or his grandmother would give up their bedrooms so that Father, who had been sleeping on a couch in the living room, could stay in a bedroom with Luke. Welch was concerned that Father could not maintain stable employment. She also related that Father texted her in November 2016 and stated that he knew he was "running out of time" to complete the services. But Welch also stated that Father had passed all of his drug tests since October 2016 and that Father would play appropriately with Luke and would change his diapers when he took advantage of visitation. Father had told Welch in January 2017, however, that his scheduled time for visitations would be problematic with his new job. Finally, Welch testified that Luke had bonded with the Smith family and that their home was a good environment for Luke.

The guardian ad litem testified that Father took no initiative and failed to follow through with the services. She expressed concern with Father's unstable housing and Father's apparent failure to plan for possible reunification with Luke. She recognized that Father was "loving and attentive" to Luke when he visited but that Father had no sense that Luke needed the visits as much as Father and that Father had missed several visitation appointments. And although Father

had told the guardian that he would do anything if Luke was determined to be his child, he did nothing after the paternity test came back. In sum, she testified that Father did not have the tools to care for Luke.

Father, who was twenty-one years old at the time of trial, testified and attempted to explain his noncompliance with the service plan even though he believed that his actions represented his "best efforts." Father sporadically attended Alcoholics Anonymous meetings and stated that he did not actively work the steps suggested by that program because he did not feel that he "need[ed] to." He also did not fully participate in the recommended services in the case regarding Chris and Pam because Mother "wasn't doing hers so . . . I wasn't gonna get any rights [and] there wasn't any point of me doing them, I didn't feel." He partially completed a parenting class in that case but had to start over for Luke. He missed visitation appointments with Luke for various reasons: Father was sick, his car broke down, or he forgot to call and cancel. He recognized that he had seen Luke for only seven hours between October 2016 and February 2, 2017, when the trial judge suspended visitation. He missed some of his scheduled counseling sessions because of a funeral and because of the pretrial mediation.

Father also testified to his monthly income—$800 a month to detail cars—and to his monthly expenses, which did not include rent payments as he had included in his affidavit of indigence but did include the $140 he paid monthly to support his smoking habit. He stated that he stopped paying rent to his

grandmother because she wanted him "to focus more on [his] son." He confirmed he would get medical insurance for Luke and would place him in a daycare program while Father was at work, but Father was unsure how to enroll Luke in an insurance program and guessed that daycare would cost approximately $200 a week. Father stated that he no longer had problems waking up as Holly had stated because he stopped taking over-the-counter sleeping aids and starting setting an alarm. He also testified that he stopped drinking alcohol in September 2016.

During Father's testimony, the trial judge challenged Father's veracity. When Father testified that he had stopped drinking in September 2016, the trial judge stated, "What about drinking and driving and hitting the mailbox [in December 2016]? Be sure about your answers. Don't sit up there and start lying to me or I'll call downstairs and have them prosecute you for perjury. You've already admitted that under oath, right? So you think I'm stupid and I wasn't listening?" When Father testified that he owed $4,000 in child support for Brynn after he resumed making payments, the trial judge questioned the $8,000 he had entered as a child-support debt on his December 2016 affidavit of indigence:

> THE COURT: So when it comes to your testimony here, you want the record to reflect your estimate. But when it comes to the Court considering whether you are indigent, you want the Court to consider the [Texas Attorney General's] estimate because it looks better for you in one way and worse for you in another; is that about right?
>
> [Father]: No.

THE COURT: So why did you tell me 8,000 there and you are telling me 4,000 today?

[Father]: Because if I would have told you 4,000 [in the affidavit] then I would have been lying.

THE COURT: Or you are telling me 4,000 today and you are lying?

[Father]: That's what it is supposed to be.

At the end of the trial day, the trial judge noted that he had a jury trial beginning the next day—Tuesday, March 7, 2017—that would continue through the remainder of the week. The parties apparently agreed to resume the trial on Monday, March 20, 2017. But on March 14, DFPS filed a verified motion for continuance based on a witness conflict. DFPS again noted that the dismissal date was six months later in September. The record does not reflect that the trial court made an express ruling on the motion, but the trial did not resume until Monday, April 3, 2017.

2. Second Day of Father's Trial

On the second day of Father's trial, which was the third day of testimony on DFPS's petition, Jacqueline Fox—the DFPS conservatorship worker who had been involved in the case regarding Chris and Pam and in the beginning of the case regarding Luke—testified as to Father's failure to comply with the service plan regarding Pam and his eventual relinquishment. She stated that Father's actions in getting a ticket for public intoxication in September 2016 and driving drunk in December 2016 showed that Father did not complete a substance-

abuse program or learn coping skills. Based on these behaviors, his failure to maintain significant contact with Luke, his inability to care for Luke full-time, and his unsafe living environment, Fox testified that DFPS was seeking to terminate Father's parental rights. Termination, she averred, would be in Luke's best interest, and she noted that the Smith family would adopt Luke if termination occurred.

Fran Smith testified regarding Luke's foster-family environment. The Smiths have five children in their home, which includes Luke, Pam, Chris, and the Smiths' two children. She is a stay-at-home mother to the children, and the family has a "fantastic support group" consisting of neighbors, family, and church friends. Mike is a police officer. She testified that Luke does not know Father and that Luke is "very happy" and healthy, "[p]hysically . . . right . . . where he needs to be." She confirmed that their goal is to adopt Luke as they had adopted Chris and Pam.

Father's mother's boyfriend, Kyle Hill, testified that Father had a "close-knit family" that would help him raise Luke:

> Someone is always baby-sitting someone else's, . . . someone wants to go on a date, someone has got to go to work, whatever the case may be, there is . . . 15 adults available to baby-sit and pitch in. And [Father's] Aunt . . ., for example, is always passing out . . . Chick-Fil-A cards so you get a free meal . . . . But on a weekly basis [Father] and his brother get Chick-Fil-A cards, one meal they don't have to pay for, two meals they don't have to pay for. Things like that. Diapers, toys, the whole nine yards. The aunts . . . dote on the children.

He described Brynn as "a daddy's girl" and testified that Father displayed good parenting skills with her. Finally, he testified that Father's grandmother's home was an appropriate environment for Luke.

Father was recalled as a witness. Father explained that he previously had not agreed to a service plan or visited Luke before his paternity was established in October 2016 because he got "a bad reaction" from the trial court when he participated in court-ordered services for Pam before he and Mother voluntarily relinquished their parental rights to her. Father also introduced pictures of some of the items he had received after Luke was born, such as a traveling crib, clothes, toys, diapers, a car seat, and formula. Father testified that after his testimony on March 6, he had installed child-safety devices in the bedroom Luke would be sharing with Father and in other areas of his grandmother's home. He also testified that he had found a higher paying job since his prior testimony, raising his pay to approximately $1,920 a month. He did this because he realized after he first testified that he could not support Luke and pay child support for Brynn if he remained in his lower paying job.

The trial judge also questioned Father about his ability to support Luke:

> THE COURT: You do realize you could get a DNA test on your own any time, right?
>
> [Father]: Right.
>
> THE COURT: Would it be fair to say you didn't want to pay for a DNA test, you wanted [DFPS] to pay for a DNA test?
>
> [Father]: I was told that [DFPS] offered it.

THE COURT: Listen to me. Would it be fair to say that you didn't want to pay for a DNA test, you wanted [DFPS] to pay for a DNA test?

[Father]: No.

THE COURT: Okay. So you understand you and [Mother] could have gone and gotten a DNA test before the child was born on your own, right?

[Father]: Yes.

THE COURT: Didn't do it, correct?

[Father]: Correct.

THE COURT: Would it be fair to say you couldn't afford to pay for it at that time?

[Father]: Yes.

THE COURT: So after the child was born and before it was ordered, why didn't you do it then? Still couldn't afford it?

[Father]: I could not.

THE COURT: So you couldn't afford a DNA test for this child, but you think you are in an appropriate position to raise the child?

[Father]: Yes.

THE COURT: Do you understand why that seems ridiculous?

[Father]: I do.

THE COURT: And since I have interrupted, let me go ahead and ask. All of this stuff [shown in the pictures], you didn't offer to provide any of that to the [Smiths] for [Luke's] use, right?

[Father]: I believe that they already had it.

THE COURT: Okay. Did you hear my question? Was it confusing?

[Father]: No.

THE COURT: Do you think you understood what my question was?

[Father]: Yes.

THE COURT: Then how about let's answer it. You didn't offer to provide any of that stuff to the [Smiths], did you?

[Father]: No.

THE COURT: You haven't paid financial child support for [Luke], right?

[Father]: Correct.

THE COURT: At least up until apparently the last paycheck. After this trial began, right?

[Father]: Yes.

THE COURT: No child support whatsoever, zero. No medical support, zero. You are not disputing that, right?

[Father]: Yes.

THE COURT: And you even had clothing, food, other items, a bassinet or a bed, a car seat, things that you know this child could use, and you didn't offer them to the [Smiths] to use for his benefit, right?

[Father]: Yes.

THE COURT: So what are you doing? Are you holding on to all these things as leverage? If I get the child then I will use them for his benefit, otherwise I don't want anybody else to have them, is that what's going on?

[Father]: No.

THE COURT: You understand that's the way it looks?

[Father]: Yes.

THE COURT: By even introducing these today, it begs the question, are you just holding these things back, offering to use them for your child's benefit as long as you can control it, but you don't really care about your child's needs because you haven't supported him otherwise? You understand that's how it looks?

[Father]: Yes, sir.

THE COURT: Can you point me to one thing you've done in your life as an adult, so we are taking about since you turned 18, that would demonstrate, not just words, but demonstrate that you can stick with something to the end, see it through and successfully completed? Because the evidence is that you bounced around from job to job, just don't generally complete things. You bounce around from house to house. You are saying you are ready to be a father, but everything that I've heard says, no, you are not. You don't see things through. Can you point me to something?

[Father]: I have always been there for my daughter and I have raised her since day one.

THE COURT: Anything else?

[Father]: I have had plenty of experience with nephews and nieces ever since I was younger.

THE COURT: And the daughter you are referring to is [Brynn], right?

[Father]: Yes.

THE COURT: And she doesn't actually live with you.

[Father]: No.

THE COURT: So her day-to-day existence is really dependent on someone else's efforts, not yours; is that right?

[Father]: Yes.

THE COURT: And just from the beginning of this case when [Luke] was born, you haven't always even had a place for your own shelter; is that right?

[Father]: Yes, sir.

THE COURT: So it would be unfair to say that you were always able to provide for [Brynn's] needs, because the fact of the matter is you can't always provide for your own needs, even since last July; is that right?

[Father]: Yes, sir.

THE COURT: And even now, all it would take would be your grandmother to say, I'm done, you're out, you are not welcome to stay here anymore. You are entirely dependent on her. Do you see how that's not independence? That's not independent support, independent living when you have to depend on somebody else to provide you with that place to stay.

[Father]: Yes, sir.

. . . .

THE COURT: But you are holding those [gifts] back in case [Luke] comes home, not offering them to the people that can actually use them, right? Is that right?

[Father]: Well, I need them in case - -

THE COURT: Is that right? You are holding them back? Is that right?

[Father]: Yes.

THE COURT: You understand why that upsets me? It insults me as a father and as a judge to hear that crap. Because all you care about is you, not that child. Please continue. In fact, let's just take a break. I'm gonna go cool off. We will be back in 15.

(Break taken.)

But Father also testified that after the first day of his trial, his priority became making more money to support a child, which prevented him from working the services set by DFPS. He stated that he understood the trial judge's concern about his prior failure to support Luke and had attempted to remedy that with better paying, yet less flexible, employment.

3. Order of Termination

At the conclusion of the second day of trial regarding Father's parental rights, both Father and DFPS stated in their closing arguments that DFPS was seeking termination on only two of the three grounds alleged in its March 3, 2017 amended petition: constructive abandonment and endangerment. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E), (N). DFPS, however, recognized that it had not satisfied the constructive-abandonment requirement that Luke be in its care for six months prior to trial; however, DFPS argued that the trial court could "interpret the constructive abandonment in light of the facts here" and terminate Father's parental rights on that ground as well. *See id.* § 161.001(b)(1)(N).

The trial judge stated on the record that he found the "totality of the evidence" supported both the endangerment and constructive-abandonment grounds alleged and that termination of Father's parental rights would be in Luke's best interest. The trial judge also recognized that the six-month requirement regarding constructive abandonment would not have been met "had we completed the trial in February or early March," but stated that "it is clear we have passed that mark at this point [i.e., April 3, 2017]." The trial judge then

stated that he questioned Father's status as an indigent litigant based on Father's testimony:

> And, finally, that in the event of an appeal, the Court intends to reconsider the issue of father's indigency status to the extent that, based on the last affidavit requesting appointment of counsel, because father was unemployed and had zero income at that point in time. That has clearly changed on two different occasions since then, and the second time it changed in a way that the father's income increased by about 25 percent over the last job. So there's been a significant and material change in father's financial circumstances since the application was submitted to the Court back on December 21st, 2016. And, Ms. Robb, just for clarity, your appointment will be presumed to continue for 30 days after the written order is submitted to the Court and signed, during which the Court would retain plenary power to consider any post judgment motions and during which . . . a notice of appeal would have to be filed. And in the event your client wishes to proceed, I wanted to touch on those issues to the extent the Court may need to enter temporary orders and/or revisit any findings previously made concerning father's indigency status, okay.

The trial court signed the order of termination on April 10, 2017, terminating Father's parental rights as to Luke based on clear and convincing evidence of the endangerment and constructive-abandonment grounds and of Luke's best interest and appointing DFPS Luke's permanent managing conservator.

4. Appeal

On April 19, 2017, Robb filed a notice of appeal on Father's behalf.[16] *See id.* §§ 109.002(b), 263.405(a) (West 2014); Tex. R. App. P. 26.1(b). On the same day, Robb filed a motion to withdraw as Father's attorney, stating that there was good cause for her removal because she "does not handle appellate matters

[16]Mother does not appeal from the termination of her parental rights.

in her practice." *See* Tex. Fam. Code Ann. § 107.016(3)(C) (West 2014). She further moved the trial court to appoint appellate counsel for Father. Also on April 19, 2017, Father signed an application for a court-appointed attorney accompanied by his financial affidavit. His financial affidavit showed that his monthly income was $1,760, but his monthly expenses were $1,842. Although Father signed the declaration included in the financial affidavit, it was not sworn.[17] The trial court made a docket entry on April 20, 2017, regarding Father's application:

> [Father] appeared requesting appointment of appellate counsel. Reviewed record and discovered that [Robb] filed Motion to Withdraw and Appoint Appellate Counsel on 4/19/17, but did not present same or corresponding order to trial court prior to filing Notice of Appeal on same date. Per TRAP 25.1(b), COA now has jurisdiction and since no motion for new trial, to correct or modify judgment has been filed, trial court appears to lack plenary power to consider motion absent abatement by COA.

On April 21, 2017—the day after the trial judge refused to rule on Robb's motion to withdraw and on Father's tendered request for court-appointed appellate counsel based on its perceived lack of plenary power—Robb filed a motion to withdraw as Father's appellate attorney in this court. *See* Tex. R. App. P. 6.5, 10.1(a). We granted Robb's motion on April 26 and referred the appeal to the trial court solely "for the appointment of new appellate counsel." We specifically did not request the trial court to inquire into Father's status as an

[17]The record reflects that when Father "tendered" his application for a court-appointed attorney to the trial court on April 20, the court would not sign the declaration because Robb had filed a notice of appeal.

indigent litigant. On that same day, the trial court notified Father that Robb had been allowed to withdraw and that he was required to be present at a May 5 "abatement hearing." The trial court clerk also filed the appellate clerk's record of the termination proceeding that same day.

At the May 5 hearing, the trial judge, DFPS's counsel, and Luke's guardian ad litem questioned Father extensively about his financial status after the trial judge stated that Father's indigence status should be "revisited." Because we had allowed Robb to withdraw as counsel, Father did not have the benefit of counsel at the hearing. Based on Father's testimony, the trial judge concluded that Father was not indigent and, therefore, not entitled to the appointment of counsel:

> So, for the record, my calculations are that [Father's] present income would be an estimated gross income of $26,400 annually, and that's without any overtime, that's just based on the hourly rate of . . . $12 an hour, 40 hours per week . . . . Based on the federal poverty guidelines for 2017 for a person in a two-person family household would be $16,020 annually.
>
> If we were to assume that this is a two-person household, based upon the legal duty to support, and certainly the Court recalls the evidence at trial reflecting inconsistency when it comes to the support of all of the children, but that child in particular for which [Father] still has a duty to support, in short the amount of income is not only significantly different than it was at the time that the original indigency finding was made and counsel was appointed, but it is far in excess of the poverty guidelines, and so my finding is that [Father] is no longer indigent for purposes of appeal and is not entitled to the appointment of counsel for purposes of appeal.

The trial judge did, however, conditionally appoint Dorothea Laster to represent Father should this court conclude "otherwise." We received a

reporter's record from this hearing on May 11, but the trial judge did not sign an order finding Father not indigent until May 15—ten days after the trial court's hearing and five days after Father's deadline to file a motion for new trial passed. *See* Tex. R. Civ. P. 329b(a). The signature portion of the order noted that it had been "**RENDERED** on **MAY 5, 2017**, but **SIGNED** on **MAY 15, 2017**."

On May 16, 2017, we concluded that the trial court had exceeded the scope of our order—to appoint appellate counsel and report the appointment to this court. We recognized that no party had formally challenged Father's presumed, continued indigence as required by statute and we ensured that Laster was listed as Father's court-appointed attorney for appeal. *See* Tex. Fam. Code Ann. § 107.013(e).

Now on appeal, Father argues that the lack of an unbiased and impartial trial judge, which he asserts is apparent from the face of the record, was fundamental error requiring reversal because it "infected the whole proceeding." In the alternative, he asserts that if the trial judge's conduct is not fundamental error, we should review the issue under the rubric of ineffective assistance of trial counsel based on counsel's failures to challenge the trial judge's conduct in the court below through a trial objection, a motion to recuse, or a motion for new trial. Father finally argues, also in the alternative to his first issue, that the evidence was legally and factually insufficient to support either termination ground or that the termination was in Luke's best interest.

II. JUDICIAL BIAS

In his first issue, Father points to the trial judge's comments and actions made throughout this termination proceeding and asserts that the judge's obvious bias and lack of impartiality deprived him of his rights to due process, equal protection, and a fair trial under the United States Constitution. *See* U.S. Const. amend. XIV, § 1. DFPS asserts that Father has waived any error because he did seek to recuse the trial judge or otherwise object to the trial judge's conduct in the court below. Father recognizes that he challenges the trial judge's bias and partiality for the first time in this court but asserts that because these important constitutional rights defy a harm analysis and because their violation affected the framework within which the entire proceeding unfolded, he did not waive the issue. In other words, Father asserts that the trial judge's conduct, clearly showing his bias and lack of impartiality, was fundamental error that may be raised for the first time on appeal. *See In re B.L.D.*, 113 S.W.3d 340, 350–52 (Tex. 2003) (discussing fundamental-error doctrine and holding doctrine did not permit appellate review of claim raising unpreserved jury-charge error in parental-termination appeal); *In re A.L.W.*, No. 02-11-00480-CV, 2012 WL 5439008, at *11 (Tex. App.—Fort Worth Nov. 8, 2012, pet. denied) (mem. op.) (declining to apply fundamental-error doctrine to unpreserved claim directed to admission of testimony from attorney who served as both attorney ad litem and guardian ad litem).

A. PRESERVATION

We begin by noting that recusal and disqualification are different. *See In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428 (Tex. 1998) (orig. proceeding). Disqualification is the mandatory removal of a judge based on grounds set out in the Texas Constitution and is, in effect, jurisdictional in nature because it cannot be waived. *See* Tex. Const. art. V, § 11; *Horn v. Gibson*, 352 S.W.3d 511, 514 (Tex. App.—Fort Worth 2011, pet. denied); *see also* Tex. R. Civ. P. 18b(a) (restating constitutional grounds for disqualification in procedural rule). Recusal, on the other hand, is governed by rule and may be waived if not raised in the trial court. *See* Tex. R. Civ. P. 18a(b)(1), 18b(b)(1)–(3); *Davis v. West*, 433 S.W.3d 101, 107–08 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Father does not raise a constitutional ground mandating the trial judge's disqualification. Therefore, we must address whether Father's failure to object in the court below, which he does not contest, resulted in the waiver of his appellate complaint, which he does contest by relying on the fundamental-error doctrine.

Fundamental error may be found when (1) the record shows on its face that the court rendering the judgment lacked jurisdiction, (2) the alleged error occurred in a juvenile-delinquency case and falls within a category of error for criminal cases on which preservation of error is not required, or (3) the error directly and adversely affects the interest of the public generally, as that interest is declared by constitution or statute. *See In re M.M.M.*, 428 S.W.3d 389, 398 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (citing *Mack Trucks, Inc. v.*

Tamez, 206 S.W.3d 572, 577 (Tex. 2006) and *B.L.D.*, 113 S.W.3d at 350–51). Only the third category is at issue in this appeal.

Although not framing the issue in terms of fundamental or structural error, the Texas Supreme Court has recognized that claims of judicial bias would not be waived by a failure to object in the court below if "the conduct or comment cannot be rendered harmless by proper instruction." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (citing *State v. Wilemon*, 393 S.W.2d 816, 818 (Tex. 1965)). In short, if a trial judge's conduct or comments are incurable, the failure to object may be excused. *See id.* This "limited," "narrow," and "rare" exception to the preservation-of-error requirements in civil cases essentially requires a harm analysis—the error "probably caused the rendition of an improper judgment"—to determine if the error was incurable and, therefore, not subject to waiver. Tex. R. App. P. 44.1(a)(1); *B.L.D.*, 113 S.W.3d at 350–51; *see In re K.R.*, 63 S.W.3d 796, 799–800 (Tex. 2001); *Dow Chem.*, 46 S.W.3d at 241. Accordingly, if a judge's bias and prejudice as shown on the face of the record were harmful, thereby depriving a litigant of his important constitutional right to a fair trial with an impartial fact-finder and resulting in an improper judgment, then a party's failure to object does not waive the complaint. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) (recognizing a biased criminal trial judge is fundamental error, affecting "[t]he entire conduct of trial from beginning to end").

B. FUNDAMENTAL ERROR

A trial court has broad discretion to conduct a trial and may express itself in exercising this discretion. *See Dow Chem.*, 46 S.W.3d at 240–41. Remarks made by the judge "during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* at 240 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Instead, reversible bias or partiality is shown if the judge's conduct showed "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* (quoting *Liteky*, 510 U.S. at 555). We conclude, under the singular facts of this case, that the trial judge's course of conduct throughout the entire proceeding showed a deep-seated antagonism for Father that violated Father's constitutional right to a fair trial, resulting in a judgment that neither this court nor the public generally could be confident was not improper.

1. Pretrial Conduct

The dismissal date for DFPS's petition regarding Luke did not occur by statute until September 18, 2017.[18] *See* Tex. Fam. Code Ann. § 263.401(a). Despite DFPS's, Father's counsel's, and the guardian ad litem's repeated opposition to setting the termination trial almost six months earlier than the dismissal date, the trial judge insisted that the trial begin in February 2017 based on Father's "poor performance of services in the last case"—the proceeding

[18]At the September 14, 2016 adversary hearing, the trial judge referred to this statutory deadline as a "game."

regarding Chris and Pam. In fact, the trial judge stated that a continuance would be possible only if it subjectively appeared to him that Father "made a good faith effort." In other words, the trial judge treated the two termination proceedings as one proceeding: Because Father did not complete the services before relinquishing his parental rights to Pam, who was not his biological child, he could be found to have not complied with a similar, yet different, service plan regarding Luke. The trial judge did so even though Father had agreed to the service plan only four months before the February 27 trial date. The trial judge, believing that Father should have either paid for his own paternity test (although the trial judge himself had declared him to be indigent) or agreed to work services for a child that might not be his (which Father had done with Pam), concluded that Father's time to comply with the service plan regarding Luke began before Luke's birth—when he agreed to the service plan in the proceeding regarding Chris and Pam in December 2015.

Although a trial court may terminate before the dismissal date and otherwise accelerate the statutory scheme governing termination proceedings, the trial judge here did so without making the requisite statutory findings and based on conduct occurring in a prior termination proceeding that did not result in the involuntary termination of Father's parental rights based on section 161.001(b)(1)(D) or (E). *See id.* § 262.2015. And he did so by taking judicial notice of the truth of the facts admitted in the prior termination proceeding without admitting the record from that proceeding into evidence. *See In re E.W.*,

494 S.W.3d 287, 296–97 (Tex. App.—Texarkana 2015, no pet.) (holding trial court may not take judicial notice of the truth of facts admitted in prior termination trial involving same parents absent admission of the prior record into evidence). The statutory scheme governing termination proceedings was enacted to ensure that parental-termination trials result in a correct decision. *See B.L.D.*, 113 S.W.3d at 353; *see also Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."); *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 27 (1981) ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one."). It follows, therefore, that a trial court's substantial deviations from that scheme would result in a fundamentally unfair proceeding. *See generally In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003) ("The State's interests in economy and efficiency pale in comparison to the private interests at stake, and to the risk that a parent may be erroneously deprived of his . . . parental rights and the child may be erroneously deprived of the parent's companionship . . . .").

From the outset, DFPS primarily sought reunification, not termination of Father's parental rights. Indeed, DFPS did not seek termination to the exclusion of reunification until one month after the trial judge decreed at the permanency hearing that he did not want DFPS in "[his] court" unless DFPS sought termination and until three days (two of which were a Saturday and a Sunday) before the evidentiary portion of Father's trial began. Indeed, DFPS stated that it

had no grounds to seek termination regarding Father only twenty-five days before the trial court called the case for trial. In short, the record indicates that the trial judge badgered DFPS into seeking termination before it was deemed necessary because the judge, who was sitting as the fact-finder, had already determined that Father was noncompliant and would never be compliant based on his knowledge of the prior proceeding and his personal "expectations."

At the February 2, 2017 permanency hearing, the trial judge also suspended all visitation for Father and Luke to "fix that little problem" based on unidentified "extreme circumstances" that typically justify an extension of the dismissal date, not the termination of visitation, and without "outlin[ing] specific steps" Father could take to resume visitation.[19] Tex. Fam. Code Ann. § 263.109(b) (West 2014); *see also id.* § 263.401(b).

The trial judge also appointed Robb to represent Father only twenty-five days before he called DFPS's petition for trial. This amount of time, considering that the trial judge had made it clear he would consider not just evidence regarding Luke but also evidence from the separate proceeding regarding Chris and Pam, was insufficient for Robb to discharge her statutorily mandated duties as Father's attorney ad litem. *See id.* § 107.0131(a) (West 2014).

[19]The trial judge mentioned that he had not seen a "miraculous turnaround" from Father since the termination proceeding regarding Chris and Pam but gave no further specifics.

And although Father's first counsel, Burkett, had failed to notify the trial court of her scheduling conflict for trial earlier than the February 2, 2017 permanency hearing, the trial judge laid that failure at Father's feet because Father had "thumbed his nose at all this and said I'm not doing services until I know that it is my child." The trial judge also complained about Father's delay in seeking appointed counsel: "So he caused delay [by] wait[ing] until . . . December [2016] to ask for an appointed attorney when he could have made that request much earlier and any possible scheduling issues that would create could have been addressed." At the October 2016 status hearing, DFPS and Father had tried to present Father's application for court-appointed counsel, which was substantially complete, but the trial judge stated Father would have come back another time when the trial judge had more time to look at it. *Cf. In re E.A.F.*, 424 S.W.3d 742, 747 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (recognizing trial court is required to appoint attorney ad litem to represent indigent parent under section 107.013 even if parent does not request appointment).

When Robb then immediately moved to continue the trial date, which the trial judge did not hear until four days before the scheduled trial date, the trial judge again relied on facts admitted in the termination proceeding regarding Chris and Pam to conclude that Father could not complete services for Luke. And he stated that Father's "indifference" and "flippant attitude" meant that a continuance would only "reward[] him." But even DFPS believed that a

continuance was necessary because at that point it had not decided to seek termination, and the guardian ad litem opposed a quick trial date because she was "fearful of the potential outcome of a trial at this point." In fact, Robb candidly admitted that Father would not be receiving constitutionally effective assistance of counsel if trial began on February 27. Even so, the trial judge extended the beginning of the presentation of evidence regarding Father for one week—until March 6—but called the case for trial on February 27. The trial judge even rushed the mediation, which had been requested by all parties, ordering on February 27 that the mediation had to take place no later than March 5. *Cf. Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986) (holding trial court abused its discretion by denying motion to continue trial after allowing attorney to withdraw two days before trial).

The trial judge also stated at the hearing on Robb's motion to continue that it would not "be appropriate" for this court to "second guess" his decision to consider the prior termination proceeding. This is not a guessing game. We do not guess when reviewing a trial court's rulings. We review lower courts' actions based on the parties' briefing, the appellate record, and the appropriate standards of review. And whether the trial judge here agrees with our analysis and ultimate conclusion or does not agree with them, his attempts to trivialize the judicial process or opine on how or even whether this court should review his actions are inappropriate.

2. Trial Conduct

On the first day of evidence regarding DFPS's petition to terminate Father's parental rights—March 6, 2017—the trial judge again improperly took "judicial notice" of the termination proceeding regarding Chris and Pam. During Father's testimony, the trial judge questioned Father, accusing him of "lying" and threatening to have him prosecuted for perjury. At the end of this day of testimony, the trial judge continued the trial for two weeks based on his own trial schedule. In fact, the trial judge had a trial set to begin the next day—March 7. The trial on DFPS's petition to terminate Father's parental rights ultimately did not resume until April 3.

DFPS introduced evidence regarding Father's actions in the proceeding involving Chris and Pam. Father testified again, and the trial judge questioned him extensively, which we previously quoted. This questioning shows that the trial judge had ceased to be an impartial fact-finder or umpire and was acting as an advocate in favor of termination. *See Cason v. Taylor*, 51 S.W.3d 397, 405 (Tex. App.—Waco 2001, no pet.). The trial judge became irate that Father had not given the Smiths the gifts Father had received after Luke's birth and concluded that he was using the gifts as "leverage." But it seems apparent that the trial judge would not have been satisfied even if Father had done so. Indeed, if Father had given those items to the Smiths, he would not have been prepared for Luke to live with him, which had been pointed out as a failure by Father on the

first day of his trial. In any event, the trial judge characterized Father's testimony on this issue as "crap."

3. Post-Trial Conduct

After orally stating that Father's parental rights were terminated, the trial judge stated that because Father had found a higher paying job the month before, he did not believe Father was indigent. The trial judge then mentioned that if Father decided to "proceed," he would "revisit any findings previously made concerning father's indigency status." After Robb timely filed a notice of appeal and a motion to withdraw, which included a request that new appellate counsel be appointed to represent Father, the trial judge refused to rule on the motion, which resulted in the eventual appointment of appellate counsel occurring after the time to file a motion for new trial had passed. *See In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016) ("Courts have a duty to see that withdrawal of counsel will not result in foreseeable prejudice to the client."); *cf. In re D.W.*, 498 S.W.3d 100, 115–16 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (remanding for new termination trial after concluding Father was denied procedural due process in several respects, one of which was the denial of counsel during thirty-day deadline to file motion for new trial); *In re V.L.B.*, 445 S.W.3d 802, 807–08 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (op. on reh'g) (based on mandatory nature of appointment of counsel for indigent parent, holding trial court erred by proceeding to termination trial without first considering indigence affidavit filed the week before).

The delay in appointing appellate counsel to represent Father during a critical stage of the proceeding was caused (1) by the trial judge's mistaken impression that the notice of appeal deprived him of the power to hear either the motion to withdraw or Father's post-judgment financial affidavit, which were filed before plenary power expired,[20] and (2) by his insistence on setting an evidentiary hearing to "revisit" Father's indigence even though no party had contested it and Father was presumed indigent. Further, Father was not represented by counsel at this hearing, but the trial judge questioned Father at length and allowed DFPS and the guardian ad litem to question him as well about his financial situation. These actions by the trial judge and his previous October 2016 refusal to accept Father's substantially complete and proffered application for court-appointed counsel until the judge had "some time" to "look[] over that" dangerously infringed on Father's constitutional rights to due process and to the assistance of counsel, despite his presumed indigence, and again departed from the statutory scheme governing termination proceedings. *See*

[20]*See* Tex. R. Civ. P. 329b(d) (giving trial courts plenary power for thirty days after judgment signed even if notice of appeal filed); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000) ("A trial court retains jurisdiction over a case for a minimum of thirty days after signing a final judgment."); *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 294–95 (Tex. App.—Dallas 2009, no pet.) ("The filing of a notice of appeal does not divest the trial court of its plenary power."); *Saudi v. Brieven*, 176 S.W.3d 108, 114 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) ("Generally speaking, . . . once an appeal has been perfected *and* the trial court's plenary power to perform certain acts after appeal has expired, the appellate court acquires exclusive plenary jurisdiction over the cause." (emphasis added)).

Tex. Fam. Code Ann. §§ 107.013, 107.0131, 107.016; *Lassiter*, 452 U.S. at 27–32.

C. Conclusion

The trial judge's entire course of conduct, which constituted more than isolated remarks on the record or unfavorable rulings, revealed his deep-seated antagonism against Father that had its apparent genesis in the prior and separate termination proceeding regarding Chris and Pam, neither of which were Father's children. This antagonism infected the entire proceeding, including the trial judge's decision to fast track the termination trial for no other stated reason than that he personally believed Father had not had a "miraculous turnaround" since the prior termination proceeding. The trial judge essentially coerced DFPS into seeking termination to the exclusion of reunification—his personal "expectation[]" for "[his] court"—six months before the statutory dismissal date and less than five months after Father signed the service plan for Luke. And the trial judge's questioning of Father, including his threats to have Father prosecuted and intemperate characterizations of his testimony as "ridiculous" and "crap," reveals that all impartiality had been irretrievably lost.

Father's status as an indigent also was no impediment to the trial judge as shown by the trial judge's failure to consider Father's status as an indigent entitled to the appointment of counsel when the issue was fairly raised by Father and DFPS in October 2016; refusal to continue the trial after Burkett had a scheduling conflict (choosing instead to appoint Robb twenty-four days before

the case was called for trial); refusal to delay the presentation of evidence regarding Father more than six days (even though all parties urged a lengthier continuance and even though the trial judge himself had a trial conflict the next day); insistence that Father should have paid for his own paternity test even though indigent; refusal to recognize Father's presumptive indigence; erroneous refusal to rule on Robb's post-trial motion to withdraw or Father's post-trial indigence affidavit; and delay in appointing appellate counsel during a critical stage of the trial.

We recognize that the trial judge repeatedly stated that his main concern was Luke's best interest and stability. We agree that this is an important and statutory consideration in termination cases. *See* Tex. Fam. Code Ann. §§ 153.001(a), 153.002 (West 2014); *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). But this concern cannot completely override the statutory scheme set in place by the Texas Legislature, which we must strictly construe in favor of the parent, or the constitutional underpinnings of the parent-child relationship. *See In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *In re E.R.*, 385 S.W.3d 552, 567 (Tex. 2012); *C.H.*, 89 S.W.3d at 26. *See generally Santosky*, 455 U.S. at 753–54 & n.7 (1982) (recognizing fundamental liberty interest parent has in his child and concluding State must provide parent with fundamentally fair procedures when seeking to terminate parental rights).

The trial judge here abdicated his responsibility to be neutral and unbiased and to decide this case on only this case's merits. *See* Tex. Code Jud. Conduct,

Canon 3, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. B (West 2013). As a result, his conduct, as clearly shown on the face of the record, revealed a level of bias and partiality that harmed Father by depriving him of his right to a fair trial before an impartial fact-finder and constituted fundamental error. This error probably caused the rendition of an improper judgment and thwarted the proper presentation of this case on appeal. *See* Tex. R. App. P. 44.1(a). Therefore, no objection was required to preserve this harmful error for our review.[21]

DFPS argues that because the admitted evidence was sufficient to terminate Father's parental rights, Father cannot show the requisite harm that would classify the judge's conduct as fundamental error. But the trial judge's conduct occurring throughout the proceeding to terminate Father's parental rights in effect hamstrung Father, his counsel, and DFPS. By expediting the trial outside the statutory structure put in place by the Texas Legislature, by impermissibly considering evidence admitted in the termination proceeding regarding Chris and Pam, by essentially mandating that DFPS seek termination of Father's parental rights, by failing to give Father's counsel sufficient time to prepare for trial, and by acting as an advocate, the trial judge tainted the entire proceeding such that we cannot be assured that the presentation of Father's or

[21]Even were we to conclude that an objection or motion to recuse was necessary to preserve error based on bias or partiality, the trial judge's actions stymied Father's counsel and their ability to represent him, rendering their assistance constitutionally ineffective, as Robb recognized before the trial began.

DFPS's evidence was not prejudiced, thereby denying Father his constitutional rights to an impartial fact-finder and a fair trial. *See generally Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905–09 (2016) (discussing interplay between due process and objective judicial bias based on judge's prior involvement in case as a prosecutor); *Duffey v. State*, 428 S.W.3d 319, 327 (Tex. App.—Texarkana 2014, no pet.) (concluding criminal defendant harmed by judge's objective bias and stating "[c]haracterizing this behavior by a jurist as harmless would undermine public confidence in the judicial system").

We are compelled, however, to make it clear that we are not holding, even implicitly, that the evidence was or was not sufficient to support the termination of Father's parental rights to Luke. Indeed, the evidence as presented and as we have recounted in this opinion may very well have been more than sufficient to meet the requirements of section 161.001.[22] But that is not the point. The point is that the trial judge's conduct tainted the entire proceeding, even the presentation of evidence, such that we cannot be assured that the resulting judgment was correct or that the proper presentation of the case for appeal was not affected. *See In re C.E.C.*, No. 05-16-01392-CV, 2017 WL 2224546, at *2–3 (Tex. App.—Dallas May 22, 2017, no pet.) (mem. op.) (declining to address sufficiency point after concluding trial conducted in Father's absence violated his

[22]We do note that it is doubtful that Luke was in DFPS's custody for the amount of time required to authorize termination based on constructive abandonment, which DFPS recognized at trial. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(N).

right to due process and prevented the proper presentation of case on appeal). For that reason, we must sustain Father's first issue.

We do not address his alternative arguments that delve into the merits of DFPS's petition and the trial, the presentation of which was affected by judicial bias that deprived Father of his constitutional right to a fair trial and an impartial fact-finder. *See id.*; *see also* Tex. R. App. P. 43.3(b) (recognizing rendition inappropriate if "the interests of justice require a remand for another trial"); *In re J.A.J.*, No. 04-14-00684-CV, 2014 WL 7444340, at *3 (Tex. App.—San Antonio Dec. 31, 2014, no pet.) (mem. op.) ("Although our conclusion would ordinarily require us to render judgment . . ., we may exercise our broad discretion to remand for a new trial in the interest of justice when there is a probability that a case has not been fully developed for any reason."); *Ford Motor Co. v. Cooper*, 125 S.W.3d 794, 804–05 (Tex. App.—Texarkana 2004, no pet.) (recognizing discretion to remand for new trial in interest of justice even if evidence found legally insufficient); *cf. Armstrong v. Benavides*, 180 S.W.3d 359, 364 (Tex. App.—Dallas 2005, no pet.) (explaining that although appellate courts generally render judgment if evidence legally insufficient, "an exception is made in cases involving default judgments because the facts have not been fully developed"). Indeed, Father, in his appellate brief, argues legal insufficiency in the alternative

to his judicial-bias issue and prays solely for a new trial based on the fundamental error of judicial bias, not a rendered judgment.[23]

III. DISPOSITION

The trial judge's deep-seated antagonism for Father, which was shown on the face of the record, deprived Father of a fair trial before an impartial fact-finder and resulted in fundamental and harmful error. Accordingly, we sustain Father's first issue, reverse the trial court's order of termination, and remand this proceeding for a new trial regarding Father before a different trial judge. *See* Tex. R. App. P. 43.2(d), 43.3; *Union Pac.*, 969 S.W.2d at 428 (noting if appellate court determines trial judge should have been recused, appellate court "can reverse the trial court's judgment and remand for a new trial before a different judge"); *Hawkins v. Walker*, 233 S.W.3d 380, 401 n.75 (Tex. App.—Fort Worth 2007, no pet.) (same).

[23]Of course, Father's prayer does not dictate our appropriate disposition—the rules of appellate procedure do. *See Garza v. Cantu*, 431 S.W.3d 96, 108–09 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (op. on reh'g). But because we cannot properly assess whether the evidence was legally sufficient based on fundamental error affecting the presentation of evidence and the assistance of counsel, justice demands a new termination trial without our advisory determination of the merits of DFPS's petition. *See* Tex. R. App. P. 43.3(b), 44.1; *cf. Downing v. Burns*, 348 S.W.3d 415, 428–29 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (holding because evidence of defamation was used to support and rebut tortious-interference claim, all claims must be remanded in the interest of fairness even though no evidence supported tortious-interference damages awarded).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: GABRIEL, KERR, and PITTMAN, JJ.

DELIVERED: September 21, 2017