



- 1) although the trial court's charge was erroneous because it omitted the children's best interest as a prerequisite for termination in material parts of the charge, Texas Rule of Civil Procedure 279 requires us to supply the omitted finding in support of the judgment because there is either an express or deemed finding by the trial court that termination is in the children's best interest;
- 2) the concept of "fundamental error" cannot be used to circumvent the application of Rule 279 of our rules of procedure;
- 3) applying Rule 279 does not violate the due process clause of the United States Constitution or due course of law provision of the Texas Constitution;
- 4) because parental conduct on which termination could be based was conclusively established, we do not reach whether the trial court erred in failing to instruct the jury that the same ten jurors must agree that at least one statutorily described course of parental conduct occurred and that termination is in the best interest of the children; and
- 5) assuming, without deciding, that a judgment could be set aside in a parental termination case based on ineffective assistance of a parent's counsel, assistance of counsel in this case was not ineffective.

The factual sufficiency issues raised by the parents in the court of appeals pertain to a ground of termination that is unnecessary to the trial court's judgment. The remaining issues raised by the parents do not require reversal of the trial court's judgment terminating the parents' rights. Accordingly, we reverse the court of appeals' judgment and render judgment that the parent-child relationships are terminated.

## I

Because we consider the record in this case in some detail later in this opinion, we include here only minimal facts and the procedural history. The three children who are the subject of this proceeding were removed from their parents' home by the Texas Department of Protective and Regulatory Services (DPRS)

in October 1997. At that time, the children's respective ages were four years, two years, and seven months.

The children were initially removed without a court order.<sup>2</sup> The next day, the trial court held an emergency removal hearing and appointed the DPRS temporary managing conservator of the children.<sup>3</sup> Five days later, the court held an adversary hearing, continued the removal, and issued temporary orders appointing the DPRS temporary managing conservator.<sup>4</sup>

The trial court thereafter entered various orders directing the parents to perform specific acts to avoid restriction or termination of their parental rights. After working with the family for six months following the children's removal, the DPRS amended its petition in the trial court to seek termination of both parents' rights. A jury trial was held in February 1999, and the trial court rendered judgment in March 1999 terminating the parent-child relationship between each parent and the three children who had been removed from the home seventeen months earlier, in October 1997. A fourth child had been born in January 1999 shortly before trial. That child was removed from the parents at birth but was not the subject of any of the proceedings in this case.

The parents appealed, and the court of appeals, with one justice dissenting, reversed the trial court's judgment and remanded the case for a new trial. The court of appeals concluded that the charge

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<sup>2</sup> See TEX. FAM. CODE § 262.104.

<sup>3</sup> See TEX. FAM. CODE § 262.105.

<sup>4</sup> See TEX. FAM. CODE § 262.201.

permitted the jury to find that the parents' respective rights should be terminated without finding that termination would be in the children's best interest. Although the parents had not objected to the charge on this basis, the court of appeals held that the omission went to a "core issue" in a termination case, and that failing to review the unpreserved error on appeal would violate "Fourteenth Amendment procedural due process" requirements under the United States Constitution.<sup>5</sup> The parents had also complained for the first time on appeal that it was error in a parental termination case to use broad-form submission because less than ten jurors could rely on one basis for termination while other jurors could rely on another basis.<sup>6</sup> The parents contended that there must be a separate finding with regard to each element necessary for termination.<sup>7</sup> The court of appeals rejected these arguments, concluding that broad-form submission was permissible.<sup>8</sup> The dissent would have affirmed the trial court's judgment on the basis that there was either an express or implied finding that termination of parental rights was in the children's best interest.<sup>9</sup>

## II

We first consider the jury charge's submission of the best interest of the children. There is no indication in the record that the trial court or any counsel in the case was under any misapprehension that there are two prerequisites for termination of parental rights under section 161.001 of the Texas Family

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<sup>5</sup> 57 S.W.3d at 72.

<sup>6</sup> *Id.* at 73.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 73-74.

<sup>9</sup> 57 S.W.3d at 75-76 (Gray, J., dissenting).

Code. Section 161.001 sets forth nineteen different courses of parental conduct, any one of which may satisfy the first prerequisite for termination. The second prerequisite under section 161.001 is that termination must be in the child's best interest. However, the written charge to the jury in this case omitted the children's best interest as an element in three material parts of the charge, perhaps because of a typographical error. The submission of the termination issues was as follows:

With regards to [**THE MOTHER**], for the parent-child relationship to be terminated in this case, it must be proved by clear and convincing evidence that she has done at least one of the following:

- 1) 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;

OR

- 2) Failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for abuse or neglect of the child.

With regards to [**THE FATHER**], for the parent-child relationship to be terminated in this case, it must be proved by clear and convincing evidence that he has done at least one of the following:

- Knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children;

OR

- Failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services for not less than nine months as a result of the

child's removal from the parent under Chapter 262 for abuse or neglect of the child. For the parent-child relationship to be terminated in this case, it must also be proved by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the children.

Some factors to consider in determining the best interest of the child are:

1. the desires of the child,
2. the emotional and physical needs of the child now and in the future,
3. any emotional and physical danger to the child now and in the future,
4. the parenting ability of the individuals seeking custody,
5. the programs available to assist those individuals to promote the best interest of the child,
6. the plans for the child by those individuals or by the agency seeking custody,
7. the stability of the home or proposed placement,
8. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and
9. any excuse for the acts or omissions of the parent.

QUESTION 1:

Should the parent-child relationship between [**THE MOTHER**] and [**J.F.C.**] be terminated?

Answer "Yes" or "No."

Answer: \_\_\_\_\_

[similar questions as to the other two children]

QUESTION 4:

Should the parent-child relationship between [**THE FATHER**] and [**J.F.C.**] be terminated?

Answer "Yes" or "No."

Answer: \_\_\_\_\_

[similar questions as to the other two children]

The charge would have accurately instructed the jury regarding the children's best interest if a hard return had been inserted in the instruction regarding the father just before the words "For the parent-child relationship to be terminated . . . ." But as can be seen, the written instruction regarding the father's parental rights mentioned the best interest of the children only in connection with one of the two alternative descriptions of parental conduct. The jury was free to conclude that if the father had endangered the children, his rights could be terminated without any consideration of the children's best interest. Because of the way the written charge was structured, the factors the jury was to consider in determining the best interest of the children were referable only to whether the father had failed to comply with a court order establishing the actions necessary for return of the children.

The written instruction to the jury regarding the mother's parental rights omitted any reference to the best interest of the children. The jury was instructed that her rights could be terminated if there was clear and convincing evidence that she either engaged in conduct that endangered the children or failed to comply with a court order establishing the actions necessary for the return of her children.

Accordingly, the charge in this case omitted a statutorily prescribed element for parental termination. There was no objection to this omission.

**A**

Rule 279 of the Texas Rules of Civil Procedure prescribes the consequences for failing to object to the omission of an element of a ground of recovery. The current version of Rule 279, like its predecessor, embodies long-standing case law that when some but not all elements of a claim or cause of

action are submitted to and found by a jury, and there is no request or objection with regard to the missing element, a trial court may expressly make a finding on the omitted element or, if it does not, the omitted element is deemed found by the court in a manner supporting the judgment if the deemed finding is supported by some evidence.<sup>10</sup> Rule 279 thus directs courts how to proceed when an element of a “ground of recovery or defense” is omitted from a jury charge.<sup>11</sup>

In this case, the trial court’s judgment contains an express finding that termination is in the best interest of the children. It recites that

the Court having reviewed the said verdict of the Jury and the pleadings and the evidence herein is of the opinion that the Petitioners are entitled to the judgment of termination with regard to the children in whose interest this suit is brought, and that such judgment is in the best interest of the children in whose interest this suit is brought.

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<sup>10</sup> Texas Rule of Civil Procedure 279, embodying these concepts, was promulgated in 1941. It essentially tracked the holding in *Wichita Falls & Oklahoma Railway Co. v. Pepper*, 135 S.W.2d 79 (1940).

<sup>11</sup> Rule 279 provides:

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

There is no indication in the record that this finding was made at the request of either party, or after notice and hearing before rendition of judgment, as Rule 279 contemplates.<sup>12</sup> However, there was no objection to the inclusion of this finding in the judgment.

But irrespective of whether that written finding satisfies Rule 279 regarding an express finding, the “omitted element or elements shall be deemed found by the court in such manner as to support the judgment”<sup>13</sup> if there is evidence to support such a finding.<sup>14</sup> Because the judgment terminated parental rights, we must determine whether there is evidence to support a deemed finding that termination is in the children’s best interest.

Due process requires the application of the clear and convincing evidence standard of proof in parental termination cases.<sup>15</sup> This Court has looked to the United States Supreme Court in articulating what the “clear and convincing evidence” standard means.<sup>16</sup> And, following this Court’s decision in *In re G.M.*, the Legislature amended the Texas Family Code to change the burden of proof in termination cases

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<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990) (holding that “[i]f the omitted element . . . is supported by some evidence, we must deem it found against Frito-Lay under Rule 279”) (citing *Payne v. Snyder*, 661 S.W.2d 134, 142 (Tex. App.—Amarillo 1983, writ ref’d n.r.e.) and *FreedomHomes of Texas, Inc. v. Dickinson*, 598 S.W.2d 714, 717 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.)).

<sup>15</sup> *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980).

<sup>16</sup> *See, e.g., State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (following *Addington v. Texas*, 441 U.S. 418, 431-32 (1979)) (defining the standard in a case in which involuntary commitment of an individual to a state mental hospital was sought); *Bentley v. Bunton*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2002) (defining “clear and convincing evidence” in a defamation case); *Huckabee v. Time Warner Entm’t Co.*, 19 S.W.3d 413, 422 (Tex. 2000) (same).

from a preponderance of the evidence to clear and convincing evidence.<sup>17</sup> The Family Code defines clear and convincing evidence in the same manner that this Court has defined that burden of proof: “‘Clear and convincing evidence’ means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.”<sup>18</sup>

## B

We have never considered how to apply the overlay of the clear and convincing evidence burden of proof onto our legal sufficiency, also known as our “no evidence,” standard of review in cases other than defamation cases.<sup>19</sup> However, just recently, in a parental termination case, this Court was called upon to determine how the clear and convincing evidence standard must be applied in a factual sufficiency review.<sup>20</sup> We held in *In re C.H.*, “that the appellate standard for reviewing termination findings is whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State’s allegations.”<sup>21</sup> We expressly “reject[ed] standards that retain the traditional factual sufficiency

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<sup>17</sup> See Act of June 14, 1983, 68<sup>th</sup> Leg., R.S., ch. 298, § 2, 1983 Tex. Gen. Laws 1554, 1555 (former TEX. FAM. CODE § 11.15) recodified by Act of April 20, 1995, 74<sup>th</sup> Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 212 (current version at TEX. FAM. CODE §§ 161.001(1), (2)).

<sup>18</sup> TEX. FAM. CODE § 101.007; *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002) (discussing this Court’s and the Legislature’s use of the same definition of “clear and convincing evidence”); see also *Bentley v. Bunton*, \_\_\_ S.W.3d at \_\_\_ (defining “clear and convincing evidence” in a defamation case) (citing *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d at 422); *State v. Addington*, 588 S.W.2d at 570 (defining the standard in a case in which involuntary commitment of an individual to a state mental hospital was sought).

<sup>19</sup> See *In re C.H.*, 89 S.W.3d at 25 n.1; see also *Bentley v. Bunton*, \_\_\_ S.W.3d at \_\_\_.

<sup>20</sup> *In re C.H.*, 89 S.W.3d at 25.

<sup>21</sup> *Id.*

standard while attempting to accommodate the clear-and-convincing burden of proof.”<sup>22</sup> We concluded that “the burden of proof at trial necessarily affects appellate review of the evidence.”<sup>23</sup> We explained:

Under traditional factual sufficiency standards, a court determines if a finding is so against the great weight and preponderance of the evidence that it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. But that standard is inadequate when evidence is more than a preponderance (more likely than not) but is not clear and convincing. As a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance.<sup>24</sup>

The same logic dictates the conclusion that our traditional legal sufficiency standard, which upholds a finding supported by “[a]nything more than a scintilla of evidence,”<sup>25</sup> is inadequate when the United States Constitution requires proof by clear and convincing evidence. Requiring only “[a]nything more than” a mere scintilla of evidence does not equate to clear and convincing evidence.

We find support for this conclusion, by analogy, in the United States Supreme Court’s decision in *Jackson v. Virginia*.<sup>26</sup> In the criminal, habeas corpus context, the Supreme Court held in *Jackson* that the “no evidence” test it had previously articulated in *Thompson v. Louisville*<sup>27</sup> was “simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt” because “[a] mere

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<sup>22</sup> *Id.* at 26.

<sup>23</sup> *Id.* at 25.

<sup>24</sup> *Id.* (citations omitted).

<sup>25</sup> *Formosa Plastics Corp. U.S.A. v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998) (citing *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996) and *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993)).

<sup>26</sup> 443 U.S. 307 (1979).

<sup>27</sup> 362 U.S. 199 (1960).

modicum of evidence may satisfy a ‘no evidence’ standard.’’<sup>28</sup> The Court defined a “mere modicum” of evidence to include “[a]ny evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence.”<sup>29</sup> The Court concluded that “it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.”<sup>30</sup> The Court explained further:

Application of the *Thompson* [no evidence] standard to assess the validity of a criminal conviction after *Winship* could lead to absurdly unjust results. Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence. Yet a defendant against whom there was but one slender bit of evidence would not be denied due process so long as the jury has been properly instructed on the prosecution’s burden of proof beyond a reasonable doubt. Such results would be wholly faithless to the constitutional rationale of *Winship*.<sup>31</sup>

The availability of habeas review has since been limited by the United States Supreme Court, but a majority of the Court has not modified the *Jackson* standard of review when the merits of a habeas petition are reached.<sup>32</sup>

The reasoning in *Jackson* reinforces our conclusion that to apply our traditional no evidence standard of review in a parental termination case would not afford the protections inherent in the clear and

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<sup>28</sup> *Jackson*, 443 U.S. at 320 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 202 (1964) (Warren, C.J., dissenting)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 320 n.14 (citations omitted).

<sup>32</sup> See generally *Stewart v. Coalter*, 48 F.3d 610, 613-14 (1<sup>st</sup> Cir. 1995).

convincing standard of proof. As the example in *Jackson* highlights, a parent's rights could be terminated based on "but one slender bit of evidence" as long as the jury was properly instructed on the clear and convincing evidence burden of proof. Our legal sufficiency review, therefore, must take into consideration whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof.

The distinction between legal and factual sufficiency when the burden of proof is clear and convincing evidence may be a fine one in some cases, but there is a distinction in how the evidence is reviewed. 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. 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. 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. This does not mean that a court must disregard *all* evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.

If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then

that court must conclude that the evidence is legally insufficient.<sup>33</sup> Rendition of judgment in favor of the parent would generally be required if there is legally insufficient evidence.<sup>34</sup>

In a factual sufficiency review, as we explained in *In re C.H.*, a court of appeals must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing.<sup>35</sup> We also explained in that opinion that 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.”<sup>36</sup> 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. 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.<sup>37</sup> A court

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<sup>33</sup> This standard is similar, but not identical, to the formulation used by federal courts in criminal cases to determine whether the defendant is entitled to a directed verdict of acquittal under the reasonable doubt standard of proof. *See generally* *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947); *United States v. Taylor*, 464 F.2d 240, 243 (2<sup>nd</sup> Cir. 1972); *see also* 2A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 467 (3<sup>rd</sup> ed. 2000).

<sup>34</sup> *See Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 270 (Tex. 2002) (rendering judgment against the plaintiff in a negligence case when there was legally insufficient evidence of proximate cause); *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176, 176-77 (Tex. 1986) (holding that rendition is proper when a no evidence point is sustained); *see also In re D.T.*, 34 S.W.3d 625, 642 (Tex. App.—Fort Worth 2000, pet. denied) (partially rendering judgment for the parents in a termination case because the evidence was legally insufficient to support findings on two statutory grounds for termination).

<sup>35</sup> *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002).

<sup>36</sup> *Id.*

<sup>37</sup> The parameters of legal and factual sufficiency that we have set forth for parental termination cases differ to some degree from those adopted by the Texas Court of Criminal Appeals for criminal cases. *See, e.g., Vasquez v. State*, 67 S.W.3d 229, 236 (Tex. Crim. App. 2002).

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.

A number of our courts of appeals held, prior to our decision in *In re C.H.*,<sup>38</sup> that a legal sufficiency review in a case in which the burden of proof is clear and convincing evidence is the same as in a case in which the burden of proof is a preponderance of the evidence.<sup>39</sup> We disapprove of those decisions' articulation of the standard of review on appeal. At least five courts of appeals' decisions have concluded that a heightened standard of review applies when the burden of proof is clear and convincing evidence,<sup>40</sup>

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<sup>38</sup> 89 S.W.3d 17 (Tex. 2002).

<sup>39</sup> See *W.B. v. Tex. Dep't of Protective & Regulatory Servs.*, 82 S.W.3d 739, 741 (Tex. App.—Corpus Christi 2002, no pet.); *In re J.M.M.*, 80 S.W.3d 232, 240 (Tex. App.—Fort Worth 2002, pet. denied); *In re A.L.S.*, 74 S.W.3d 173, 178 (Tex. App.—El Paso 2002, no pet.); *In re R.G.*, 61 S.W.3d 661, 667 (Tex. App.—Waco 2001, no pet.); *In re I.V.*, 61 S.W.3d 789, 794 (Tex. App.—Corpus Christi 2001, no pet.); *In re L.S.R.*, 60 S.W.3d 376, 378 (Tex. App.—Fort Worth 2001, pet. denied); *In re A.V.*, 57 S.W.3d 51, 61-62 (Tex. App.—Waco 2001, pet. granted); *In re J.O.C.*, 47 S.W.3d 108, 113 (Tex. App.—Waco 2001, no pet.); *In re A.P.*, 42 S.W.3d 248, 256 (Tex. App.—Waco 2001, no pet.); *In re V.R.W.*, 41 S.W.3d 183, 190 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001, no pet.); *In re J.M.T.*, 39 S.W.3d 234, 238 (Tex. App.—Waco 1999, no pet.); *Leal v. Tex. Dep't of Protective & Regulatory Servs.*, 25 S.W.3d 315, 321 (Tex. App.—Austin 2000, no pet.) (stating that a heightened standard applies, but actually applying “more than a scintilla” standard); *In re P.R.*, 994 S.W.2d 411, 415 (Tex. App.—Fort Worth 1999, pet. dismissed w.o.j.); *In re J.N.R.*, 982 S.W.2d 137, 142 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1998, no pet.); *In re W.A.B.*, 979 S.W.2d 804, 806 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, pet. denied); *Hann v. Tex. Dep't of Protective & Regulatory Servs.*, 969 S.W.2d 77, 82 (Tex. App.—El Paso 1998, pet. denied); *In re D.L.N.*, 958 S.W.2d 934, 936 (Tex. App.—Waco 1997, pet. denied); *In re B.R.*, 950 S.W.2d 113, 119 (Tex. App.—El Paso 1997, no writ); *Lucas v. Tex. Dep't of Protective & Regulatory Servs.*, 949 S.W.2d 500, 502 (Tex. App.—Waco 1997, writ denied); *Edwards v. Tex. Dep't of Protective & Regulatory Servs.*, 946 S.W.2d 130, 137 (Tex. App.—El Paso 1997, no writ); *Spurlock v. Tex. Dep't of Protective & Regulatory Servs.*, 904 S.W.2d 152, 155-56 (Tex. App.—Austin 1995, writ denied); *In re J.F.*, 888 S.W.2d 140, 141 (Tex. App.—Tyler 1994, no writ); *In re A.D.E.*, 880 S.W.2d 241, 245 (Tex. App.—Corpus Christi 1994, no writ); *D.O. v. Tex. Dep't of Human Servs.*, 851 S.W.2d 351, 353 (Tex. App.—Austin 1993, no writ); *In re L.R.M.*, 763 S.W.2d 64, 67 (Tex. App.—Fort Worth 1989, no writ).

<sup>40</sup> *In re C.D.B.*, No. 13-01-492-CV, 2002 WL 31730029, at \*2 (Tex. App.—Corpus Christi December 5, 2002, no pet. h.); *In re W.C.*, 56 S.W.3d 863, 867-68 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001, no pet.); *Rodriguez v. Tex. Dep't of Human Servs.*, 737 S.W.2d 25, 26-27 (Tex. App.—El Paso 1987, no writ); *Subia v. Tex. Dep't of Human Servs.*, 750 S.W.2d 827, 831 (Tex. App.—El Paso 1988, no writ); *Neiswander v. Bailey*, 645 S.W.2d 835, 836 (Tex. App.—Dallas 1982, no writ).

but the standards they articulated differ in varying degrees from our holdings in *In re C.H.*<sup>41</sup> and in this case today.

We note that the parents have not argued that the United States Constitution requires appellate courts to conduct a *de novo* review in parental termination cases like the *de novo* review that the United States Supreme Court has held is required in defamation cases<sup>42</sup> and for punitive damage awards.<sup>43</sup> The parents' only constitutional challenge regarding the best interest of the children is that violations of due process under the federal Constitution and of the due course of law provision in our state Constitution have occurred because there is no specific finding answered by the jury that termination is in the children's best interest. We consider this argument in section II.D. below. In the absence of any contention that the federal constitution requires a *de novo* review of the evidence, we leave open, as we did in *In re C.H.*, whether the United States Constitution requires the type of review set forth by the United States Supreme Court in *Harte-Hanks*<sup>44</sup> and *Bose*,<sup>45</sup> and if so, whether the standards we have set forth above would comport with the *de novo* review required by those decisions.

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<sup>41</sup> 89 S.W.3d at 25.

<sup>42</sup> *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685-86 (1989); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 515-16 (1984).

<sup>43</sup> *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

<sup>44</sup> 491 U.S. at 685-86.

<sup>45</sup> 466 U.S. at 515-16.

Finally, we note that our decision in *Garza v. Maverick Market, Inc.*<sup>46</sup> is distinguishable. *Garza* concerned a wrongful death claim by an illegitimate child. This Court reaffirmed its prior holding in *Brown v. Edwards Transfer Co.*<sup>47</sup> that “[i]f paternity is questioned in a wrongful death action, the alleged child would have to prove by clear and convincing evidence that he is a filial descendant of the deceased.”<sup>48</sup> Our Court had adopted the clear and convincing evidence standard in such cases to maintain consistency with the Legislature’s choice of the clear and convincing evidence standard in connection with other legitimacy issues under the Probate Code and the Family Code.<sup>49</sup> The United States Supreme Court had not mandated a clear and convincing evidence burden of proof. Accordingly, this Court, not the federal constitution, imposed a clear and convincing burden of proof in *Garza*. The Court’s statements in *Garza* that if there is “some evidence,” the case must go to the jury, that “we ‘consider all of the evidence in the light most favorable to the plaintiff, disregarding all contrary evidence and inferences,’” and that “[t]he question of whether the evidence clearly and convincingly prove[s paternity is] a question for the jury to determine,”<sup>50</sup> do not control when, as here, we are considering a constitutionally mandated clear and convincing evidence burden of proof.

We turn to evidence in this case of whether termination is in the children’s best interest.

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<sup>46</sup> 768 S.W.2d 273 (Tex. 1989).

<sup>47</sup> 764 S.W.2d 220, 223 (Tex. 1988).

<sup>48</sup> *Garza*, 768 S.W.2d at 275-76.

<sup>49</sup> *Brown*, 764 S.W.2d at 223.

<sup>50</sup> *Garza*, 768 S.W.2d at 276.

## C

In applying the standards set forth above, we consider the evidence that supports a deemed finding regarding best interest and the undisputed evidence. We do not consider evidence that a factfinder reasonably could have disbelieved.

Child Protective Services (CPS) began monitoring the parents and offering services on a continuing basis in March 1997. At that time, there were three children. J.F.C. was four years old, A.B.C. was two and one-half years old, and M.B.C. had just been born. The family lived on the campus of the Texas State Technical College.

The incident that gave rise to CPS's continual monitoring of this family was a report that the parents "had serious drug problems" and that they were physically abusive to one another. An investigator went to the home to meet with the parents and examine the children. After initially refusing to permit the investigator to see the three children, the parents ultimately allowed the investigator to examine the oldest child and the infant. The investigator did not see any indication of abuse or neglect of these two children and noted that J.F.C. seemed happy. However, the parents told the investigator that two-and one-half-year-old A.B.C. was with a babysitter and was therefore unavailable for examination. The CPS investigator went to the babysitter's home, but she denied having seen the child that day. CPS then contacted the Texas State Technical College police, who accompanied the CPS investigator back to the family's home. It was only then that the parents produced A.B.C., and the investigator learned that the mother had hit A.B.C., leaving dark bruises surrounding the outside of the child's eye.

In an interview shortly after CPS discovered that A.B.C. had been abused, the father told a CPS counselor that his wife (the children's mother) was "very physically violent" and physically attacked him. He also said he was concerned for the safety of his children because their mother brought other men home and had sexual relations with them. There were also other people living in the home whom the father said he did not trust. Both parents admitted that during one of their many arguments, the mother had chipped or knocked out one of the father's teeth.

During April 1997, the parents also admitted to being under the influence of illegal drugs while watching the children, and CPS learned that the mother had tested positive for cocaine and methamphetamines shortly after M.B.C.'s birth a month earlier in March 1997. When asked about their drug use at trial, both parents said that they used cocaine while the children were at home and in their care. The mother further admitted to using cocaine within two weeks after giving birth to M.B.C., but she then testified that her children were safe in her care when she was using cocaine because the drug made her "more aware of [her] surroundings" and that they weren't endangered "even a little bit" when both parents were "high on drugs." The father in turn testified that God made cocaine available to him in times of grief and pain and that he was always able to supervise the children in a very caring manner even when he was under the influence of narcotics.

Although CPS knew of the drug use and some of the family violence as early as April 1997, it concluded that removal of the children was not justified because they were not in immediate danger. CPS instead implemented a Child Safety Evaluation and Plan in April 1997. The mother submitted to a psychological exam in compliance with this plan, and based on the results, CPS concluded that she was

not “an immediate threat of harm to the children.” Because the father refused to submit to a psychological exam, CPS referred the case to what it called “family preservation” in July 1997. The next month, the father did submit to a psychological exam, and based on the results of his and the mother’s exam, family preservation recommended counseling.

A Family Service Plan was established in August 1997, five months after the initial instance of child abuse in March of that year. The plan established tasks for each parent, including drug assessments, individual counseling, and marriage counseling. The mother attended three of four scheduled sessions, but the father attended only one before the children were removed in October 1997.

Between April and early October of that year, CPS found no further indication of physical abuse of the children during home visits. However, there was evidence of continued and escalating hostility between the parents from April of 1997 until October 22, 1997, when the children were removed from the home. CPS case workers witnessed arguments and hostility and met with each parent separately during home visits in order to be able to communicate with them. Because of the continual arguing between the parents, CPS recommended day care for the children, to which the parents agreed. Day care commenced the first week of October, but a few days later, another incident of physical abuse of A.B.C. occurred. The parents had arrived to pick up A.B.C. at day care, and the child began what the mother described as a “temper tantrum.” A heated argument between the parents ensued, and the mother grabbed A.B.C. by the throat and face and shoved him into a car seat. A.B.C. later told a case worker that this hurt his neck, and an investigator subsequently found a mark on A.B.C.’s forehead and fingernail scratches on his neck.

The children's attendance at day care thereafter was sporadic because the parents would not take them, even after CPS offered to provide transportation.

There was testimony at trial from Texas State Technical College police officers about domestic disturbances. Their records indicate that they responded to fourteen reports of violence at the family's home. The mother testified that the police came to their home between ten and fifteen times because she and her husband (the father of the children) were "extremely angry and arguing." Some of the visits by the campus police occurred before the DPRS removed the children and while the children were in the home. One of the officers testified that he had been to the home to respond to domestic disturbances and had seen three children. He always checked the children, and there were no signs of physical harm. He described the parents as "venomous" towards one another, and testified that the children definitely heard their fighting. The officer urged the mother many times to seek counseling, identifying several on- and off-campus sources, and at least once offered "any type of assistance [to the father] to overcome any problems."

On two other occasions, in August and October 1997, just before the children were removed, campus police officers went to the home because of domestic violence disturbances. On both occasions, the parents were upset, arguing loudly, and could not communicate with one another. The children were not at home during the latter incident. About a year and a half earlier, in 1996, campus police had given the mother and two of the children a ride home because the father had left them "on foot." (M.B.C. had not yet been born.)

The day the children were removed from the home (twelve days after the car seat incident), the father called the CPS case worker. The father was "very irate" and was "shouting . . . that . . . he wasn't

going to be responsible for the children” and that he was “getting out of there.” While the father was on the phone, the case worker heard an argument between the parents that was escalating. When the phone abruptly went dead, the case worker immediately went to the home. When he arrived, the father had left. The mother was very agitated and highly emotional. She complained about A.B.C., who was almost three years old at this point, saying that he “yelled and screamed all the time,” that he “threw fits,” that “[n]obody could control him or calm him down,” and that she “just didn’t know what she was going to do.” The case worker took the children to day care, found the father, and brought both parents to his office. The parents did not calm down. CPS concluded that it would be unsafe for the children to go home to the parents in that state and asked the parents if there were relatives who could take the children. The mother gave them the name of one person, who declined to provide care for the children. Neither parent could offer any other names. The children remained with CPS that day, and the parents went home. CPS attempted to contact the parents for several days thereafter without success to arrange a visit with the children.

At this point, the DPRS petitioned the trial court to be appointed as temporary managing conservator of the children. The trial court ultimately entered a series of orders setting forth specific actions that each parent was to take. The orders advised the parents that if they did not comply, their children might not be returned and their parental rights could be terminated. The parents both testified at trial that they understood what the orders required and the consequences of noncompliance. The parents also testified that they did not comply with many provisions of family preservation plans CPS had implemented prior to removal of the children. As detailed in section III below, the parents consciously failed to comply with material provisions of the trial court’s orders. Each parent was ordered to pay child support in the

amount of \$100 per month, not for each child, but for all three. The mother testified that although she could financially afford it, she deliberately chose not to pay child support because she believed that she should not have to. The father gave similar testimony. Both parents refused to attend any parenting classes or to attend individual counseling sessions. The father testified that he continued to use illegal drugs. The mother became pregnant with the couple's fourth child, and although ordered by the trial court to obtain prenatal care, she did not do so for the first six months of her pregnancy.

After the children were removed from the home, violence between the parents continued. Seven days after the children were removed, a Texas State Technical College Police officer was again called to the home after a female's screams had been heard. When the responding officer approached the home, the father would not allow him to enter and insisted that the mother was not there. The father was "violent, screaming, yelling, cussing, belligerent, [and] uncooperative." The officer called the father on the phone, and the father continued to insist that the mother was not at home. It was only after the Waco SWAT team arrived that an agreement was reached by phone with the father. He and the mother then appeared at a picture window to show the officers that had gathered at the scene that the mother was not physically harmed.

On another occasion, campus police responded when the father had locked the mother out of the home during an argument even though she was stark naked. She broke a window with her hand and arm to gain re-entry and was cut and bleeding.

Campus police officers also responded to a call eight months after the children were removed when the father struck an eight-year-old neighbor. The police ultimately termed it an accidental striking, even

though the father had threatened to hit the child right before he accidentally hit her. The father was, however, arrested on this occasion for evading detention. The record does not provide details of all fourteen responses by campus police to the home, but an officer described the father as “angry and explosive” and the mother as “[a]ngry, belligerent, nervous, [and] argumentative” in his dealings with them.

There was considerable expert testimony at trial that related to the children’s best interest. One expert testified that the physical violence and verbal confrontations in the home had a negative emotional impact on the children. A.B.C. told this licensed counselor that he had seen his parents hit one another and that his father had hit him with a baseball bat. A.B.C.’s play consisted of male characters hitting female and child characters. One CPS worker observed visits between the parents and the children after their removal. She said these visits tended to be “chaotic” and that the children’s behavior deteriorated after each visit. And there was testimony that the children displayed no distress at being separated from their parents.

A psychologist with over thirty years experience also evaluated both parents. In addition to taking the history of each parent, a battery of formal tests was conducted. This expert concluded that the mother had “manic tendencies, tendencies toward cycles of explosive behavior followed by periods of calm.” He did “not see any real potential for change. I’d have to say her potential is extremely limited.” When asked if the mother “is a fit parent or could she be,” this expert said, “[t]here are too many concerns about aggression and violence and hostility as well as documented things in the history that are giant red flags in regard to parenting, and I would have to say, no, she doesn’t have that capacity.” There was extensive, detailed testimony about the mother’s responses to various questions and standardized tests that directly

related to violence. She also revealed that at some time in the recent past, she had hit a 22-month-old child when she was babysitting.

This same expert testified that during the psychological testing of the father, the father reported an “extensive drug history,” including the use of LSD, amphetamines, cocaine, and marijuana. The expert also testified that psychological testing and medical history indicated that the father suffered from a bipolar disorder and that an unmedicated individual with bipolar disorder who was using “street drugs” was “extremely dangerous.” The doctor testified that he recommended that the father see a psychiatrist who could prescribe medication, but he testified that he believed the father would not comply in taking the medication because he, like other individuals with bipolar disorder, prefers the excitement of the unmedicated state. The expert concluded that the father was “a very troubled individual,” and the expert was “most concerned about the potential for violence, especially since there were so many areas where family conflict was noted.” The expert further testified that the father’s responses to items on a standardized test that related to sexual deviance raised concerns about parenting potential.

There was undisputed evidence that does not support a finding that termination was in the children’s best interest. About a year after the children were removed from the home, the parents moved to Austin. The mother found work there. The parents’ landlord in Austin testified that their home was a “safe environment.” The obstetrician who attended the birth of their fourth child described the parents as “an appropriate, courteous, and loving couple.” There was also evidence that after this termination case was set for trial, the parents made attempts to comply with some parts of the trial court’s order. But in spite

of this evidence, a factfinder could reasonably form a firm belief or conviction that termination was in the children's best interest.

## D

The parents have asserted that the omission of the children's best interest from the jury charge violated the due process clause of the United States Constitution<sup>51</sup> and the due course of law provision of the Texas Constitution.<sup>52</sup> That argument was not preserved in the trial court. But assuming, without deciding, that this complaint could be raised for the first time on appeal, the argument has no merit. Applying Rule 279 to deem a finding in support of a judgment in a parental termination case does not violate the due process clause of the United States Constitution or the due course of law provision of the Texas Constitution.

The United States Supreme Court has held in *Santosky v. Kramer* that “[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”<sup>53</sup> In the termination context, due process “turns on a balancing of . . . ‘three distinct factors.’”<sup>54</sup> Those factors are: “the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.”<sup>55</sup>

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<sup>51</sup> U.S. CONST. amend. XIV, § 1.

<sup>52</sup> TEX. CONST. art. I, § 19.

<sup>53</sup> 455 U.S. 745, 753-54 (1982).

<sup>54</sup> *Id.* at 754 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>55</sup> *Id.*

In a parental termination case, the private interest affected is the right of a parent to raise his or her child, which is undeniably “an interest far more precious than any property right.”<sup>56</sup> The Supreme Court has correctly observed that “[w]hen a State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.”<sup>57</sup> The Supreme Court has thus termed the private interest in a parental termination case “a commanding one.”<sup>58</sup>

The second factor identified by the Supreme Court in *Santosky* is “the risk of error created by the State’s chosen procedure.”<sup>59</sup> On balance, the risk of error caused by Rule 279 is not substantial. Rule 279 deems a finding on an element of a claim only after a full trial on the merits. Rule 279 does not deem an omitted finding in support of the judgment if the parent has objected to the omission or requested a proper submission. And, more importantly, an omitted finding may be supplied by an express finding of the trial court or a deemed finding only if that finding is supported by evidence. In a parental termination case, that evidence must be clear and convincing. A parent may raise legal and factual sufficiency challenges even after the verdict is rendered, and an appellate court will review those challenges on appeal, including the challenges to the legal and factual sufficiency of the evidence supporting the omitted finding. On appeal, the courts also consider whether the evidence was clear and convincing.<sup>60</sup>

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<sup>56</sup> *Id.* at 758-59.

<sup>57</sup> *Id.* at 759.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 754.

<sup>60</sup> *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002).

In this case, the parents' motion for new trial asserted that the evidence was factually insufficient to support a finding that the parents had endangered the children or had failed to comply with court orders specifying the actions they were to take in order to have their children returned. There was an opportunity to challenge the legal and factual sufficiency of the evidence regarding the best interest of the children, but the parents did not avail themselves of that opportunity in the trial court. Nor have they challenged legal or factual sufficiency regarding the best interest of the children in the court of appeals or this Court.

The third due process factor identified in *Santosky* is the governmental interest supporting use of the challenged procedure.<sup>61</sup> The government has a substantial interest in preventing retrial of a case when 1) some but not all elements of a termination action have been submitted to and found by a jury based on clear and convincing evidence or have been established as a matter of law, 2) the trial court renders judgment on the jury's verdict, and 3) there is clear and convincing evidence to support a finding of the missing element. Parents and children also have an interest in resolving termination proceedings as expeditiously as reasonably possible. A retrial results in prolonged uncertainty and disruption in the lives of the parents and children who are involved. The government has a legitimate interest in encouraging a parent to object in the trial court if a statutorily prescribed element of a termination action has been omitted from the court's charge rather than challenging the omission for the first time on appeal. A trial court can easily cure an omission in its charge to the jury if that omission is called to its attention before the case is submitted.

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<sup>61</sup> 455 U.S. at 754.

For these reasons, Rule 279 does not deprive the parents of due process or due course of law.

## E

The dissenting opinions would resolve this case by analyzing whether an omission of an element of a claim in a jury charge is fundamental error. JUSTICE SCHNEIDER’S dissenting opinion urges the Court to do so in order to provide “guidance for practitioners and lower courts.”<sup>62</sup> But the importance of an issue asserted by a party cannot justify ignoring applicable rules of procedure that bind this Court.

Rule 279 *requires* a reviewing court to supply an omitted finding in support of the trial court’s judgment where, as here, there was no objection to the omission in the trial court, and some (in this case clear and convincing) evidence supports the omitted finding. This Court must apply the rules of civil procedure unless a constitutional provision or statute requires us to do otherwise. JUSTICE HANKINSON’S dissent incorrectly asserts that we are considering unpreserved error. Appellate courts should not reverse a trial court’s judgment in violation of Rule 279 any more than appellate courts should reverse a trial court’s judgment for error that was harmless. Rule 279 applies just as Texas Rule of Appellate Procedure 44.1 applies.

JUSTICE HANKINSON’S dissenting opinion seems to reason that since it concludes that the error in omitting an element of a claim was fundamental error, the charge should be reviewed as if an objection had been made. But this reasoning is circular since the fact that no objection was made is precisely why Rule 279 applies. Because of the operation of Rule 279, we have a very narrow question before us regarding

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<sup>62</sup> See \_\_\_ S.W.3d at \_\_\_ (SCHNEIDER, J., dissenting).

“fundamental error.” That question is whether the notion of “fundamental error” can be used to circumvent the operation of Rule 279 when a party fails to object to the omission of an element of a claim against that party. We answer that question “no.” Assuming, without deciding, that the formulation of fundamental error in JUSTICE HANKINSON’S dissenting opinion is correct, deeming an omitted finding in support of a judgment in a parental termination case when that finding is supported by clear and convincing evidence does not adversely affect any “fundamental public policy” found in the Texas Constitution or statutes.<sup>63</sup> Giving full effect to Rule 279 simply means that a court, rather than a jury, has supplied a finding that is supported by clear and convincing evidence on one of the elements of parental termination. Neither the Texas Constitution nor any statute prohibits a bench trial of one or more issues in a termination case when there has been no objection by the parent.

To put this in perspective, suppose that a parent had requested a jury trial, but then failed to object when the trial court conducted a bench trial instead of empaneling a jury, entered findings of fact and conclusions of law, and rendered judgment terminating the parent-child relationship. Would we say that the parent could argue for the first time on appeal that his or her right to a jury trial had been denied because this was fundamental error? The answer to that question is “no.”

JUSTICE HANKINSON’S dissenting opinion concludes that the error in the charge was harmless because “the focus” of the trial was the children’s best interest.<sup>64</sup> JUSTICE HANKINSON’S dissent seems to be saying that in spite of what the jury was told in writing by the trial court’s charge, the omission of the

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<sup>63</sup> See *id.* at \_\_ (HANKINSON, J., dissenting).

<sup>64</sup> See *id.* at \_\_\_ (HANKINSON, J., dissenting).

children's best interest in three of four material parts of the charge was cured because there was so much evidence and argument from counsel about the children's best interest, the jury must (somehow) have understood that it could not find that the parent-child relationships should be terminated unless it concluded that termination was in the children's best interest.

While we agree that there was legally sufficient clear and convincing evidence that termination was in the children's best interest, most of the evidence relevant to the best interest of the children was also relevant to the grounds for termination based on the parents' conduct set forth in the charge. The jury was not told that it had to reach separate, distinct conclusions not only that there were grounds for termination based on the parents' conduct, but also that termination would be in the children's best interest. The jury was specifically instructed that the best interest of the children must be found in connection with only one of the four grounds for terminating based on parental conduct.

## F

The record before us does not require a remand to the court of appeals for a factual sufficiency review of the deemed finding that termination was in the children's best interest. In the absence of a challenge to the factual sufficiency of the evidence, appellate courts must deem an omitted finding in support of a judgment if there is some evidence<sup>65</sup> (in this case clear and convincing evidence) to support the omitted finding and the other requirements of Rule 279 have been met.

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<sup>65</sup> See *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990) (holding that "[i]f the omitted element . . . is supported by some evidence, we must deem it found against Frito-Lay under Rule 279") (citing *Payne v. Snyder*, 661 S.W.2d 134, 142 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) and *Freedom Homes of Texas, Inc. v. Dickinson*, 598 S.W.2d 714, 717 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)).

Rule 279 permits a trial court to make an express finding on an omitted element if there is “factually sufficient evidence to support a finding.”<sup>66</sup> If the trial court does not make an express finding, “such omitted element or elements shall be deemed found by the court in such manner as to support the judgment.”<sup>67</sup> Rule 279 applies to deemed findings in a jury trial and is a parallel to Rule 299, which applies to deemed findings in a bench trial. Rule 299 provides: “where one or more elements thereof have been found by the trial court, omitted unrequested elements, where supported by evidence, will be supplied by presumption in support of the judgment.”<sup>68</sup> The history of the rules that require deemed findings in both jury and bench trials do not indicate that there is to be any difference in the application of these rules in requiring a court to deem a finding.<sup>69</sup> It is only when there has been a factual sufficiency challenge that is preserved in the trial court that a deemed finding must be reviewed for factual sufficiency on appeal.<sup>70</sup>

The parents in this case have not contended in the trial court, the court of appeals, or this Court that the evidence is factually insufficient to support a finding that termination is in the children’s best interest.

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<sup>66</sup> TEX. R. CIV. P. 279.

<sup>67</sup> *Id.*

<sup>68</sup> TEX. R. CIV. P. 299; *see also* *Wisdom v. Smith*, 209 S.W.2d 164, 166-67 (1948); *Page v. Cent. Bank & Trust Co.*, 548 S.W.2d 802, 804 (Tex. Civ. App.–Eastland 1977, no writ); *Gulf States Theatres of Tex. v. Hayes*, 534 S.W.2d 406, 407 (Tex. Civ. App.– Beaumont 1976, writ ref’d n.r.e.); *Go Int’l, Inc. v. Big-Tex Crude Oil Co.*, 531 S.W.2d 208, 210 (Tex. Civ. App.–Eastland 1975, no writ); *Ives v. Watson*, 521 S.W.2d 930, 934 (Tex. Civ. App.– Beaumont 1975, writ ref’d n.r.e.).

<sup>69</sup> From 1941 until 1988, Rule 279 provided that if “there is evidence to support a finding,” omitted findings would be “deemed as found by the court in such manner as to support the judgment.” When that rule was amended in 1988, there was no indication in the record of the rules proceedings that revised Rule 279 was to meant to change the prerequisite of “evidence,” which was maintained in Rule 299, to “factually sufficient” evidence with respect to deemed findings. *But see* Kilgarlin, *Practicing Law in the “New Age”: The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH. L. REV. 881, 916 (1988).

<sup>70</sup> *See* TEX. R. APP. P. 33.1; *see also* TEX. R. CIV. P. 279.

Accordingly, we need not address whether factual sufficiency of evidence may be raised for the first time on appeal in a parental termination case.<sup>71</sup> The inquiry in this appeal is limited to whether there is *legally* sufficient evidence to support the trial court’s express or deemed finding that termination is in the best interest of the children. The trial court’s deemed finding that termination is in the best interest of the children is supported by legally sufficient clear and convincing evidence.

### III

The parents have an additional complaint about the jury charge. There are two predicates to parental termination under section 161.001 of the Texas Family Code. The first is that one or more courses of parental conduct must be established. The second is that termination must be in the best interest of the children. The gravamen of the parents’ complaint is that the charge does not require the same ten jurors to agree that a parent engaged in at least one particular course of conduct described by section 161.001(1) and that termination is in the children’s best interest. The charge only requires that ten jurors agree that the parent-child relationships should be terminated.<sup>72</sup> They thus contend that this broad-form submission did not satisfy federal due process requirements.

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<sup>71</sup> We express no opinion with regard to the holdings on this issue in the courts of appeals. *See In re M.S.*, 73 S.W.3d 537, 542 (Tex. App.–Beaumont 2002, pet. granted) (holding that a sufficiency challenge must be preserved in the trial court in a parental termination case to be reviewed on appeal); *In re G.C.*, 66 S.W.3d 517, 527 (Tex. App.–Fort Worth 2002, no pet. h.) (same); *In re I.V.*, 61 S.W.3d 789, 794 (Tex. App.–Corpus Christi 2001, no pet.) (same); *In re J.M.S.*, 43 S.W.3d 60, 62 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2001, no pet.) (same); *In re C.E.M.*, 64 S.W.3d 425, 428 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2000, no pet.) (same); *In re A.P.*, 42 S.W.3d 248, 256 (Tex. App.–Waco 2001, no pet.) (holding that a factual sufficiency complaint in a parental termination case may be reviewed even though it was not preserved in the trial court); *In re A.V.*, 57 S.W.3d 51, 56 (Tex. App.–Waco 2001, pet. granted) (same).

<sup>72</sup> The jury was instructed only that “[t]he same ten or more of you must agree upon all of the answers made and to the entire verdict.” As can be seen from the charge, quoted in Section II, *supra*, the only questions to be answered were whether the parent-child relationships should be terminated.

This constitutional challenge was not raised in the trial court. However, even assuming, without deciding, that 1) this argument could be raised for the first time on appeal, and 2) the charge erred in this regard, we do not reach the constitutional challenge because the evidence conclusively establishes that each parent engaged in a course of conduct described by subsection 161.001(1) of the Family Code. Therefore, the alleged error did not cause the rendition of an improper judgment or prevent the parents “from properly presenting the case to the court of appeals.”<sup>73</sup>

Paragraph (O) of subsection 161.001(1) provides that one basis for establishing the parental conduct prong required for termination of parental rights is that a parent “failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the [DPRS] 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.” The State relied on subsection (O) as one of two alternate grounds of parental conduct that could support termination.

It is undisputed that both parents failed to comply with numerous, material provisions of court orders that specifically required their compliance to avoid restriction or termination of their parental rights. During the sixteen-month period between the time the DPRS removed the children and the time of trial, the trial court entered four separate orders.<sup>74</sup> Each order specifically advised the parents that failure to provide

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<sup>73</sup> TEX. R. APP. P. 44.1(a).

<sup>74</sup> The first order, a status hearing order, was signed on December 23, 1997. The next three orders, all permanency hearing orders, were signed on April 28, 1998, August 18, 1998, and December 15, 1998.

a safe environment within a reasonable time could result in restriction or termination of their parental duties and rights or the children not being returned to them. Each order directed each parent to perform specific acts. The mother testified that they knew they had to comply with the orders to obtain the return of the children. But both the mother and the father admitted that they had consciously decided not to comply with many of the requirements imposed by the orders.

There are some provisions of the orders with which the parents partially complied and others for which they offered an excuse for their noncompliance. But even giving full credit to their excuses and partial compliance, there were a number of material provisions of the orders with which the parents completely and undisputably failed to comply. Among other things, each of the four orders required the parents to (1) pay \$100.00 per month in child support for the children while they were in DPRS custody;<sup>75</sup> (2) obtain an individual psychiatric evaluation;<sup>76</sup> (3) participate and make progress in parenting classes; (4) voluntarily submit to random urinalysis testing; and (5) participate and make progress in anger control classes. While the four orders were in effect, the parents never paid a single dollar of child support even though they admitted they were capable of doing so; never attended a single anger control class; and never attended a single parenting class.

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<sup>75</sup> The first order (signed in December 1997) did not order the mother to pay any child support, but ordered the father to pay \$100. The remaining three orders directed each parent to pay \$100.

<sup>76</sup> The parents had undergone individual psychological testing in 1997, before the children were removed, pursuant to the initial Child Safety Evaluation and Plan that CPS had implemented in April 1997. The psychiatric evaluations ordered after removal were to be new, additional evaluations that were distinct from the previous psychological testing.

Similarly, at the time of trial, the parents had yet to obtain an individual psychiatric evaluation. At one point, the mother scheduled a psychiatric evaluation and went to the appointment but refused to participate without her husband being present during the examination. Shortly before trial, the parents made appointments to obtain evaluations during the week after the scheduled trial. But, again, even giving full credit to their last minute efforts to comply, it is undisputed that they were not in compliance at the time of trial and had not complied with that portion of the trial court's orders.

With regard to the urinalysis requirement, the DPRS made no requests for urinalysis under the second order, but the parents admitted and other evidence shows that they refused requests to submit to urinalysis during the time the first order was in effect. And, although they took one requested urinalysis test under the third order, they took only two of the six urinalysis tests requested under the December 15, 1998 order, which were requested in the few weeks before trial.

As noted above, the orders set forth requirements with which the parents partially complied. Prior to April 1998, the mother attended six of thirteen scheduled individual counseling sessions, and the father attended five of eleven. But because the parents missed so many appointments, the therapist expelled them from the program. The orders required the parents to maintain appropriate housing free from abuse, neglect, and safety hazards. As discussed above in section II.C., family violence in the home continued after the removal of the children. And, in June 1998, the parents were evicted from the Texas State Technical College campus. In August or September 1998, about five or six months before trial, the parents moved to Austin. There is some evidence that they had a clean, safe home there. But these sporadic

incidents of partial compliance do not alter the undisputed fact that the parents violated many material provisions of the trial court's orders.

The evidence establishes as a matter of law that the parents failed to comply with the court's orders specifying the actions the parents had to take for the DPRS to return the children to the parents. The record also conclusively establishes that the children were removed from their parents under Chapter 262 of the Family Code, and it is undisputed that they were in the DPRS's custody for more than nine months after their removal. Accordingly, the parental conduct described in subsection 161.001(1)(O) of the Family Code was established as a matter of law. Any error in failing to submit a specific instruction on juror agreement regarding parental conduct was thus harmless.

#### **IV**

The parents additionally contend that their counsel's failure to object to error in the charge and other alleged mistakes during trial rendered his assistance ineffective and that they are entitled to a new trial on that basis. The parents argue that the Sixth Amendment to the United States Constitution entitles a parent to effective assistance of counsel when termination of parental rights is sought. They assert that termination is no less a punishment than imprisonment or even capital punishment.

Several Texas courts of appeals have considered whether the Sixth Amendment or other federal constitutional provisions mandate effective assistance of counsel in termination cases, and they have reached differing conclusions. A number of courts of appeals have concluded that the federal constitution does not

grant that right.<sup>77</sup> At least one court of appeals has indicated that it does,<sup>78</sup> although other statements in its opinion indicate that it concluded that the right flows from section 107.013 of the Texas Family Code that requires appointment of counsel in limited circumstances.<sup>79</sup> Another court of appeals has recognized a right to effective counsel because of both section 107.013 and that court's "procedural due process concerns."<sup>80</sup> At least four decisions in other states recognize a right to effective assistance of counsel in termination cases, two of those basing the right on a statute requiring appointment of counsel, one finding that the right emanates from the due process clause of the Fourteenth Amendment, and the fourth apparently basing its conclusion on the Sixth Amendment.<sup>81</sup>

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<sup>77</sup> *In re A.R.R.*, 61 S.W.3d 691, 695 (Tex. App.—Fort Worth 2001, pet. denied) (Sixth Amendment); *In re B.B.*, 971 S.W.2d 160, 172 (Tex. App.—Beaumont 1998, pet. denied) (holding that the Sixth Amendment right does not extend to parental termination cases, although the parent contended the right to effective counsel stemmed from TEX. FAM. CODE § 107.013); *Artega v. Tex. Dep't of Protective & Regulatory Servs.*, 924 S.W.2d 756, 762 (Tex. App.—Austin 1996, writ denied) (Sixth Amendment); *In re J.F.*, 888 S.W.2d 140, 143 (Tex. App.—Tyler 1994, no writ) (Sixth Amendment); *Krasniqi v. Dallas County Child Protective Servs. Unit of Tex. Dep't of Human Servs.*, 809 S.W.2d 927, 931 (Tex. App.—Dallas 1991, writ denied) (Due process and equal protection under the Fourteenth Amendment); *Posner v. Dallas County Child Welfare Unit of the Tex. Dep't of Human Servs.*, 784 S.W.2d 585, 588 (Tex. App.—Eastland 1990, writ denied) (holding that "the constitutional right to effective assistance of counsel" does not extend to parental termination proceedings without identifying any specific constitutional provision); *Howell v. Dallas County Child Welfare Unit*, 710 S.W.2d 729, 734-35 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

<sup>78</sup> *In re J.M.S.*, 43 S.W.3d 60, 62-63 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2001, no pet.).

<sup>79</sup> TEX. FAM. CODE § 107.103.

<sup>80</sup> *In re B.L.D.*, 56 S.W.3d 203, 211-12 (Tex. App.—Waco 2001, pet. granted).

<sup>81</sup> *In re Oghenekevebe*, 473 S.E.2d 393, 396 (N.C. Ct. App. 1996) (basing right on a statute); *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992) (holding that the test for ineffective assistance of counsel in termination cases is generally the same as in criminal proceedings); *In re Adoption of T.M.F.*, 573 A.2d 1035, 1041 (Pa. Super. Ct. 1990) (holding that "[t]he constitutional rights in a termination proceeding . . . are derived from the due process clause of the fourteenth amendment of the United States Constitution and not the sixth amendment"); *In re Simon*, 431 N.W.2d 71, 74 (Mich. Ct. App. 1988) (basing right on a statute).

We believe that it is prudent to defer the resolution of whether a parent in a termination case may seek a new trial based on ineffective assistance of counsel because in this case, even applying the stringent test set forth by the United States Supreme Court for use in criminal cases, assistance of counsel was not ineffective.

In *Strickland v. Washington*, the United States Supreme Court examined at length the considerations in determining whether counsel in a capital or other criminal case was ineffective.<sup>82</sup> The Supreme Court's observations were extensive. The Supreme Court said at the outset of *Strickland* that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>83</sup> The Court then said there were two components in a criminal case in determining whether assistance of counsel was so defective to require reversal:

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>84</sup>

With regard to the first component, the Supreme Court said:

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<sup>82</sup> 466 U.S. 668 (1984).

<sup>83</sup> *Id.* at 686.

<sup>84</sup> *Id.* at 687.

- “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”<sup>85</sup>
- “The purpose [of the Sixth Amendment’s effective assistance of counsel guarantee] is simply to ensure that criminal defendants receive a fair trial.”<sup>86</sup>
- “Judicial scrutiny of counsel’s performance must be highly deferential.”<sup>87</sup>
- “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”<sup>88</sup>
- “A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”<sup>89</sup>
- “The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.”<sup>90</sup>
- “The court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”<sup>91</sup>

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<sup>85</sup> *Id.* at 688.

<sup>86</sup> *Id.* at 689 (alteration in original).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

<sup>90</sup> *Id.* at 690.

<sup>91</sup> *Id.*

The Supreme Court then said with regard to the second component that even if an error by counsel were professionally unreasonable, that “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”<sup>92</sup> Elaborating, the Court said:

- “Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.”<sup>93</sup>
- “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.”<sup>94</sup>
- “On the other hand, we believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.”<sup>95</sup>
- “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>96</sup>
- “A court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.”<sup>97</sup>
- “A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.”<sup>98</sup>

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<sup>92</sup> *Id.* at 691.

<sup>93</sup> *Id.* at 693.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 694.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 696.

- “Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.”<sup>99</sup>

We reiterate that we leave open the question of whether a claim of ineffective assistance of counsel may be asserted as a basis for reversing a judgment in a parental termination case. Even were we to recognize such a claim, the question of whether our harmless error rule must be discarded in such cases is another significant question that would have to be broached.

But even measuring the parents’ complaints about their counsel against *Strickland*’s standards, assistance of counsel was not ineffective in this case. Although the parents’ complaints about their counsel are numerous, they are not well-founded. First, the parents cite the failure of their counsel to object to the omission of the children’s best interest in material parts of the charge to the jury. Had there been an objection, then no finding would be deemed under Rule 279.<sup>100</sup> However, in light of the entire record, the parents have not “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”<sup>101</sup>

Counsel for the parents demonstrated in voir dire of the jury that he knew that the parents’ rights could not be terminated, regardless of whether the conduct of the parents would otherwise permit termination, unless termination was found by the jury to be in the best interest of the children. He stated:

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<sup>99</sup> *Id.*

<sup>100</sup> *See* TEX. R. CIV. P. 279.

<sup>101</sup> *Strickland*, 466 U.S. at 699 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Now, folks, everyone keeps talking about we are here for a termination of parental rights. Not necessarily true. If the jury votes and says, “We believe that termination of parental rights is in the best interest of the children,” then parental rights are terminated, and no longer will these people ever have the opportunity to be parents with their children. If the jury says, “No, it is not in the best interest of these children to have parental rights terminated,” that doesn’t say that the kids—that my folks go out this afternoon and pick up the kids and go home. What that would say is we all keep working together to try to resolve the situation. Okay? So this isn’t like a criminal case where it’s guilty or not guilty and you can never be tried again because I’ve been found innocent. This isn’t like a car wreck where my client gets up and says, “We either recover the money or we don’t recover the money.” In this case it is not that kind of finality. In this case the jury can say, “Wait a minute. I don’t believe that these folks had a fair chance to do it,” and all you’ve got to do is say, “No, it’s not in the children’s best interest to terminate parental rights,” and what that says is, “Children’s Protective Services, you’ve got to work with them. We all have to work together.” Okay? If you say, “Yes, termination is in the best interest,” that’s it, it’s over. Okay?

Then again, in his opening statement, counsel for the parents stated to the jury:

We’re here because the State of Texas is asking this jury to rubber stamp what they did and say, “Looks good to us. Take the kids.” We’re here because we’re saying, ladies and gentlemen, this jury needs to come back and say, “No, it’s not in those children’s best interest. Do not terminate parental rights,” and what that will say, what that will do is then the State of Texas will have to honestly work with [the parents], and that’s what we’re asking. Thank you.

Subsequently, during the objections to the charge, counsel for the parents demonstrated his ability to compare the language of the charge to the verbatim requirements of the Family Code. Counsel objected to the definition of “clear and convincing evidence” in the charge because it omitted three words that the statutory definition contained. Counsel then affirmatively stated to the court that he had no further objections to the charge. Notably, when it came time for closing arguments, counsel for the parents said nothing about the best interest of the children.

Based on this record, the parents did not overcome the presumption that their counsel's decision regarding the charge error was based on strategy. There is precedent in criminal cases for raising jury charge error for the first time on appeal.<sup>102</sup> There is also precedent for raising some types of charge error for the first time on appeal in juvenile cases.<sup>103</sup> Counsel may have made the strategic decision not to object and to attempt to raise charge error for the first time on appeal in the event the jury returned an adverse verdict. The diligence exhibited by counsel in other aspects of the trial and what appear to be other tactical decisions, as discussed below, also indicate that counsel for the parents may well have made a strategic decision not to object to the omission of the children's best interest in material aspects of the charge.

The parents contend that their counsel's failure to object to the broad-form submission of the termination issues also constituted ineffective assistance of counsel. In light of this Court's decision in *Texas Department of Human Services v. E.B.*,<sup>104</sup> which specifically approved broad-form submission in a termination case, it cannot be said that counsel's failure to object was, "in light of all the circumstances, . . . outside the wide range of professionally competent assistance."<sup>105</sup> While it would certainly have been within the bounds of professional competency to raise an issue in the trial court so that counsel could

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<sup>102</sup> See *United States v. Olano*, 507 U.S. 725, 731-32 (1993) (holding that under Federal Rule of Appellate Procedure 52(b), "plain error" in a jury charge may be considered by an appellate court although it was not brought to the attention of the trial court); *Poindexter v. State*, 942 S.W.2d 577, 588 (Tex. Crim. App. 1996); *Green v. State*, 934 S.W.2d 92, 108 (Tex. Crim. App. 1996); *Ransom v. State*, 920 S.W.2d 288, 303 (Tex. Crim. App. 1996); *Jackson v. State*, 898 S.W.2d 896, 899 (Tex. Crim. App. 1995).

<sup>103</sup> See *State v. Santana*, 444 S.W.2d 614, 615 (Tex. 1969) (holding that a jury charge submitting preponderance of the evidence as the burden of proof was error that could be raised for the first time on appeal), *vacated on other grounds*, 397 U.S. 596 (1970); *R.A.M. v. State*, 599 S.W.2d 841, 844-45 (Tex. Civ. App.— San Antonio 1980, no writ).

<sup>104</sup> 802 S.W.2d 647 (Tex. 1990).

<sup>105</sup> *Strickland*, 466 U.S. at 690.

ultimately implore this Court to reconsider *E.B.*, it is not outside the bounds of competency to follow a decision of this Court.

The parents also contend that counsel's failure to request an instruction not to consider the parents' religious beliefs constituted ineffective assistance of counsel. There was considerable testimony during the trial about the parents' religious beliefs. At one juncture, the father testified that his conduct toward his children should be judged by God, not by a court. At another, the father testified that it was God who made cocaine available to the parents. Instead of requesting a jury instruction, counsel for the parents cross-examined the DPRS witnesses about the relevancy of the parents' religious beliefs and made arguments to the jury that the parents' religious beliefs were irrelevant to the termination inquiry. Even were it assumed that the trial court should have given an instruction to the jury had counsel so requested, it cannot be said that counsel's decision to address the parents' religious beliefs through argument was anything other than a reasonable exercise of trial strategy.

The parents contend that their counsel should have objected to questions they were asked during trial about their sexual conduct with third parties and alleged "sexual deviations." However, their counsel did object, many times, to questions of this nature. The fact that he did not object to each and every question is again within the realm of reasonable trial strategy in light of the record in this case.

At trial, the DPRS called expert witnesses with backgrounds in psychology and social work. The parents contend that their counsel provided ineffective assistance because he did not challenge the reliability of all psychological expert testimony on the ground that there is no scientific basis for predicting future behavior or evaluating individuals. Counsel for the parents did object to the qualifications of one witness,

but not to the scientific reliability of this testimony in particular or the underpinnings of psychology in general. Psychological experts routinely testify in parental termination cases. It was not unreasonable for counsel to fail to take on the reliability of all psychological testimony in this case. More importantly, there is no basis in this record for concluding that had the trial court conducted a hearing on reliability, the evidence would have been shown to be unreliable.

The parents argue that their counsel treated the Family Service Plans developed by CPS as a court order. However, the record reflects that only one Family Service Plan was referenced by a court order in setting forth the tasks that the parents were to perform, and that plan was filed with the court. The other three orders that were in evidence and at issue at trial contained directives to the parents in the orders themselves, wholly apart from any Family Service Plan.

The parents did not receive ineffective assistance of counsel.

## V

None of the remaining issues raised by the parents require reversal. The parents asserted in their motion for new trial and in the court of appeals that there was factually insufficient evidence to support any finding by the jury that either parent had endangered the children. Because the evidence conclusively established other parental conduct described in section 161.001(1) of the Family Code, and there is an express or implied finding by the trial court, supported by clear and convincing evidence, that termination is in the children's best interest, it is immaterial whether an alternate submission regarding parental conduct was supported by factually sufficient evidence.

The parents equate parental termination for failure to comply with the court's orders to criminal contempt. They first argue that criminal contempt requires proof beyond a reasonable doubt. As discussed above, the United States Supreme Court held in *Santosky* that the federal constitution requires a clear and convincing evidence standard of proof in parental termination cases, but not proof beyond a reasonable doubt.<sup>106</sup>

The parents' second contention is that they have been punished with termination of their rights for failing to comply with the trial court's orders delineating what they must do to have their children returned. This punishment amounts to contempt, they argue, and violates the statutory limits on punishment of contempt to six months in jail or a \$500 fine. The Legislature has specifically provided in subsection 161.001(1)(O) that failure to comply with court orders like those issued in this case is grounds for termination. That statute, not the contempt statutes, controls.

The parents contend that the trial court erred in admitting evidence that either the father or the mother brought other men home to have sexual relations with the mother while the father watched. Evidence of other alleged sexual activities was also admitted. However, there was unchallenged testimony from an expert witness that the father "endorse[d]" many of the items on the Minnesota Multiphasic Personality Inventory test that relate to sexual deviance. This expert concluded, without objection, that the father's responses to this standardized test raised concerns about his parenting potential. It cannot be said,

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<sup>106</sup> 455 U.S. 745, 769 (1982).

based on the record as a whole, that the trial court abused its discretion in admitting the challenged evidence.

Finally, the parents contend that one witness, Jasmine Khan, gave an expert opinion when she was not qualified to do so. Counsel for the parents objected on this basis. But even if this witness's qualifications were not demonstrated, her testimony was cumulative of other witnesses.

In sum, any errors committed by the trial court did not require reversal.

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For the foregoing reasons, we reverse the judgment of the court of appeals and render judgment terminating the parent-child relationships between each of the children, J.F.C., A.B.C., and M.B.C., and their mother and father.

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Priscilla R. Owen  
Justice

OPINION DELIVERED: December 31, 2002