

NO. 24-0881

IN THE SUPREME COURT OF TEXAS

In the Interest of K.N., K.L., K.L., and K.L., Children

*On Petition for Review from the 7th Court of Appeals, Amarillo, Texas
Cause No. 07-24-00146-CV*

PETITIONER'S REPLY BRIEF

MICHELSSEN LAW FIRM
Jay A. Michelsen, SBN 24088057
112 West Main Street
Canadian, TX 79014
Telephone: (806)323-3261
Facsimile: (806)329-0212
jaymichelsen@michelsenlaw.com

Attorney for Petitioner

PETITIONER REQUESTS ORAL ARGUMENT

IDENTITY OF PARTIES AND COUNSEL

PARTIES

Petitioner
Robby Lirille (“R.L.”)

Real Party in Interest
Cama Niccum (“C.N.”)

Respondent
The Department of Family and
Protective Services (“The
Department”)

Real Party in Interest
The Children (“K.N., K.L., K.L.,
and K.L.”)

COUNSEL

Jay Michelsen
112 West Main St.
Canadian, Texas 79014
Tel: (806) 323-3261
Jaymichelsen.esq@gmail.com

Michael J. Sharpee, SBN 00788401
Sharpee Law Firm
P.O. Box 1819
Amarillo, TX 79105
Tel: (806) 367-9713
Fax: (806) 367-9716
mike@sharpeelawfirm.com

Cory A. Scanlon
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711
Tel: (512) 936-1700
Cory.scanlon@oag.texas.gov

Taylor Harris
314 N. Cuyler St.
Borger, Texas 79066
Tel: (806) 665-3788
taylor@rickjharrislaw.com

TABLE OF CONTENTS

| | |
|---|----|
| Summary of the Argument | 1 |
| Issues Presented..... | 2 |
| Identity of Parties and Counsel..... | 3 |
| Table of Contents | 4 |
| Index of Authorities..... | 5 |
| ARGUMENT | |
| I. The Department Misstates UCCJEA Jurisdiction | 7 |
| Summary | 7 |
| A. The UCCJEA Imposes Jurisdictional Prerequisites | 8 |
| B. The Trial Court Lacked Home-State or Substitute Jurisdiction | 9 |
| C. Lack of Jurisdiction Renders the Judgment Void | 10 |
| D. Finality Cannot Cure Jurisdictional Defects | 11 |
| E. The UCCJEA’s Purpose Undermined by the Department’s Theory .. | 12 |
| II. Texas Lacked Jurisdiction Under the UCCJEA at the Time of Filing .. | 13 |
| Summary | 13 |
| A. Home-State Jurisdiction Was Absent..... | 14 |
| B. Emergency Jurisdiction Was Misused | 15 |
| C. No Significant Connection Findings Were Made | 16 |

| | |
|---|----|
| III. Constitutional Defects in (D) and (E) Grounds | 17 |
| Summary | 17 |
| A. In re N.G. Requires Parent- and Child-Specific Findings. | 18 |
| B. Post-Removal Conduct Cannot Support Termination | 19 |
| C. No Ongoing Pattern of Endangerment Shown | 20 |
| D. Due Process Demands Evidentiary Rigor | 21 |
| IV. Best-Interest Findings Cannot Save a Void Judgment | 22 |
| Summary | 22 |
| A. Best-Interest Cannot Salvage Invalid Grounds | 23 |
| B. Appellate Deference Cannot Excuse Constitutional Violations. | 24 |
| C. Respondent’s Brief Offers No Holley-Based Analysis | 25 |
| D. The Judgment Is Void and Must Be Reversed | 26 |
| Conclusion and Prayer for Relief | 27 |
| Certificate of Compliance | 28 |
| Certificate of Service | 29 |

INDEX OF AUTHORITIES

Alfonso v. Skadden, 251 S.W.3d 52 (Tex. 2008) 10, 11, 13

Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71 (Tex. 2000) 1, 8

Engleman Irrigation Dist. v. Shields Bros., Inc., 514 S.W.3d 746 (Tex. 2017)
13

Garza v. Harney, 726 S.W.2d 198 (Tex. App.—Amarillo 1987, no writ)7, 20

Holley v. Adams, 544 S.W.2d 367 (Tex. 1976) 3, 26, 27

In re C.H., 89 S.W.3d 17 (Tex. 2002) 3, 26, 27

In re D.S., 602 S.W.3d 504 (Tex. 2020) 10, 11, 12

In re Dean, 393 S.W.3d 741 (Tex. 2012) 1, 8

In re E.C.R., 402 S.W.3d 239 (Tex. 2013) 28

In re E.N.C., 384 S.W.3d 796 (Tex. 2012) 2, 18, 27

In re E.R., 385 S.W.3d 552 (Tex. 2012) 5

In re G.X.H., 627 S.W.3d 288 (Tex. 2021) 1, 8, 21

In re J.F.C., 96 S.W.3d 256 (Tex. 2002) 2, 17, 25

In re J.T.G., 121 S.W.3d 117 (Tex. App.—Fort Worth 2003) 2, 18, 27

In re K.E.W., 335 S.W.3d 930 (Tex. App.—Texarkana 2011, no pet.) 19

In re K.S.L., 538 S.W.3d 107 (Tex. 2017) 1, 29, 30

In re N.G., 577 S.W.3d 230 (Tex. 2019) 2, 17, 25, 29, 30

| | |
|---|---------------|
| <i>In re J.W.</i> , 152 S.W.3d 200 (Tex. App.—Dallas 2004, pet. denied) | 27 |
| <i>Phillips v. Beaber</i> , 995 S.W.2d 655 (Tex. 1999) | 13 |
| <i>Powell v. Stover</i> , 165 S.W.3d 322 (Tex. 2005) | 1, 8, 10, 21 |
| <i>PNS Stores, Inc. v. Rivera</i> , 379 S.W.3d 267 (Tex. 2012) | 13 |
| <i>Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.</i> , 571 S.W.3d 738 (Tex. 2019) | 13 |
| <i>Santosky v. Kramer</i> , 455 U.S. 745 (1982) | 3, 27, 28, 30 |
| <i>Travelers Ins. Co. v. Joachim</i> , 315 S.W.3d 860 (Tex. 2010) | 1, 29, 30 |
| <i>Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser</i> , 140 S.W.3d 351 (Tex. 2004) | 10, 11 |
| <i>City of DeSoto v. White</i> , 288 S.W.3d 389 (Tex. 2009) | 13 |

Statutes

| | |
|--|---------------|
| <i>Tex. Dep’t of Human Servs. v. Boyd</i> , 727 S.W.2d 531 (Tex. 1987) | 19 |
| Tex. Fam. Code § 152.102 | 6 |
| Tex. Fam. Code § 152.102(7) | 3 |
| Tex. Fam. Code § 152.201 | 1, 6, 7, 8, 9 |
| Tex. Fam. Code § 152.201(a)(1)-(4) | 2 |
| Tex. Fam. Code § 152.201(b) | 2 |
| Tex. Fam. Code § 152.204 | 1, 7, 8 |
| Tex. Fam. Code § 161.001(b)(1)(D) | passim |
| Tex. Fam. Code § 161.001(b)(1)(E) | passim |
| Tex. Fam. Code § 161.001(b)(2) | 3, 26 |

Tex. Fam. Code § 161.211 10, 21, 22

Tex. Fam. Code § 161.211(a) 5

Tex. Fam. Code § 262.002 1, 6, 8, 9

Rules

Tex. R. App. P. 9.4(i)(3) 33

Tex. R. App. P. 59.1 11

Other

Joint Editorial Board for Uniform Family Law, Commentary on UCCJEA Subject
Matter Jurisdiction & Hague Abduction Convention (Nov. 1, 2024) 10, 11

NO. 24-0881

IN THE SUPREME COURT OF TEXAS

In the Interest of K.N., K.L., K.L., and K.L., Children

PETITIONER'S REPLY BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

SUMMARY OF ARGUMENT

The Department's termination judgment rests on jurisdictional and legal defects that compel reversal. First, it mischaracterizes the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as non-jurisdictional, contrary to binding Texas Supreme Court precedent, including *Powell v. Stover* and *In re G.X.H.*, which hold that UCCJEA compliance is a prerequisite to subject-matter jurisdiction and may be raised for the first time on appeal.

The Department initiated this suit after Petitioners, and the children had relocated to Louisiana. It improperly invoked Tex. Fam. Code § 262.002 and failed to establish home-state or emergency jurisdiction under §§ 152.201 or 152.204. No Louisiana court relinquished jurisdiction or communicated with Texas, and the Department did not comply with the UCCJEA's procedural safeguards. As a result, the trial court lacked subject-matter jurisdiction, rendering the termination order void.

Even if jurisdiction existed, the Department’s findings under Tex. Fam. Code § 161.001(b)(1)(D) and (E) are legally insufficient and constitutionally defective. It improperly imputed the conduct of Clare against Kim to justify terminating Ronnie’s rights to unrelated children. This collective attribution violates the mandates of *In re N.G.* and *In re J.F.C.*, which require individualized, parent-specific and child-specific findings.

Moreover, the Department relied on post-removal conduct—such as noncompliance with service plans and fleeing the jurisdiction—to establish endangerment under (E), contrary to *In re E.N.C.* and *In re J.T.G.*, which require pre-removal evidence of endangerment.

The best-interest analysis compounds these errors. It is conclusory, merges predicate grounds with best-interest findings, and fails to assess each child’s specific needs and preferences as required by *Holley v. Adams* and *In re C.H.*

Lastly, the Department misstates the scope of appellate review, erroneously claiming this Court cannot reverse legally unsupported grounds. While factual sufficiency is outside this Court’s jurisdiction, it remains obligated to reverse legally insufficient findings to safeguard due process.

This termination judgment fails at every level: jurisdictionally, constitutionally, and evidentially. Reversal is required.

ARGUMENT PRESENTED

Reply to Response Point I: The Department Mischaracterizes the UCCJEA as Non-Jurisdictional, Ignoring Controlling Precedent

Summary: The Department misstates the law by claiming the UCCJEA is not jurisdictional, defying binding precedent. Under Tex. Fam. Code § 152.201, the UCCJEA exclusively governs custody jurisdiction. At filing, Texas was not the children’s home state, and emergency jurisdiction under § 152.204 was improperly invoked. Subject-matter jurisdiction cannot be waived or retroactively conferred. The Department’s appeal to finality under § 161.211 cannot cure this fatal defect. Because jurisdiction was absent at inception, the judgment is void and must be reversed.

Reply to Response Point II: Texas Lacked Home-State or Substitute Jurisdiction Under the UCCJEA at the Time of Filing

Summary: The Department failed to establish home-state jurisdiction under § 152.201(a)(1) because the children had moved to Louisiana eleven days before the suit. Texas lacked emergency jurisdiction under § 152.204, as the children were not present and no immediate danger existed. The trial court made no significant connection findings, and Louisiana clearly qualified as the home state. The Department's reliance on § 262.002 was legally inadequate, and post hoc theories cannot cure the jurisdictional defect. With no valid UCCJEA basis, the trial court lacked jurisdiction, rendering the judgment void.

Reply to Response Point III: The Termination Grounds Under (D) and (E) Are Legally Defective and Constitutionally Invalid

Summary: The Department's predicate findings under § 161.001(b)(1)(D) and (E) are constitutionally defective and lack legally sufficient evidence. The trial court improperly imputed Clare's abuse of Kim to terminate Ronnie's rights to his unrelated children, violating the parent- and child-specific mandates of *In re N.G.* and *In re J.F.C.* The Department also relied on post-removal conduct—like fleeing and noncompliance—instead of the required pre-removal evidence under *In re E.N.C.* and *In re J.T.G.* With no valid predicate grounds, the termination judgment must be reversed.

Reply to Response Point II: The Best-Interest and Appellate Review Arguments Cannot Cure the Underlying Defects

Summary: The Department's best-interest analysis conflates predicate grounds with conclusory welfare claims, failing to assess each child individually as required by *Holley* and *In re C.H.* Its reliance on § 161.211 and appellate finality is misplaced; that statute bars only collateral attacks, not direct appeals. Subject-matter jurisdiction is never waived and may be challenged at any time. Because the defects are jurisdictional and constitutional, they cannot be cured by best-interest findings or procedural finality.

ARGUMENT

A. Reply to Response Point I: The Department Mischaracterizes the UCCJEA as Non-Jurisdictional, Ignoring Controlling Precedent.

1. The UCCJEA Establishes Jurisdictional Prerequisites, Not Mere Procedural Rules

With regard to the jurisdictional arguments raised by this action, the threshold inquiry is whether the UCCJEA (herein after referred to as the “Act”) governs subject matter jurisdiction in a custody dispute. It is true, Justice Lehrmann’s concurring opinion in *IN RE D.S.*, 602 S.W.3d 504 (Tex 2020) raised the issue, questioning if the Act had anything to do with subject matter jurisdiction. As stated in the majority opinion “The matter is not settled.” Texas courts citing the issue in cases since *D.S.* reached the same conclusion.

Petitioners argue that a plain reading of the statute and its history make it clear the Act is intended to determine subject matter jurisdiction. Obviously, the Act uses the term jurisdiction in its title. Texas Family Code section 152.201 states that its provisions are the exclusive basis for establishing jurisdiction to make a child custody determination in this state. Thus, this state either has jurisdiction under the Act and can make a custody determination or if it does not have jurisdiction under the Act, it may not. This is a hallmark of subject matter jurisdiction.

On November 1, 2024, the Joint Editorial Board for Uniform Family Law issued a commentary on UCCJEA Subject Matter Jurisdiction & Hague Abduction Convention. In this commentary, the drafters of the Act make it clear that the intent was for the Act to govern subject matter jurisdiction.

Child Custody Jurisdiction is Subject Matter Jurisdiction Subject matter jurisdiction, including over a child custody dispute, either exists or does not at the time the petition is filed in court. “The UCCJEA is the exclusive method of determining subject matter jurisdiction in custody cases.” Most courts have found that subject matter jurisdiction cannot be created by the consent, assent, or presence of the parties, nor by their waiver. Subject matter jurisdiction cannot be conferred by estoppel. If the court lacks subject matter jurisdiction to make an initial child custody determination or to modify an existing determination, the judgment must not be issued, and, if issued, must be vacated. A defect in subject matter jurisdiction can be raised at any time by any party or by the court. Therefore, it is well settled in case law throughout the United States that the jurisdiction to establish or modify a child custody determination either exists by statute, or does not. The parties cannot confer such jurisdiction through agreement.

The commentators cite to this Court for support in a footnote for the proposition that subject matter jurisdiction is governed by the act:

Subject-matter jurisdiction cannot be waived, and can be raised at any time. *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004). Because the trial court lacked subject-matter jurisdiction to enter the custody provisions in the 1999 divorce decree, it properly refused to enforce that portion of the decree here. Accordingly, we grant Tarquis's petition for review, and without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and render judgment dismissing the enforcement actions for lack of subject-matter jurisdiction.

Alfonso v Skadden, 251 S.W.3d 52 (Tex. 2008).

Subject matter jurisdiction is thus the tool utilized by the Act to determine, in a mobile society and one in which interstate custody disputes have become more common, when a court can act and when it cannot.

The Honorable Justice Lehrmann starts her analysis by analogizing a sovereign immunity defense with subject matter jurisdiction. In *Engleman Irrigation Dist. V. Shields Bros.*, 514 S.W.3d 746 (Tex. 2017), the Court refused to equate a defense of

sovereign immunity with subject matter jurisdiction, denying a collateral attack on a judgment. While immunity is often raised in a plea to jurisdiction, that is the ability of the plaintiff to even bring the suit, immunity from liability must be raised as an affirmative defense. *Rosenburg Dev. Corp. v. Imperial Performing Arts Inc.*, 571 S.W.3d 738 (Tex. 2019). It is reasonable to say that a governmental entity that had immunity available and did not raise the issue in the underlying action should not be able to later attack a judgment on that basis. However, as cited by the Court, there is reluctance to conclude that a provision is jurisdictional absent clear legislative intent to that effect *City of Desoto v. White*, 288 S.W. 3d 389 (Tex. 2009). In the present case, the plain language of the statute provides that the statute is jurisdictional and is intended to address subject matter jurisdiction.

The Honorable Justice Lehrmann comments that the Act provides that a court can decline jurisdiction and the agreement of the parties as to jurisdiction can be a factor in the analysis, both of which indicate that the Act is not talking about subject matter jurisdiction. It is true that subject matter jurisdiction, as cited by the authors of the Act, is something a court either has or it does not. The idea that the parties may agree on which court has jurisdiction is just a factor for a court to consider in deciding an inconvenient forum challenge. It is only a factor and is not

determinative. It is not like a forum selection clause in a contract. Simply because the parties agree that a different court may have jurisdiction does not mean the court is bound by this agreement by the parties. It is not as if the parties can control which court hears the case by mere agreement, it is only a factor and is not determinative. Likewise, a court can decline jurisdiction under the Act. This does not negate the concept that a court hearing a custody case does not have subject matter jurisdiction. A court, or a court in conference with a sister court, may decide it has jurisdiction under the Act, but under the dictates of the Act the court can decide the sister court should hear the case. This does not negate the concept that the court hearing the case must have subject matter jurisdiction. It is not that the court has “declined” (the term used by the Act) to exercise its jurisdiction.... what it has done is passed that jurisdiction on to another court. It is not that subject matter jurisdiction is being waived by a court, which it could not do and be true subject matter jurisdiction, Petitioner argues that it has essentially transferred that jurisdiction under the dictates of the Act.

The Honorable Justice Lehrmann states the import of the Act is to decide where an action may be brought but not who will hear the action. Petitioner argues that deciding where the action is to be heard is tantamount to deciding who will hear

the action. The Act does not provide that an action may be brought somewhere if that court does not have jurisdiction under the Act. Petitioners read in the Justices' comments that the Act is akin to an interstate venue statute. But the Act does not provide for the ability to transfer an action to another state. As stated in the commentary, the state in question either has authority to act or it does not, there is no transfer. The underlying public policy suggesting that the Act does not implicate subject matter jurisdiction is the need for finality of the judgment, particularly in cases involving custody of children:

Importantly, the principle justification for this Court's general reluctance to view statutory requirements as jurisdictional—ensuring a judgment's finality—is even more pronounced in child-custody cases. Indeed, one of the UCCJEA's primary concerns is avoiding relitigation of custody judgments, which is often detrimental to the child. *Phillips v. Beaber*, 995 S.W.2d 655, 659 (Tex. 1999) (discussing the UCCJEA's predecessor). Holding that noncompliance with the UCCJEA's requirements deprives a court of subject matter jurisdiction over a custody dispute renders the court's judgment vulnerable to collateral attack years later. And the complexity of making home-state determinations in an increasingly mobile world only magnifies this concern. See ante at 513. Such uncertainty harms children and parents alike. See *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 274 (Tex. 2012) (“While no system is infallible, endless litigation, in which nothing was ever finally determined, would be worse than the occasional miscarriage of justice.” (alteration and quotation omitted)).

In Re D.S.

These concerns for finality are not present in the current case. This case presents a direct attack on the jurisdiction of the trial court it is not a collateral attack brought years after a judgment of termination was final and the appellate process was not perused. The children in this case are not put at risk of perpetual limbo. Even without the jurisdictional argument, the children (and the Department and prospective adoptive parents, if any) would have to await the outcome of the appellate process before they know where they will live and with whom. Finality, or the lack of, it is not a concern in making a decision in this case.

In conclusion, the Act does implicate subject matter jurisdiction and this Honorable Court should so find.

B. Reply to Response Point II: The UCCJEA Establishes Subject-Matter Jurisdiction In Custody Proceedings, Rendering The Trial Courts Judgment Void Absent Compliance.

1. The UCCJEA Imposes Jurisdictional Prerequisites, Not Mere Procedural Rules

Petitioner's position on the issue of jurisdiction, as briefly restated from his brief on the merits, is the trial court initiated an initial custody determination after the children and parents moved from Texas to Louisiana. The initial custody determination was based on a petition for emergency order of protection. The statute

referenced in the order as a basis for jurisdiction was Tex. Fam. Code § 262.002. This statute provides that the suit may be filed “in a court with jurisdiction to hear the suit in the county where the child may be found.” Because the children were not in Texas, the court did not have jurisdiction to enter the order. Petitioners take the same position as to emergency jurisdiction under the Act, as stated in its brief on the merits. Based on the analysis in *Garza v. Harney*, 726 S.W.2d 198, 202-03 (Tex.App.-Amarillo 1987), Petitioner argues that the trial court could not regain home state status (acknowledging the Department takes the position that Texas was always the home state) by using law enforcement to forcibly return the children to Texas. Petitioners argue this is using what is only supposed to be a temporary jurisdiction to require the children to return to Texas, where they remained until the final trial of the matter. At that point, the children had been in Texas for a sufficient period to identify Texas as the home state in the final order. Should the State be able to force children to return to Texas when there was no basis to exercise emergency jurisdiction in the first place, and then be able to claim it is the home state with jurisdiction to terminate parental rights? Petitioners argue it should not.

The Department responds that Texas was the home state under the Act for several reasons: the Department argues that it was possible that the whole assertion

that the family had moved to Louisiana was fabricated. Petitioner's testimony that the family had moved out of the state was uncontroverted.

There was no testimony about it other than her testimony. Furthermore, the children were found in Louisiana and the mother arrested there based on warrants for her refusal to return the children to Texas.

The Department argues that the move out of state was in bad faith, i.e. to avoid the Texas court's jurisdiction. Petitioner argues the move was not in bad faith. At the time of the move, parents retained full custody of the children, and there was only an order to participate in services for C.N.. There was no order that the parents had to remain in the state. There was no order giving the Department custody of the children that the parents were allegedly fleeing to avoid. As far the parents were concerned, they were well within their rights to move their family to another state if they so chose.

The Department argues that the move to Louisiana was only a temporary absence and therefore does not defeat jurisdiction under the Act. Petitioners agree that case law makes the parties subjective intent irrelevant under the Act as to whether the move was intended to be temporary or permanent. Nevertheless, there is no evidence that the family left temporarily. This is not a situation where one parent was

exercising summer visitation, or the children were going to visit relatives out of state. Petitioner argues that the issue turns on the definition of “immediately” as used in the code. The Court will have to decide if “immediately” encompasses the eleven days the family had left prior to the filing of the initial custody proceeding. Petitioners argue it does not. Therefore, the Texas court lacked jurisdiction.

The Department argues since there was no home state at the time the initial custody action was filed and the parties had a significant connection with the state of Texas, therefore, Texas could exercise jurisdiction. It would be disingenuous to argue the parties did not have a significant connection with Texas. However, nowhere does the trial court provide that this is the basis for its jurisdiction. The initial custody action cited to was emergency jurisdiction. Petitioner has already argued the trial court did not have emergency jurisdiction. The children did not return to Texas until almost four months after the filing of the initial custody determination. There is nothing in the record to indicate the children would have ever returned to Texas except for their removal by law enforcement. But for that action, it is a reasonable inference that the children would have remained in Louisiana until it had achieved home state jurisdiction. As argued in her brief on the merits, Louisiana had emergency jurisdiction. A suit could have been initiated in Louisiana under the Act. Then the

Louisiana court contacts the Texas court and the significant contacts analysis is done and possibly a determination of significant contacts with Texas is determined. At that point there would have been compliance with the Act. The record does not indicate this ever happened. Without compliance with the Act, Petitioner argues that using emergency jurisdiction to bring the children back to Texas is not contemplated by the Act or case law. Therefore, the Texas court had no jurisdiction to make the initial custody determination.

Finally, the Department argues that Texas Family Code section 161.211 bars Petitioner's attack on jurisdiction. Petitioner admits the statute is problematic. It has been held to bar jurisdictional attacks. Petitioner responds with the following:

a. Counsel cannot represent that he has read thoroughly all 138 cases that cite to the statute. But just a cursory review of at least half of these case demonstrates that it is used in cases involving affidavits of relinquishment and collateral attacks on these affidavits. This case presents a direct attack on an involuntary termination.

b. A plain reading the statute results in any direct attack on an involuntary termination must be dismissed after six months. This leads to the absurd result that if a direct appeal is not resolved in six months it must be dismissed. Regardless of the

basis. This cannot be the result intended by the legislature.

c. Long standing case authority and precedent from this Court holds that subject matter jurisdiction can be raised at any time during the appellate process. This is what Petitioner has done. There is no reason to abrogate this well-established case law when the issue is presented in a direct attack.

Based on the above, if the Act does implicate subject matter jurisdiction, the Texas court did not have such jurisdiction under the Act and the judgment should be declared void.

CONCLUSION

The trial court lacked subject-matter jurisdiction under the UCCJEA because Texas was not the children's home state at the time of filing, and emergency jurisdiction was improperly invoked. This jurisdictional defect renders the judgment void. The orders below should be vacated.

The Department fails to establish jurisdiction under either § 152.201(a)(1) or (a)(2) of the UCCJEA. The record confirms that Petitioners and the children relocated to Louisiana on August 20, 2022, yet the Department delayed filing its suit until August 31—eleven days later. This delay is fatal to home-state jurisdiction,

which requires that the children reside in Texas for six consecutive months immediately before commencement of the proceeding. Nor can the Department invoke “significant connection” jurisdiction under § 152.201(a)(2), as it admits that no Louisiana court relinquished jurisdiction or communicated with the Texas court as required under §§ 152.201(a)(2)–(3). The Department’s reliance on Tex. Fam. Code § 262.002 is equally misplaced, as that provision does not override UCCJEA mandates. Absent a valid jurisdictional basis at the time of filing, the trial court lacked authority to adjudicate the case.

Petitioner contends that the trial court lacked jurisdiction under the UCCJEA because it initiated a custody proceeding after the children and parents had already moved to Louisiana. The trial court relied on Texas Family Code § 262.002 and asserted emergency jurisdiction, but the children were not physically present in Texas at the time, and no facts supported an emergency under the UCCJEA.

Citing *Garza v. Harney*, Petitioner argues the trial court could not create home state jurisdiction by forcibly returning the children to Texas and waiting until enough time had passed to claim jurisdiction. The UCCJEA does not allow a state to bootstrap jurisdiction in this manner.

The Department now disputes whether the family actually relocated, but the only evidence was Petitioner's uncontroverted testimony and the fact that the children were found and seized in Louisiana. The Department also argues bad faith and temporary absence, yet no order restricted Petitioner's right to move, and there is no evidence of a temporary visit or concealment. Petitioner retained full custody and had no legal obligation to remain in Texas. Petitioner argues the move was not in bad faith. At the time of the move, the parents retained full custody of the children, and there was only an order to participate in services. There was no order that he had to remain in the state. There was no order giving the Department custody of the children that he was fleeing to avoid. As far as he knew, he was well within his rights to move his family to another state if he so chose.

C. Reply to Response Point III: Whether the judgment terminating parental rights under Tex. Fam. Code § 161.001(b)(1)(D) and (E) is constitutionally invalid for lack of individualized, parent-specific findings supported by clear and convincing evidence.

1. The State Misapplies the Legal Standard by Relying on Post-Removal Conduct and Guilt by Association

The Department urges affirmance by invoking Ronnie's alleged post-removal drug use and failure to complete services. But this Court has held repeatedly that termination under subsection (E) must be based on *pre-removal* conduct that

endangers the child’s physical or emotional well-being. *In re E.N.C.*, 384 S.W.3d 796, 803 (Tex. 2012); *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.). The State cannot retroactively justify removal—and certainly not termination—by recasting a parent’s post-removal difficulties as predicate acts of endangerment. Doing so inverts the constitutional order and allows termination to rest on compliance performance rather than danger to the child.

Moreover, the State’s claim that Ronnie “failed to protect Kim” is an improper attempt to impute another parent’s conduct to him. This is precisely what *In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019), forbids. Ronnie is not Kim’s biological parent, and the record contains no evidence that he inflicted harm on her, encouraged it, or failed to intervene in the face of known abuse. The Department relies heavily on the fact that he “was in the home” and “aware” of Clare’s discipline, but there is no evidence that he witnessed violence, approved it, or failed to act when confronted with a risk. These gaps in the evidentiary chain are fatal under the “clear and convincing” standard. See *In re J.F.C.*, 96 S.W.3d 256, 265–66 (Tex. 2002).

2. **The Department’s Heavy Reliance on Ronnie’s Drug Arrest Ignores the Constitutional Context**

The Department cites Ronnie’s post-removal drug arrest as evidence of endangerment, but fails to acknowledge that (1) no children were present, (2) the conduct occurred months after removal, and (3) the Department made no effort to evaluate whether it posed a present danger to the children. In *In re K.M.L.*, 443 S.W.3d 101, 112 (Tex. 2014), this Court reaffirmed that the State’s burden cannot be satisfied by inference, suspicion, or implication. Yet the Department offers no direct evidence that Ronnie’s children were exposed to drugs, drug paraphernalia, or drug-related activity. Nor is there any evidence that his conduct resulted in neglect, instability, or psychological harm.

Second, an arrest is not a conviction, and mere possession charges—particularly absent any evidence of use in the children’s presence, exposure to narcotics, or impaired parenting—do not meet the constitutional threshold for terminating a fundamental right. The Department cites Ronnie’s possession of methamphetamine but presents no evidence that Ronnie used drugs around the children, impaired his ability to parent, or placed the children at risk while in his care. See *In re C.J.C.*, 603 S.W.3d 804, 817 (Tex. 2020) (recognizing “fit parents have a fundamental right to

make decisions concerning the care, custody, and control of their children”). The constitutional guarantee of due process bars termination based on speculative or post hoc evidence that is untethered from actual danger to the children.

Additionally, the Department refused to submit Ronnie’s medical documentation to the Medical Review Officer after a positive amphetamine test. (RR V3, p. 215:5–20). He produced a valid Adderall prescription, yet the State chose to ignore it and use the result as a weapon to construct a predicate finding. That is not “clear and convincing” evidence—it is bureaucratic bad faith.

The Constitution requires more than guilt by association or character attacks dressed as child protection. The Department’s reliance on Ronnie’s arrest—untethered to the children’s safety, removed in time and location, and never adjudicated—falls far short of the clear and convincing standard required to sever a parent’s rights.

Ronnie refused to permit warrantless home access and declined to submit to services not supported by judicial findings. These are lawful exercises of his constitutional rights—not indicia of unfitness. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The Department’s theory would allow the State to punish parents for

asserting basic privacy rights and to equate due process protections with evidence of danger. This cannot stand.

To satisfy subsection (E), the Department must prove “a voluntary, deliberate, and conscious course of conduct” that endangers a child. *Boyd*, 727 S.W.2d at 533. Yet the State presents no such pattern. At most, it cites isolated issues, largely occurring post-removal, that are constitutionally protected or factually benign. Ronnie’s limited visitation, work conflicts, and refusal to accept services do not constitute a pattern of endangering conduct—particularly absent any evidence that his children were harmed, exposed to harm, or simply afraid.

6. The Department Cannot Rely on (N) and (O) After Failing to Facilitate Reunification or Provide Reasonable Accommodations.

The State contends that Ronnie constructively abandoned his children and failed to comply with a service plan, but fails to confront its own role in creating the conditions it now cites. The Department denied reasonable accommodations, failed to restart services after relocation, and treated lawful resistance as noncompliance. *In re K.E.W.*, 335 S.W.3d 930 (Tex. App.—Texarkana 2011, no pet.). This Court has made clear that the Department must do more than offer a plan—it

must make reasonable efforts to enable reunification. It did not do so here.

7. This Is the Marginal Case the Texas Supreme Court Warned.

In *In re R.R.A.*, the Texas Supreme Court emphasized that parental rights cannot be terminated on a “legally thin” evidentiary basis. As Justice Blacklock explained, courts must guard against overreach by ensuring that termination findings rest on concrete, individualized evidence of actual or imminent harm—not speculation, guilt by association, or post hoc rationalizations. 687 S.W.3d at 284. This case exemplifies precisely the kind of marginal case that *R.R.A.* condemned.

According to the Department’s own brief, Ronnie’s parental rights were terminated based on three factors: (1) alleged failure to protect Kim from Clare’s abuse, (2) a drug arrest months after removal, and (3) failure to complete services (Resp’t Br. at 46–51). But none of these facts, even if taken at face value, meet the constitutional and statutory standard for termination under Tex. Fam. Code § 161.001(b)(1)(D) or (E).

First, there is no allegation—let alone evidence—that Ronnie ever physically harmed any of his biological children. The Department attributes Clare’s abuse of Kim to Ronnie through inaction, but Ronnie was not Kim’s biological father, and the record does not show he had custody or decision-making authority over her prior to DFPS involvement (Resp’t Br. at 2, 6). The children at issue—Karen, Kate, and Karl—are not alleged to have been subjected to or witnesses of physical abuse by Ronnie. The CASA testimony about “emotional abuse” is tied to witnessing Kim’s mistreatment, but this presumes that Ronnie not stopping Clare equates to deliberate endangerment of his own children. This is speculation, not evidence of a “voluntary, deliberate, and conscious course of conduct.” *Boyd*, 727 S.W.2d at 533.

Second, the Department relies heavily on Ronnie’s January 2023 drug arrest (Resp’t Br. at 46), but that occurred months *after* the children were removed and living with relatives. The record contains no indication the children were exposed to drugs, criminal activity, or any dangerous behavior while in Ronnie’s care. As *In re E.N.C.* makes clear, post-removal conduct does not satisfy subsection (E)’s requirement for predicate *pre-removal* endangerment. 384 S.W.3d 796, 803 (Tex. 2012).

Third, the failure-to-complete-services rationale is misleading. The State admits that Ronnie was not ordered to engage in services until after removal (Resp't Br. at 7), and the cited noncompliance consists of missed counseling, failure to verify an address, and absence from visits—all after the children had been removed. Again, this is not proof of endangerment, much less evidence of a pattern of conduct justifying permanent severance of constitutional rights.

Justice Blacklock warned in *R.R.A.* that § 161.001(b) is not a catch-all to terminate rights in cases where the Department simply "doubts a parent's fitness" or "disagrees with parenting style." 687 S.W.3d at 284. Here, the Department's evidence is:

- largely post-removal;
- based on Clare's actions, not Ronnie's;
- unsupported by any harm to Ronnie's biological children; and
- devoid of any individualized predicate findings, despite *In re N.G.*'s requirement for parent-specific and child-specific analysis. 577 S.W.3d 230, 239 (Tex. 2019).

If the Court affirms termination here, it would effectively lower the constitutional floor and invite termination in any case involving circumstantial doubts, passive parenting, or noncompliance after removal. That is exactly the result *R.R.A.* warned against.

CONCLUSION: Judgment is Legally Insufficient

The judgment terminating Ronnie's parental rights cannot stand. It rests on findings unsupported by clear and convincing evidence, as required by both statute and constitutional due process. The trial court attributed endangerment to Ronnie based on Clare's conduct toward a child who was neither Ronnie's biological nor legal child. There is no evidence that Ronnie endangered his own children—Karen, Kate, or Karl—or that they were ever exposed to a substantial risk of harm in his care.

The Department's reliance on post-removal conduct, such as noncompliance with non-mandatory services and an unrelated arrest months later, is legally impermissible under well-established precedent. Subsections (D) and (E) require proof of pre-removal endangerment—not retrospective disapproval of constitutionally protected choices or subsequent hardship.

Termination under subsections (N) and (O) fares no better. The Department failed to accommodate the family's relocation, made no genuine effort at reunification, and then used its own failures as grounds for severance. This circular logic is legally insufficient and constitutionally indefensible.

The Constitution prohibits termination by association, implication, or convenience. It demands concrete, individualized proof of unfitness. Because the Department failed to carry that burden, the termination order is void of legal and constitutional support. It must be reversed.

D. Reply to Response Point VI: Best Interest And Appellate Review Arguments Cannot Salvage A Void or Defective Termination.

1. Best-Interest Findings Cannot Cure Jurisdictional or Predicate Deficiencies

Respondent's reliance on the jury's best-interest finding under Tex. Fam. Code § 161.001(b)(2) does not remedy the fundamental jurisdictional and predicate defects in this case. The Texas Supreme Court has made clear that predicate grounds under § 161.001(b)(1) are not mere formalities—they are constitutional safeguards. In *In re N.G.*, 577 S.W.3d 230, 239 (Tex. 2019), the Court held that if a predicate ground fails,

termination cannot be upheld on best interest alone. Here, the Department failed to prove either subsection (D) or (E) as to Ronnie with clear and convincing evidence.

2. The Record Contains No Constitutionally Sufficient Evidence of Endangerment by Ronnie.

The record reflects that Ronnie was not the biological father of Kim, the child most associated with the Department's abuse allegations. No evidence links Ronnie to any direct abuse, nor was he present at the time of Clare's prior CPS involvement. There is no testimony that Ronnie engaged in or knowingly allowed any endangering conduct toward Karen, Kate, or Karl. The Department relied on generalized household conditions and Clare's conduct to justify termination against Ronnie, violating the requirement of parent-specific and child-specific findings under *In re N.G.*

Further, much of the evidence cited by the Department involves post-removal conduct, such as missed visits or service plan compliance. But as the Court reaffirmed in *In re E.N.C.*, 384 S.W.3d 796, 803 (Tex. 2012), subsection (E) requires pre-removal conduct that demonstrates a voluntary, conscious course of endangering behavior. That standard was not met here.

3. No Holley Analysis or Expert Testimony Supports Best Interest.

The Department failed to conduct any best-interest analysis under the *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), factors. There is no discussion of the children's desires, no expert testimony regarding psychological needs, and no comparison of current versus potential placements. There is also no indication that Ronnie's relationship with Karen, Kate, or Karl was explored or evaluated.

Kim's outcry against Clare—made after being placed with the Department—does not extend to Ronnie. In fact, Kim expressed a desire to remain separated from Clare but did not request separation from her siblings or Ronnie. No testimony was presented that Ronnie posed a danger to the children or that termination of his rights would serve their long-term welfare.

4. The Department Ignored Less Restrictive Alternatives.

There is no indication that the Department considered permanent managing conservatorship, monitored return, or other less drastic alternatives to termination. Ronnie remained employed and sought to maintain contact. Clare requested a service plan restart in Louisiana but was denied. These efforts were disregarded. Under *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), termination is justified only where necessary—not merely preferable.

5. Finality Cannot Cure a Jurisdictional Defect.

Despite its attempts to shift blame to the parents or invoke procedural finality, the Department's own brief concedes facts that render the termination judgment void for lack of subject-matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). No amount of elapsed time or statutory finality can confer jurisdiction where none existed.

The Department admits the children moved to Louisiana before suit was filed. The Department's brief states that Clare and Ronnie "claim[]" they moved to Louisiana on August 20, 2022, and that the Department did not initiate suit until August 31, 2022 (Resp't Br. at 18, 46). Crucially, the Department offers no contemporaneous documentation to dispute this timeline. In fact, Ronnie testified that he was still working in Texas at the time, but this only confirms the move was recent—not that the children were present in Texas for six continuous months immediately before the suit, as required by § 152.201(a)(1).

Even under the Department's reading, the most it can prove is a disputed and tenuous tie to Texas during an 11-day window—hardly the "home state" required by the statute. The Department's own factual recitation fails to establish any other basis under § 152.201 existed at the time of filing.

There was no valid alternate jurisdiction under §§ 152.204 or 152.201(a)(2). The Department does not claim emergency jurisdiction under § 152.204, and it admits that it made no contact with Louisiana under § 152.206 (Resp’t Br. at 17–20). Thus, it cannot assert jurisdiction based on “significant connections” or the absence of another forum. That omission is fatal under *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005), which holds that UCCJEA compliance is a jurisdictional prerequisite, not a procedural technicality.

6. A void judgment cannot be insulated by finality or § 161.211(a).

The Department invokes § 161.211(a), arguing that any challenge to the termination order is now barred by finality. But this argument fails on its face. As the Texas Supreme Court has made clear, § 161.211 does not—and cannot—validate a void judgment entered without subject-matter jurisdiction. In *In re G.X.H.*, the Court expressly rejected the idea that statutory finality could trump constitutional jurisdictional limits:

“A void judgment is not entitled to the normal deference owed to final judgments, and may be challenged at any time.”

— *In re G.X.H.*, 627 S.W.3d 288, 295 (Tex. 2021)

The Department also cites *In re K.S.L.*, 538 S.W.3d 107 (Tex. 2017), but that case concerned statutory compliance, not the absence of constitutional or UCCJEA-based subject-matter jurisdiction. In contrast, *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010), confirms that “a judgment rendered without subject-matter jurisdiction is void and can be collaterally attacked at any time.”

The record affirmatively negates jurisdiction. Under *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000), when the facts affirmatively negate jurisdiction—as they do here—the trial court has no authority to proceed. The Department’s own recitation of the timeline and failure to engage with Louisiana confirms that no jurisdictional basis existed under Chapter 152 of the Family Code.

Conclusion: The Record Does Not Support Termination

The Department failed to prove any valid ground for termination as to Ronnie. It relied on impermissible evidence, failed to prove best interest with specificity, and proceeded in a court without jurisdiction. No individualized findings were made. No *Holley* analysis was conducted. And no expert or credible fact witness linked Ronnie to any pre-removal endangerment. Termination under these circumstances is not only unsupported—it is unconstitutional and this Honorable Court must reverse.

CONCLUSION AND PRAYER

This case presents a fundamental violation of statutory and constitutional safeguards that govern termination of parental rights. The Department initiated proceedings in a court that lacked subject-matter jurisdiction under the UCCJEA and failed to conduct the mandatory inquiry or make the jurisdictional findings required by law. That failure renders the judgment void.

Even if jurisdiction were proper, the evidence at trial was legally and factually insufficient to support termination under any of the grounds asserted. The Department failed to provide individualized findings of endangerment, improperly relied on post-removal conduct, and presented no compelling evidence that termination was in the best interest of each child. Moreover, the parents were denied a meaningful opportunity to reunify, as the Department failed to accommodate their relocation or provide consistent services. The best-interest analysis was conclusory and unsupported by expert or behavioral evidence.

Petitioners respectfully pray that this Court:

1. Reverse the judgment of the court of appeals;
2. Vacate the trial court's order terminating parental rights;
3. Render judgment dismissing the underlying suit for lack of subject-matter jurisdiction under the UCCJEA; or, in the alternative,
4. Remand the case with instructions to vacate the termination order for failure to establish constitutionally sufficient evidence under Tex. Fam. Code § 161.001(b)(1)(D) and (E).

Petitioners further pray for all other and further relief, in law or in equity, to which they may be justly entitled.

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned counsel certifies that this brief contains 5,995 words, excluding the portions of the brief exempted by Rule 9.4(i)(1). This word count is based on the word count function of the word processing software used to prepare this document.

/s/ Jay A. Michelsen

Jay A. Michelsen

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2025, a true and correct copy of the foregoing document was served on all counsel of record in accordance with the Texas Rules of Appellate Procedure via electronic service and/or email:

Michael J. Sharpee,
Sharpee Law Firm
P.O. Box 1819
Amarillo, TX 79105
mike@sharpeelawfirm.com

Cory A. Scanlon
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711
Email: Cory.scanlon@oag.texas.gov

Taylor Harris
314 N. Cuyler St.
Borger, Texas 79066
Email: taylor@rickjharrislaw.com

/s/ Jay A. Michelsen

Jay A. Michelsen

