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CJC No. 18-0092
Letter of Inquiry: JUDGE JONATHAN BAILEY

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1. **Regarding In re L.S., No. 02-17-00132-CV, 2017 Tex.App. LEXIS 8963 (Tex.App.—Fort Worth Sep. 21, 2017, no pet.), please respond to the Appellate Courts' Memorandum Opinion which set forth that you improperly fast-tracked the Father's termination trial before the statutory dismissal date, although:**
   a. **Father had been appointed new counsel less than one month before the trial was scheduled to begin,**
   b. **DFPS's January 27, 2017 permanency report stated that its primary goal was reunification,**
   c. **The Guardian Ad Litem's January 31, 2017 report stated that its primary goal for the minor child was family reunification,**
   d. **At the February 23, 2017 hearing on its motion for continuance, DPFS stated that "the current goal is family reunification" and "at this point we do not have grounds for termination."**
   e. **All other individuals associated with the case did not oppose a continuance,**
   f. **Father's court-appointed attorney stated that his client would not be "getting adequate representation at trial if we go next week."**
   g. **The Guardian Ad Litem's February 28, 2017 report stated that it was her "understanding that DFPS's goal [was] Kinship Adoption…with concurrent goal of Family Reunification" and that she recommended the same, and**
   h. **The trial was scheduled to begin before DFPS had satisfied the constructive-abandonment requirement that L.S. be in its care for six months prior to trial.**

   In hindsight, I agree with the Appellate Courts' conclusion. I allowed my concern for what I perceived to be in the child's best interest to override my obligation to ensure that Father received both due process and a fair trial. I should have continued the trial to a date much further out than I did.

2. **Please respond to the Court of Appeals' holding that you improperly accelerated the statutory scheme governing termination proceedings without making the requisite statutory findings necessary to do so.**

   In hindsight, I agree with the Appellate Courts' conclusion.

3. **Please respond to the Court of Appeals' holding that you had already determined that Father was noncompliant with his visitation and counseling requirements, and would never be compliant based on your knowledge of the prior proceeding and your personal "expectations."**

Based upon the record and evidence presented during the statutory hearings prior to trial, Father was not compliant with his visitation and counseling requirements. In fact, Father had not even made a good faith effort in that regard. At the time Father's visitation was suspended, Father had only attended 12 one-hour visits with his child out of 30 possible visits. My expectations are that a parent should comply with the court orders and service plan in order to demonstrate that they can provide a safe and stable environment for a child. Further, my expectations are that a parent at least make a good faith effort to maintain a relationship with their child while the child remains in DFPS care. I concluded that Father had utterly failed in that regard, and the Appellate Court opinion did not find that my conclusions were unsupported by the evidence.

4. Regarding the October 13, 2016 Status Hearing, please explain:

a. Why you questioned Father about why he would "think that it is going to be any different this time around."

In the preceding case, Father refused to complete any services requested by DPFS and his rights pertaining to his daughter were terminated just a few days before the Status Hearing on October 13, 2016. Father had never even appeared for ***any*** court hearings in that case. I engaged Father regarding his "thought process" and why he was responding differently in the new case. My questions to Father at that time were neither confrontational nor rude, but merely inquisitive (CJC-2 000411-000412).

b. Why you did not address Father's application for a court-appointed attorney although you were notified that it was substantially complete.

I was not provided with Father's application for a court-appointed attorney at the Status Hearing on October 13, 2016. I advised Father of his right to counsel, and to appointed counsel upon a finding of indigence (CJC-2 000414). I also explained to him that he could complete and present the application directly to me or the court administrator after the hearing. Father did not do so. Father did not file the application for a court-appointed attorney until December 21, 2016 (CJC-1 000214-000216). I questioned Father about the information provided in the application and appointed counsel the same day. *See* Family Code §107.013(a-1) and (d).

5. Please explain the purpose of your statements at the February 2, 2017 Permanency Hearing wherein you announced that you did not want DFPS in your court unless they sought termination of Father's parental rights and that "[DFPS] needs to decide what they want to do, because apparently [DFPS's] expectations are not consistent with my own."

The initial assertion mischaracterizes my statement, as I did not state that I "did not want DFPS in [my] court unless they sought termination of Father's parental rights."

My statement, which conveyed my frustration with both the Father and DFPS, was as follows:

> "And the Department ***can nonsuit this case at any time if it wishes to***. Bottom line is, when a parent has already had their rights to two other children terminated, and they take the position that Mr. McCurry has taken in this case and, frankly, from what I hear he is not capable of looking out for himself right now, much less a child. To me, that is grounds for termination. Adults who are capable of physically working and supporting themselves have no excuse to bring children in the world when they're not so prepared themselves to raise that child, to provide shelter, provide clothing, provide food. He is not supporting his child. ***I don't know what you need, but I don't know why we're having these cases at all if the expectation isn't for parents to actually do the things they are ordered to do. And if the Department is not going to expect the parents to follow the orders and, unless they commit some cardinal sin, not going to pursue the case to termination, I, for one, don't want them in my court anymore***. I want the Department to go on the record saying as long as you don't kill your child, you're okay with us. Otherwise, it is a complete and colossal waste of judicial resources. I don't like jerking around with these cases and parents that aren't gonna do the things that they are ordered to do. And I had a one-on-one conversation with Mr. McCurry, you understand you can wait and not do services until you are sure that this is your child. But if you do that, you are gonna be wasting every day, every week, every month it takes to get those paternity test results back, and that's what he chose to do. I am not letting that decision back the rest of us into a corner. So I'm entering the permanency hearing order and ***the Department needs to decide what they want to do, because apparently the Department's expectations are not consistent with my own***." (CJC-2 000439-000440) (emphasis added).

6. Please respond to the Court of Appeals' holding that you improperly suspended all visitation at the February 2, 2017 Permanency Hearing based on unidentified "extreme circumstances" that typically justify an extension of the dismissal date, not the termination of visitation, and without "outlin[ing] specific steps" Father could take to resume visitation.

I believed then - and I still believe - that the evidence presented at the February 2, 2017, Permanency Hearing (CJC-2 000418-000441) and the reports filed by DFPS and CASA (CJC-1 000219-000233) justified cessation of Father's visitation with the child and that continued visitation was not in the child's best interest at that time. However, I agree with the Appellate Courts' conclusion that I erred by not entering a written order in compliance with Family Code §263.109(b). In all candor, I was unaware of that provision at the time and was not asked by Father or any other party to render such a written order at any time.

7. Please explain the purpose of your statement that it would not "be appropriate" for the Court of Appeals to "second guess" your decision to consider Father's prior termination proceeding in the current case. In your response, please address the Court of Appeals' holding that you improperly "treated the two termination proceedings as one proceeding."

This assertion unfairly mischaracterizes and misquotes the referenced statement. The statement related to the issue of "the merits of the motions for continuance" and indicated that I didn't "think it would be appropriate ***for me, or the Court of Appeals***…to look at this (issue) in a vacuum without also considering all of that other history" in the preceding case (CJC-2 000447)(emphasis added). I understand the Appellate Courts' conclusion that this statement and my overall handling of the case "treated the two termination proceedings as one proceeding."

8. Please respond to the Court of Appeals' holding that you improperly took judicial notice of the entire contents of the court's file in the first termination case although: (a) no party requested the court to take judicial notice of the separate proceeding, and (b) the record was not introduced into evidence.

My habitual practice in every court proceeding is to take judicial notice of the contents of the court's file in the instant and any related proceeding. Rule 201(c) of the Texas Rules of Evidence provides that court may do so on its own and I don't interpret the Appellate Court's opinion to indicate that my doing so was erroneous. I understand the Appellate Court's opinion to indicate that the trial court may not consider prior court proceedings unless a transcript of those proceedings is introduced into evidence. I also recognize that it was error for me to rely on my memory of those proceedings because a transcript was not introduced into evidence.

9. Please explain why you accused Father of lying and threatened to have him prosecuted for perjury during his trial testimony.

At trial, Father provided sworn testimony that contradicted his prior sworn testimony. I believe that it is appropriate for a court, during a bench trial, to admonish a witness regarding the potential for referral of perjury to the prosecuting authorities. In this instance, I believe that it was appropriate for me to point out to Father that his testimony was demonstrably false, and that if he persisted, he could be prosecuted for perjury.

10. Please explain why you questioned Father during trial about him not wanting to pay for a DNA test although you had previously determined that he was indigent.

I found Father indigent on December 21, 2016. The child was born nearly six months before that, on June 30, 2016. I asked Father questions about his willingness and ability to pay for DNA testing because I had not been presented any information about Father's financial circumstances prior to December 2016.

11. Please respond to the Court of Appeals' holding that by the second day of testimony in Father's trial, you "had ceased to be an impartial fact-finder or umpire and was acting as an advocate in favor of termination."

In hindsight, and having reviewed the entirety of the record, I agree with the Appellate Courts' conclusion. I allowed my concern for what I perceived to be in the child's best interest to override my obligation to ensure that Father received both due process and a fair trial. If anything, I think the record reflects that my impartiality was compromised long before the second day of trial, and wish that I had been asked to recuse myself or voluntarily recused myself *sua sponte*.

12. Please explain why you referred to Father's trial testimony as "ridiculous" and "crap."

This assertion unfairly mischaracterizes and misquotes my use of those words. The only time I used the word "ridiculous" during the entire trial was during the following exchange with Father:

The Court:	So you couldn't afford a DNA test for this child, but you think you are in an appropriate position to raise the child?
Father:	Yes.
The Court:	***Do you understand why that seems ridiculous***?
Father:	***I do***.

(CJC-2 000828)(emphasis added). In the context of that issue, even Father acknowledged that his position seemed ridiculous. I didn't use the word in an insulting manner, but merely to emphasize the incongruity of those positions.

The word "crap" was uttered four times during the trial, three of which were attributed to Father's own use of the word:

Q.	Did [Father] ever talk with you about working the services in the CPS case to take care of [the children]?
A.	I believe we spoke a few times about the services and he said it was ***crap*** that he had –
Q.	He said what?
A.	He said that it was ***crap*** that he had to do all these services.
Q.	Did he say why it was ***crap***?
A.	No.

(CJC-2 000535)(emphasis added). The fourth utterance of that word occurred later in the trial and admittedly came from my mouth. However, I did not use of the word "crap" for the purpose of characterizing Father's testimony in some way. Instead, it was my

commentary regarding Father's selfishness pertaining to non-support of his child. Father never paid a single dollar or contributed a single in-kind item toward his child's financial support, but testified that he was keeping diapers for his child's use, but only in the event the child was returned to him. Indeed, upon hearing Father's testimony in that regard, I was upset by Father's selfishness and commented – using Father's own words – that it was insulting to me "as a father and as a judge to hear that crap" (CJC-2 000833).

13. Please explain why you scheduled an evidentiary hearing to re-visit Father's status as an indigent when:

a. The Court of Appeals referred the matter to you solely "for the appointment of new appellate counsel."

b. The Court of Appeals did not request you to inquire into Father's status as an indigent,

c. No party had contested Father's status as indigent, and

d. Father was presumed indigent.

My routine practice is to handle the appointment of counsel as an evidentiary matter. Based upon the information provided in the application and affidavit, I routinely ask the applicant follow-up questions as necessary to get a complete picture of their financial circumstances. Upon information and belief, many other judges do the same. I was sincerely trying to be thorough and helpful to the Appellate Court by creating an evidentiary record, but apparently misinterpreted the limited purpose of the Appellate Court's directive. The evidence at trial indicated that Father's financial circumstances had materially and substantially improved since the appointment of trial counsel. This led me to mention revisiting the issue of Father's indigency status at the end of the trial, well before the Appellate Court referred the matter back to the trial court (CJC-2 000881-000882). I thought that appointing appellate counsel and providing the Appellate Court with that record would be appreciated, but I was clearly mistaken.

14. Regarding the post-trial May 5, 2017 "Indigency Status Hearing", please explain why you permitted Father to be extensively questioned by yourself, counsel for DFPS, and the Guardian Ad Litem regarding his financial situation without having the benefit of counsel.

As indicated previously, my routine practice is to handle the appointment of counsel as an evidentiary matter. Based upon the information provided in the application and affidavit, I routinely ask the applicant follow-up questions as necessary to get a complete picture of their financial circumstances. Upon information and belief, many other judges do the same. The applicant never has the benefit of counsel during these proceedings, as the purpose is to determine whether or not they are entitled to the appointment of counsel in the first place. I handled Father's status no differently.

15. Please explain why you did not enter a written order after the Indigency Status Hearing until ten days after the hearing and five days after Father's deadline to file a motion for new trial had passed.

After the hearing, I had to personally draft the written order. I prioritized doing so relative to my other docket obligations, and with the goal of complying with the May 16, 2017, deadline provided by the Appellate Court (CJC-1 000349). The deadline to file a motion for new trial never crossed my mind, as Father's trial attorney had already filed the notice of appeal.

16. Please respond to the Court of Appeals' holdings that:

a. "the trial judge's course of conduct throughout the entire proceeding showed a deep-seated antagonism for Father that violated Father's constitutional rights to a fair trial, resulting in a judgment that neither this court nor the public generally could be confident was not improper."

b. "the trial judge here abdicated his responsibility to be neutral and unbiased and to decide this case on only this case's merits."

c. "the judge's conduct tainted the entire proceeding, even the presentation of evidence, such that we cannot be assured that the resulting judgment was correct or that the proper presentation of the case for appeal was not affected."

In hindsight, I agree with the Appellate Courts' conclusions. I allowed my concern for what I perceived to be in the child's best interest to override my obligation to ensure that Father received both due process and a fair trial.

17. To the extent you have not already done so, please state whether, in your opinion, the manner in which you presided over this trial was consistent with your obligations under Canon 3B(5) of the Texas Code of Judicial Conduct.

Canon 3B(5) of the Texas Code of Judicial Conduct requires a judge to "perform judicial duties without bias or prejudice." In my opinion, the manner in which I presided over this trial did not involve any prejudice or *extrajudicial* bias. However, I recognize in hindsight that the manner in which I presided over this trial demonstrated *judicial* bias toward Father. In that regard, it was inconsistent with my obligations under Canon 3B(5).

18. Please provide the Commission with any additional information and/or copies of documentation that you believe to be relevant to this matter. You may also include sworn statements or affidavits from fact witnesses in support of your response.

I was humbled to read the Appellate Court's opinion and concur with their ultimate conclusions. During my years of judicial service, I have handled nearly a thousand cases filed by DFPS due to alleged parental abuse or neglect of a child. My handling of this

case can only be characterized as an anomaly. I recognize the mistakes that I made and will not repeat them. In order to improve my judicial abilities in these cases, I attended the Child Welfare Judges Conference for the first time last year – and registered to attend again this year – long before I was made aware of this complaint. I am prepared to offer further explanation and mitigating information in the event it is requested. I am sorry that my conduct has drawn your attention and necessitated this inquiry.

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(Judge's Signature) (Date)

Jonathan Bailey
(Printed Name)

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CJC No. 18-0092
Verification

State of Texas §
County of Denton §

BEFORE ME, the undersigned authority, on this day personally appeared JONATHAN BAILEY, who by me being first duly sworn, on his oath deposed and said that the above responses to the Commission's inquiries are based on personal knowledge, and are true and correct.

SUBSCRIBED AND SWORN TO BEFORE ME on this ____ day of _____, 2017.

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NOTARY PUBLIC, STATE OF TEXAS