Affirmed in Part, Reversed in Part, and Remanded; and Memorandum Majority Opinion and Dissenting and Concurring Opinion filed July 24, 2020.

In the

Fourteenth Court of Appeals

NO. 14-20-00084-CV

IN THE INTEREST OF A.J.A.R. AND M.J.R., CHILDREN

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2018-01872J

DISSENTING AND CONCURRING OPINION

I respectfully dissent in part and concur in part to this court's judgment. In this post-*In re N.G.*, world, there are many unanswered questions, and courts of appeals need guidance from the Supreme Court of Texas on how to proceed.[1] *See In re N.G.*, 577 S.W.3d 230 (Tex. 2019).

[1] *See In re M.A.J.*, No. 01-19-00685-CV, 2020 WL 3456130 (Tex. App.—Houston [1st Dist.] June 25, 2020, no pet. h.) (Keyes, J., dissenting) (disagreeing with majority's decision not to address fully subsection D and E grounds under *N.G.* when reversing due to factual insufficiency of best-interest finding); *In re H.J.Y.S.*, No. 10-19-00325-CV, 2019 WL 8071614, at *10 (Tex. App.—Waco Feb. 26, 2019, no pet.) (mem. op.) (in novel approach, modifying and effectively *rendering* trial court judgment deleting subsection E finding based on the *factual*

First, this court's judgment does not specifically dispose of all the issues raised by the parties and ruled on by the court. It is axiomatic that our job as intermediate appellate judges in appeals from final judgments in civil cases is to determine whether the trial court's final judgment contains (1) fundamental error or (2) reversible error as to complaints properly presented for appellate review by (a) preservation in the trial court when required and (b) presented in the appellate court as an issue or point for appellate review. If a complaint of reversible error is properly preserved when required and presented, then we should rule on the merits: sustain the issue if we agree there is reversible error in the trial court's final judgment, or overrule the issue if we do not agree there is reversible error in the trial court's final judgment. Sustained issues result in reversing a portion of the trial court's final judgment; overruled issues result in affirming a portion of the trial court's final judgment. Unless there is fundamental error, the appellate court does not review the judgment for error that was not properly preserved when required and presented on appeal. This is Justice Calvert's view of the role of a Texas intermediate appellate court, and I wholeheartedly embrace it.[2] *See generally* Robert W. Calvert, "Appellate Court Judgments or Strange Things Happen on the Way to Judgment," 6 TEX. TECH L. REV. 915 (1975).

What about the circumstances of this case? This court's rulings on Father's issues are as follows:[3]

1 (termination as to Daughter): Overruled

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insufficiency of finding).

[2] Whether the intermediate appellate court's power to reverse a trial court's final judgment based on factual insufficiency as authorized by Texas Constitution article V, section 6, is based on trial court "error" (as the trial court's action is presumptively legally sufficient) is a jurisprudential issue for another day.

[3] After holding that Mother's appeal is without merit, this court properly affirmed the termination of parental rights as to Mother, and I concur in that portion of this court's judgment.

2(a) (subsection D legal sufficiency): Not reached
2(b) (subsection D factual sufficiency): Not reached

3(a) (subsection E legal sufficiency): Not reached
3(b) (subsection E factual sufficiency): Not reached

4(a) (subsection O legal sufficiency): Overruled
4(b) (subsection O factual sufficiency): Overruled

5(a) (best interest legal sufficiency): Overruled
5(b) (best interest factual sufficiency): Sustained

6 (conservatorship): Overruled

Therefore, regarding Father, this court should (1) affirm the trial court's final order in part as to overruled issues 1, 4(a), 4(b), 5(a), and 6, (2) reverse the trial court's final order in part as to sustained issue 5(b), and, because there is only one issue on which the court reversed, (3) remand the case to the trial court for further proceedings limited to issue 5(b).[4] I dissent in part to this court's judgment for not specifying what portions of the trial court's final order are affirmed and what part is reversed.

Second, the court has created error in its judgment independent of the trial court's final order by remanding for further proceedings on a finding this court has affirmed, effectively vacating a portion of the trial court's final order of termination without holding the trial court reversibly erred. A court of appeals cannot do this. *See Blair v. Fletcher*, 849 S.W.2d 344, 346 (Tex. 1993)

[4] The court does not remand the case to the trial court for further proceedings limited to issue 5(b), which was the sustained challenge to the factual sufficiency of the best-interest issue. Instead, the court's judgment contains a general remand, allowing the trial court a do-over of the entire termination proceeding as to Father. However, as discussed further below, the court has overruled both the legal- and factual-sufficiency challenges in issue 4(a) and (b) to the subsection O finding, holding there is no reversible error in the predicate-ground finding that Father did not comply with the family-service plan.

(interpreting former 1986 Tex. R. App. P. 80(b), now current Tex. R. App. P. 43.2(e)). The court makes no argument why the two issues necessary for termination of the parent-child relationship—the predicate ground for termination and best interest of the child—are inextricably intertwined such that they cannot be separated on remand. I dissent in part to this court's judgment that generally remands the case to the trial court for further proceeding, *i.e.*, effectively vacating portions of the trial court's final order that this court has properly affirmed.

Third, the court should rule on the merits of issues 2(a) and 2(b) and 3(a) and 3(b) (subsections D and E predicate grounds) rather than kick the can down the road. Perhaps the supreme court will hold that the *N.G.* due-process analysis can be done if the trial court "re-finds" grounds for termination on remand and there is a subsequent appeal, but given the explicit policy of expeditious resolution of cases involving the termination of parental rights, I do not think this is correct. *See* Tex. Fam. Code Ann. § 109.002(a-1); Tex. R. App. P. 28.4 (accelerated appeals in parental-termination cases). The court should rule now on the merits of the *N.G.* subsection D and E issues raised. Even if issues 2(a) and 2(b) and 3(a) and 3(b) are not technically necessary to the final disposition of the appeal, public policy dictates that this court should reduce the outstanding issues so the trial court knows what to do on remand. I dissent in part to this court's judgment for not ruling on the *N.G.* due-process issues.

Accordingly, I dissent to this court's judgment not reaching Father's issues 2(a), 2(b), 3(a), and 3(b) (legal and factual sufficiency on subsections D and E). I concur in this court's judgment affirming the trial court's final order as to Mother and as to Father on his overruled issues 1 (trial court's alleged failure to rule on termination as to Daughter), 4(a), 4(b) (legal and factual sufficiency on subsection O), 5(a) (legal sufficiency of the best-interest finding), and 6 (appointment of

Department of Family and Protective Services rather than Father as sole managing conservator). Finally, I concur in this court's judgment reversing the trial court's final order on Father's issue 5(b) (factual insufficiency of the best-interest finding) and remanding the case to the trial court, but I dissent to this court's judgment insofar as it does not limit the scope of the remand to further proceedings limited to issue 5(b).

We need to expeditiously resolve all the issues presented on appeal in this termination of the parent-child relationship so that finality comes sooner, rather than later. We also need to render an unambiguous appellate judgment. I understand that is easier said than done, but our opinion exists to explain the reasoning for our judgment, not to fill in what is missing in the judgment. We should heed Justice Calvert and take great care in drafting our judgments.

/s/ Charles A. Spain
Justice

Panel consists of Justices Wise, Bourliot, and Spain (Wise, J., majority).