By Stephen Gibson[1]

***Preservation of Error – Jury Charge*: Requesting a question in a jury charge does not foreclose the right to later complain that the issue is immaterial or unsupported by legally sufficient evidence and should be disregarded.**

***Remand v. Rendition*: When the court of appeals erroneously fails to address an issue that is briefed, ordinarily the appropriate disposition is to remand the case for further consideration.**

In *Mussallam v. Ali*, the parties disputed whether there was an agreement to sell a wholesale business. One insisted the sale itself was conditioned on the approval of both of two suppliers; the other, maintained that only the purchase price varied depending on whether both suppliers approved the ownership change. One of the two suppliers did not approve.

Over the buyer's objection, the seller requested the submission of a charge question whether the parties had reached an agreement to sell, which the jury answered affirmatively. Post-verdict, the seller moved for judgment notwithstanding the jury's verdict. Seller argued both that the jury's answer was immaterial for two reasons. First, seller insisted the evidence was legally insufficient to support the jury's answer. The seller also urged that enforceability of the agreement was a question of law, not fact. The court of appeals declined to address the issue, however. It ruled that the seller "invited" any error by requesting submission of the issue in the first place.

In a unanimous opinion for the court, Justice Johnson reminded the court of appeals that rule 279 states explicitly "[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 made by the complainant." Likewise, citing *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 402 (Tex. 2017), Justice Johnson observed that a complaint that the jury's verdict is immaterial is one that can be raised post-verdict.

In this writer's opinion, the true reason why materiality can be raised for the first time post-verdict is the wording of rule 301 allowing a verdict to be overturned for reasons that could have been presented in a directed verdict motion. Directed verdict motions, of course, antedate charge submission and are not, therefore, subject to the terms of the jury charge.

Regardless of reasoning, the opinion ruled that the seller's requested submission of the question concerning the existence of an agreement did not foreclose appellate review of the seller's arguments. Further, the court ruled that the appropriate disposition was to remand the case back to the court of appeals to consider the argument that was briefed but unaddressed by the opinion of the court of appeals.

***Legally Sufficient Clear and Convincing Evidence*: Stipulations in a mediated settlement agreement to conclusions concerning the child's best interests when coupled with stipulations to the statutory statement of**

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

grounds for termination are legally sufficient to be clear and convincing evidence to support a best interests determination.

***Family Law*: A parent's uncontroverted admissions in a mediated settlement that termination is in the child's best interest satisfies the clear-and-convincing evidentiary standard necessary to terminate the parent-child relationship.**

In re A. C. is significant because it injects doubt about whether conclusory statements may, standing alone, be legally sufficient evidence supporting an ultimate fact. In this case, the Department of Family and Protective Services sought to terminate a mother's parental rights on the basis of child endangerment and abandonment. A mediated settlement signed by the mother and the parties' counsel agreed that termination was in the children's best interests. The mother had selected a couple that was to adopt and irrevocably gave the Department managing conservator's rights, including the right to consent to adoption, in the agreement.

The chosen adopters were unable to proceed with the adoption and different candidates would have to be chosen. At the termination hearing, although the mother did not appear, her counsel sought to enforce her selection of the next adoption candidates. She never withdrew or objected to the settlement stipulations. And she did not condition those stipulations on completion of the anticipated adoptions. Based on recitations in the mediated settlement and testimony from the *ad litem* and CASA representative that termination was in the best interest of the children, the trial court terminated the mother's parental rights in accordance with the stipulations.

On appeal, the mother challenged the sufficiency of the stipulations in the settlement documentation to satisfy the clear-and-convincing evidentiary standard necessary in termination cases. She maintained the stipulations were naked legal conclusions bereft of supporting facts. The court began with the standard of review when clear and convincing is the evidentiary standard. Without explicitly announcing a talisman for review, it observed "[t]he only issue is whether *any evidence* supports the trial court's best-interest findings under the clear-and-convincing-evidence standard … from which a factfinder could form a firm conviction or belief that termination is in the children's best interests." (Emphasis added). This standard is a hybrid of legal sufficiency's binary "any evidence" test and factual sufficiency's analysis of persuasive value.

According to the unanimous opinion by Justice Guzman, "the question here … is not whether [the stipulations were entitled to] conclusive weight … but whether a factfinder is permitted to give [them] *any* weight … under the elevated proof standard." It was. The court analogized to its opinion last year in *In re K.S.L.*, 538 S.W.3d 107, 111-12 (Tex. 2017), in which it held that an affidavit surrendering all parental rights could be, and – in that case – was, sufficient evidence to support a determination about the best interests of the child even though the affidavit contained no specific supporting facts. The opinion deemed the stipulations in the settlement no different from the affidavit in *KSL* with respect to providing legally sufficient evidence to support termination in a case where there was no question that the mother was fully informed of their significance and they were not otherwise challenged. The court reserved for future resolution what defenses, if any, might be available or the effect of the stipulations if challenged or retracted because those situations were not presented in this case.

Although presented in the context of family law – an area that might not be of universal interest to readers of *The Update* – do not overlook the tension between this decision and other legal sufficiency cases involving conclusory testimony. One need not look far for numerous Texas Supreme Court cases invalidating the probative value of expert testimony that consists of nothing more than a legal conclusion without explanation and evidence of facts supporting it. Recently, there has been some relaxation of when testimony is about an evidentiary or an ultimate fact. The *A.C.* decision is more than a continuation of this trend.

The *In re A. C.* decision does nothing to better define the dividing line between legal conclusion and evidentiary fact. It does not explain why there is a necessity for supporting facts for expert testimony, for example, but none for a party's lay opinion against interests.

Allow this writer to suggest that these issues could have and should have been resolved by recognizing that the stipulations in the settlement were binding admissions. As such they were not and need not be proofs in and of themselves. Instead, they *waived the right to insist on proof*. They conclusively establish the admitted proposition. As long as knowingly and intelligently made, the admission bars the person admitting the fact from later contesting

it. *Hous. First Am. Savs. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983). The unchallenged admissions eliminated the need for evidence. If that is still the law, the perambulations of today's *A.C.* decision about legal sufficiency were entirely unnecessary.

Apparently this rule is outside the collective memory of the court and counsel in this case. The oft-touted *stare decisis* rule is no better than the "recall" of the participants in a case. The *In re A.C.* decision may be nothing more than an instance of collective amnesia. But it now will provide fodder for those contesting whether or why testimony about ultimate facts or legal conclusions should, standing alone, be legally sufficient evidence to support the conclusion.

Another troubling but unaddressed issue is whether an admission of best interest in the child can stand when there is a change in material circumstances. Would the mother continue to believe termination of her rights was in the best interest of the children *after* the adoption candidates she selected were unable to complete the adoption of her children? The opinion does not consider this possibility because the settlement agreement did not state explicitly that the mother's admission was conditioned adoption by the mother's chosen candidates. If parental rights are sufficiently important that due process demands an elevated burden of proof, perhaps it should also demand a discussion about form and substance and whether it is appropriate for the former to be given controlling effect.