SECTION REPORT
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Message from the Chair

What an exciting year this has been so far! We tested the idea of sending the section report out to our membership electronically, and then actually did it. This current issue is now the fourth one we have sent to you in this manner. The issues are posted on our website. We are getting all of the problems ironed out, and our membership has really embraced this new idea.

Also, with regard to the section report, we recently received notice from Professor Jack Sampson that he is retiring with this issue as the Editor after 31 years of dedicated service to the Section and all those folks who practice family law. I suspect there are others who have read the Report over the years who did so only to enjoy Jack's comments, kudos and pans.

I would personally like to offer my sincere gratitude to Professor Sampson for his amazing work, and I wish him the very best with his extra free time. Of course, we all expect for him to continue be involved in family law issues and to be around for a long time to offer us his wisdom and sage advice.

Starting with our next issue, Georganna Simpson will serve as our Editor in Chief, and she will be aided by our new Section Report Board of Editors. So, watch for emails advising you of each new issue, and bookmark and visit our website often for important announcements and news regarding our Family Law Section. And, as always, please give us your input if you have ideas or suggestions to make improvements for any of the services provided to you as a member of the Family Law Section.

--------Sally Emerson, Chair

EDITOR'S FINAL NOTE

A couple of issues ago I mentioned that the first time I edited the State Bar of Texas Family Law Section Report was for the December, 1976 edition. This edition, 2007-3, Fall, is the last.

Some readers may think 31 years is an unusual milestone. Not so. Last Spring, Jody Conradt resigned as coach of the University of Texas women's basketball team after 31 years. She thought it was time to move on. So do I. I suppose some fans might be offended—or surprised—that I compare myself with a 900-game winner with lots of conference championships and one national championship in her résumé. Well yes, there is that. But we both lasted the same length of time in a job that had more wins than losses—that's something in common and something to be proud of.

In sum, I have derived special pleasure from being able to inform, and occasionally amuse, the readers of the State Bar of Texas Family Law Section Report. Over the years I have received a wealth of comments about the section report, virtually all of which have been positive. However, I have been teaching and speaking in public long enough to realize that no one ever comes up to tell you what a lousy job you did. That is generally left for the written comments solicited by the law school or the sponsor of the talk. However, I well remember one strong negative review. A devoted reader took exception to something I wrote and notified me in writing that it was "in very poor taste and not a bit funny!" I begged to differ; I certainly agreed that the statement was in very poor taste, but I did think it was quite funny.

What I am certain of is that the real great credit is due to some dedicated people behind the scenes here in Austin. The assistance from them I had in writing and editing the publication is what made it possible to continue on for more than three decades. These unsung heroes are Cathy Medina, Associate Editor, Debbie Steed, Secretary, and Joyce Sampson, proof reader and chief critic.

Finally, as President Nixon said on that memorable day when he resigned, "Au revoir. We'll see you again."

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Nancy Kubasek & Christy M. Glass, *A Case Against the Federal Protection of Marriage Amendment*, 16 TEX. J. WOMEN & THE LAW 1 (2006)

Lisa R. Mahle, *A Purse of Her Own: The Case Against Joint Bank Accounts*, 16 TEX. J. WOMEN & THE LAW 45 (2006)

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Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 FAM. L. Q. 315 (2006)

Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L. Q. 281 (2006)

Faith D. Dornbrand, *Executive Compensation: A Divorce Lawyer's Guide to Certain SEC and IRS Mandated Disclosure*, 40 FAM. L. Q. 467 (2006)

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Deborah L. Forman, *Fathers, Gender Conflict, and Family Law: A Multidisciplinary Perspective*, 40 FAM. L. Q. 149 (2006)

Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L. Q. 191 (2006)

Francis M. Nevins, *To Split or Not to Split: Judicial Divisibility of the Copyright Interests of Authors and Others*, 40 FAM. L. Q. 499 (2006)

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Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 FAM. L. Q. 237 (2006)

Vivek Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L. Q. 435 (2006)

Cynthia C. Siebel, *Fathers and Their Children: Legal and Psychological Issues of Joint Custody*, 40 FAM. L. Q. 213 (2006)

Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L. Q. 381 (2006)

IN BRIEF

Family Law From Around the Nation

by
Jimmy L. Verner, Jr.

Note: *Links to official sites frequently become obsolete, so online citations are to LexisNexis, where recent cases may be viewed at no charge through LexisOne.com.*

Marital agreements: A New York court found a postnuptial agreement unfair on its face when the husband had given up his interest in the parties' $580,000 residence for $50,000 not payable until 2015. *O'Malley v O'Malley,* 2007 N.Y. App. Div. LEXIS 6917 (June 5, 2007). A New Jersey court set aside a prenuptial agreement because the husband failed to disclose assets in the seven figures. *In re: Shinn,* 2007 N.J. Super. LEXIS 185 (June 20, 2007). The Hawaii Court of Appeals upheld a premarital agreement when the husband insisted the wife sign because a friend of his "had lost millions of dollars to two of his wives." *Prell v. Silverstein,* 2007 Haw. App. LEXIS 356 (May 30, 2007). The Alabama Court of Civil Appeals upheld a prenuptial agreement against the wife's claim that giving her the antenuptial agreement on the day before the wedding "created a coercive atmosphere." *Brown v. Brown,* 2007 Ala. Civ. App. LEXIS 498 (July 27, 2007).

Procedure: In Florida, a second wife's personal finances are not discoverable unless the first wife can show that her ex-husband ended or reduced employment to evade paying alimony and is living off his second wife. *Vega v. Swait,* 2007 Fla. App. LEXIS 11784 (Aug. 1, 2007). The California Supreme Court has ruled that courts are required to try divorces rather than decide them based on written declarations. *Elkins v. Superior Court,* 2007 Cal. LEXIS 8214 (Aug. 6, 2007). A Florida court illustrated the danger of relying on written declarations when it refused post-judgment division of stock options even though the ex-husband had failed to disclose them on his financial affidavit. *Romero v. Romero,* 2007 Fla. App. LEXIS 7946 (May 23, 2007). In Georgia, accepting the benefits of a divorce decree does not constitute "an automatic waiver of the right to appeal any aspect of that judgment." *Grissom v. Grissom,* 2007 Ga. LEXIS 406 (June 4, 2007).

Same-sex update: A sperm donor who had sought and received custodial rights also could be liable for child support when the biological mother and her female partner separated. *Jacob v. Shultz-Jacob,* 2007 Pa. Super. LEXIS 957 (Apr. 3, 2007). A Massachusetts court found a same-sex partner not to be a "de facto parent," or in other words, a person not biologically related to a child but who had "participated in the child's life as a member of the child's family." *Smith v. Jones,* 2007 Mass. App. LEXIS 703 (June 22, 2007). Pension payments payable until an ex-wife remarried or died remained payable despite the ex-wife's void same-sex

marriage. *Bureta v. Bureta*, 2007 Wash. App. LEXIS 2373 (Aug. 9, 2007).

Grandparent rights: A Kansas Court of Appeals reversed a trial court for granting too little grandparent visitation, *Spencer v. Cathey*, 2007 Kan. App. LEXIS 893 (Aug. 24, 2007), but a Missouri Court of Appeals reversed a trial court for granting too much, *Shemwell v. Arni*, 2007 Mo. App. LEXIS 803 (May 29, 2007). The Illinois Supreme Court vacated lower court rulings in a grandparent rights case when the child turned 18 during the pendency of the appeal. *Felzak v. Hruby*, 2007 Ill. LEXIS 1158 (Sep. 20, 2007). In a Hague Convention case, a federal court ordered a Florida father to return his children to their Irish grandparents who had been appointed testamentary guardians of their grandchildren under their deceased daughter's will. *Hanley v. Roy*, 2007 U.S. App. LEXIS 9894 (11th Cir. Apr. 30, 2007).

Child support: A North Carolina court held that Social Security benefits received by an obligor's children because of their stepfather's death could not be credited against the obligor's child support obligation. *Hartley v. Hartley*, 2007 N.C. App. LEXIS 1319 (June 19, 2007). A New York court held that Social Security benefits received by an obligor's children because of the disability of the obligor himself could not offset the obligor's child support obligation. *Weymouth v. Mullin*, 2007 N.Y. App. Div. LEXIS 8390 (July 12, 2007). In *In the Matter of State & Crabtree*, 2007 N.H. LEXIS 97 (June 15, 2007), the New Hampshire Supreme Court held that payments received because of an obligor's disability could be credited to the obligor's child support obligation but only after an order of modification. The Wyoming Supreme Court refused to "credit" an obligor with $4,500 in overpaid child support when the obligor sought to pay his child support in advance. *Starkey v. Starkey*, 2007 Wyo. LEXIS 114 (July 11, 2007).

Property: The Iowa Supreme Court overturned a property division favoring the wife and ordered that appreciation in the parties' premarital assets be divided equally between them. *In re: Fennelly*, 2007 Iowa Sup. LEXIS 92 (July 20, 2007). When an Alaskan wife refinanced her separate property home and added her husband to the deed during marriage, the entire home was transmuted into marital property. *Heustess v. Kelley-Heustess*, 2007 Alas. LEXIS 60 (May 25, 2007). A Missouri trial court abused its discretion when it awarded the building in which the husband's law firm leased space to the wife, in effect appointing the ex-wife as the ex-husband's landlord. *In re: Accurso*, 2007 Mo. App. LEXIS 1114 (Aug. 14, 2007).

Moveaway cases: An Oklahoma trial court misapplied the burden of proof by requiring the custodial father to prove that a proposed move to New York would be in the children's best interest rather than requiring the mother to prove that the move would not be in the children's best interest. *Mahmoodjanloo v. Mahmoodjanloo*, 2007 Okla. LEXIS 61 (May 15, 2007). In *MacKinnon v. MacKinnon*, 2007 N.J. LEXIS 688 (June 11, 2007), the New Jersey Supreme Court held that the same standards applicable to domestic moves are applicable to international moves. The North Dakota Supreme Court affirmed denial of a relocation

request when the mother "did not choose to move for economic reasons" but "wanted to move to live with her new husband." *Gilbert v. Gilbert*, 2007 N.D. LEXIS 66 (May 4, 2007).

Retirement: The Fifth Circuit reversed a district court's decision to award the deceased's ex-wife the balance of his retirement plan because the ex-wife's waiver of any interest in the deceased's retirement was ineffective given ERISA's requirement of a QDRO. *Kennedy v. Plan Administrator*, 2007 U.S. App. LEXIS 19336 (5th Cir. Aug. 15, 2007). In *Trueblood v. Roberts*, 2007 Neb. App. LEXIS 89 (May 22, 2007), the Nebraska Court of Appeals reversed summary judgment for an estate when an ex-husband did not remove his ex-wife as beneficiary of a life insurance policy, observing that the ex-husband had "the right to designate a beneficiary and to change that designation at will." Following Mansell v. Mansell, 490 U.S. 581 (1989), an Indiana court refused to require an Air Force veteran who had waived his right to retirement benefits in order to receive disability benefits to pay a portion of his disability benefits to his ex-wife because veterans' disability benefits are not property divisible on divorce. *Griffin v. Griffin*, 2007 Ind. App. LEXIS 1921 (Aug. 23, 2007).

A man scorned: A Utah court rebuffed the claims of a would-be groom who sued his ex-fiancé to recover the cost of two trips, an engagement ring's loss in value, money he had paid toward her son's car and the cost of a vasectomy he had at her request plus surgery he planned to reverse it. Quoting an Iowa opinion, the court mused: "What fact justifies the breaking of an engagement? The absence of a sense of humor? Differing musical tastes? Differing political views? The painfully learned fact is that marriages are made on earth, not in heaven." *Hess v. Johnston*, 2007 Utah App. LEXIS 222 (June 21, 2007).

Articles

Texas Receives Child Support Enforcement Award

by

Alicia G. Key

Deputy Attorney General for Child Support, Office of the Attorney General

Each year, the National Child Support Enforcement Association (NCSEA)—a non-profit organization representing government programs and private entities within the national child support enforcement community—recognizes outstanding achievements in child support enforcement. At its annual meeting in August, NCSEA presented its 2007 "Outstanding Program" award to the Texas Attorney General's Child Support Division (CSD), the state's federally mandated child support enforcement agency under Title IV-D of the Social Security Act. This award recognizes a state, regional, tribal, or county child support program that has consistently and comprehensively exemplified excellence in overall performance and in providing effective services to its constituents and its community. Among the factors considered by NCSEA in selecting the recipient of the award is a child support program's performance in meeting federal standards for the establishment of paternity and support obligations, collections on both current and past-due support, and program cost-effectiveness. NCSEA also assesses the efforts of a program to establish and maintain a high level of quality in the delivery of child support enforcement services and to monitor its performance in serving the enforcement needs of the families on its caseload.

In 2006, the Texas child support enforcement program ranked second in the nation in total child support collections. In state fiscal year 2007 (ending August 31, 2007), the CSD collected well over $2.3 billion of court-ordered child support in the more than one million cases comprising the state's Title IV-D caseload—the second largest IV-D caseload in the nation. (This total includes only those cases being enforced by the CSD. An additional $800 million was processed through the Texas State Disbursement Unit (SDU) for non-OAG cases.) The CSD's $2.3 billion in total collections exceeds the previous year's collections by nearly $244 million, and the amount collected just five years ago by some $767 million. This represents an 83 percent increase—which is triple the national average rate of increase among all state Title IV-D programs. Moreover, the Texas program's collection of child support per FTE has tripled over the last 10 years, yielding a current cost-effectiveness ratio of $7.72 in collections for every dollar in administrative expenditures, compared with a national average of $4.58 among state IV-D programs. The CSD's overall achievements in meeting federal program performance measures in 2006 put the Texas program first in the nation in the receipt of federal incentive payments by state Title IV-D agencies.

Along with its efforts to increase the collection of child support, the CSD has been working to improve medical support enforcement. In SFY 2003, health insurance was ordered and provided in 14.4 percent of the agency's cases; in SFY 2007, that percentage increased to 37.4 percent, with the number of children in IV-D cases enrolled in non-Medicaid health care coverage having gone from 152,351 in SFY 2003, to 561,713 in SFY 2007. Moreover, cash medical support disbursements during that five-year period increased more than five-fold—from roughly $11.5 million in SFY 2003 to over $58 million in SFY 2007.

In addition to its strong record of program performance, the CSD has significantly enhanced its delivery of child support enforcement services to Texas families through a number of initiatives. Already offering direct deposit of support collections, CSD expanded its disbursement options last year by offering the Texas Debit Card to custodial parents who do not have bank accounts. The debit card eliminates the risk of lost or stolen support checks, and further eliminates fees charged for cashing checks. The debit card can be used for purchases at grocery stores and other merchant locations worldwide that accept Visa debit cards. Parents using the debit card do not have to wait for mail delivery of checks and can access child support funds when away from home. This benefit is particularly significant for parents living outside the United States or those displaced by natural disasters, such as hurricanes, when mail delivery may be uncertain or totally disrupted. The use of the debit card also reduces the costs of disbursing support collections by eliminating the expenses associated with processing and mailing paper checks. The debit card now accounts for over one-third of all support disbursements made by the CSD's State Disbursement Unit. In SFY 2007, by using the debit card—along with other forms of electronic funds transfer, such as direct deposit—to disburse collections, the SDU realized a savings of nearly $6 million over the projected costs of issuing paper checks. By early 2008, an estimated 80 percent of all support disbursements processed through the SDU will be by electronic funds transfer.

Related to the operation of the SDU, but more broadly addressing the needs of the diverse constituencies with which it interacts, the CSD has worked over the past nearly two years to establish a comprehensive "Child Support Portal." The portal is a single Internet web site which provides data and services through which CSD customers and staff, state and local governmental entities, vendors providing contracted agency services, and employers having the duty of reporting new hires and of remitting income withheld for support can all have appropriate access to CSD data and services. Unlike a web site offering static content or information, an Internet portal provides access, by log-in identification, to a range of interactive services, including those provided by contracted vendors such as the SDU. The Child Support Portal now operates to provide "one-stop shopping," where CSD customers can conduct all of their child support business and access pertinent case information, including support payment information. As further development of the portal proceeds, employers, county entities, and others will increasingly be able to transact a range of CSD-related business in one Internet location. In recognition of its work on the portal, the CSD was selected to receive the federal Office of Child Support Enforcement's "Commissioner's Award for Innovative Technology."

Outreach programs to non-custodial parents constitute another innovative and successful customer service initiative undertaken by the CSD. Government child support enforcement programs are often regarded as indifferent—at best—to the circumstances and concerns of parents who owe support. The CSD has implemented various projects to help non-custodial parents function as full participants in their children's lives rather than as only payers of court-ordered support. One of these projects—called "CHOICES"—partners the CSD with the Texas Workforce Commission/Local Workforce Boards, and the judiciary. CHOICES provides enhanced employment services for non-custodial parents who, because of unemployment or low-paying jobs, are unable to meet their child support obligations, and whose children are or were receiving public assistance. Now operating as a pilot project in five different sites in the state, CHOICES already has produced significant increases in the amount, frequency and consistency of child support payments. The majority of the non-custodial parents participating in the CHOICES projects have gone from no employment to regular employment, with wage withholding for child support in place.

Another CSD initiative oriented to the concerns of non-custodial parents is the "Shared Parenting Project," an access and visitation pilot program designed to promote and strengthen the involvement of non-custodial parents in the lives of their children. This project specifically targets parents who are establishing new child support orders and are in disagreement over the amount of time the child or children will spend with the non-custodial parent. Previously, parents in this situation were left to their own resources, often leading to non-agreed orders and court hearings that required the courts to impose conservatorship and visitation provisions. Using federal grant funds and operating through two local CSD pilot offices, this project provides free parenting conferences (mediation) to help parents reach agreements that will better fit their family situations, facilitate increased parenting time for non-custodial parents, and reduce the levels of visitation conflict. Initial results from the pilot have found increased rates of agreement by parents, less likelihood that the parents will have to resort to a court hearing to remedy their parenting conflict, and a high degree of satisfaction with the services from parents using them. Child support staff in the pilot offices report that the Shared Parenting services reduce the overall levels of conflict between parents and facilitate the entire process of establishing child support orders.

The CSD was honored by the NCSEA award, but recognizes that being identified as the "Outstanding Program" of the year does not allow the agency to rest upon its laurels. We intend, with resolve and energy, to continue to pursue excellence in every area of program activity and provide the highest quality of customer service.

Grounds for Termination of Parental Rights

by

Trevor A. Woodruff,* Duke Hooten,*
and Charles G. Childress**

September 2007

Introduction

The Due Process Clause of the Fourteenth Amendment requires the State to support the "parental unfitness" finding in a termination case by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980). Clear and convincing evidence is defined as "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." TFC § 101.007.[1]

The Texas Family Code requires that termination of parental rights be supported by clear and convincing evidence (1) of a statutory termination ground, *and* (2) that termination is in the best interest of the child. TFC § 161.001. "Only one predicate finding under § 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest." *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).[2]

Since July 3, 2002, the clear and convincing evidence standard at trial requires a higher standard of factual sufficiency review on appeal. *In re C.H.*, 89 S.W.3d 17 (Tex. 2002).[3] On December 31, 2002, the court announced a new standard of legal sufficiency review. *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002). Caution should be exercised in using appellate decisions prior to those dates. While the *type* of evidence that may be considered in applying the various grounds for termination remains the same, the *quantity* of evidence necessary to sustain the judgment on appeal may be higher.

Courts of Appeal may no longer designate opinions "do not publish"; older unpublished opinions may be cited as information but not as precedent. TEX. R. APP. P. 47.7. After January 1, 2003, if a court of appeals views the issues in the case as "settled," as to the facts and the law, a "Memorandum Opinion" should be issued. T.R.A.P. 47.4. All opinions,

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* Mr. Woodruff and Mr. Hooten are appellate lawyers for the Department of Family and Protective Services. This article is a revised and updated version of previous articles. *Grounds for Termination of Parental Rights*, in STATE BAR OF TEX. FAMILY LAW SECTION REPORT (Fall 2005) and *Grounds for Termination of Parental Rights*, in STATE BAR OF TEX. FAMILY LAW SECTION REPORT (Winter 2003/04).

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[1] Short form references to the Tex. Family Code are used in this article. Unless otherwise noted, all references are to the Family Code as amended through the 2007 legislative session.

[2] The federal Indian Child Welfare Act (ICWA) preempts state law both with respect to the burden of proof and some substantive requirements. *In re W.D.H.*, 43 S.W.3d 30, 35-7 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A discussion of the impact of ICWA on termination suits in Tex. is beyond the scope of this article.

[3] To conserve space, the Blue Book-approved short-form case style "*In re* . . ." is used in place of "*In the Interest of* . . ." throughout this article.

whether or not "published" by a reporter service,[4] may now be cited as precedent, and there have been a flood of such opinions.[5] An on-point memorandum opinion from the court of appeals with jurisdiction over the particular county is controlling authority for the trial judge.

The Legislature provides 25 statutory grounds for terminating of an individual's parental rights. TFC §§ 161.001(1)(A)-(T), 161.002(b), 161.003, 161.005, 161.006, and 161.007. Termination of parental rights is final and irrevocable. An order termination the parent-child relationship "divests the parent and the child of all legal rights and duties with respect to each other, except that the child may retain the right to inherit from and through the parent." TFC § 161.206(b). However, a parent may be ordered to pay post-termination child support for a child in foster care under the managing conservatorship of the Department of Family and Protective Services ("the Department") until the child is adopted or emancipated. TFC § 154.001(a-1). The court may also order limited post-termination contact *between a parent who files an affidavit of voluntary relinquishment of parental rights* and a child until the child is adopted. TFC §161.2061.

Parental rights are of constitutional magnitude, but "they are not absolute. Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right." *In re C.H.*, 89 S.W.3d at 26. The state has a duty to protect the safety and welfare of its citizens, including minors; therefore, the state has the duty to intervene, when necessary, in the parent-child relationship. Although a termination suit can result in loss of a parent's legal relationship with the child, the primary focus of the suit is protecting the best interests of the child, not punishing the parent. Protection of the child is paramount; the "rights of parenthood are accorded only to those fit to accept the accompanying responsibilities." *In re A.V.*, 113 S.W.3d at 361 (Tex. 2003).

Common to all the grounds for termination of parental rights, including the suit by a petitioner to terminate his or her own rights, is a requirement that the court find the termination to be in the best interest of the child. This article will therefore address first the issue of "best interest" and then consider the various substantive "grounds" that statutorily justify termination of parental rights.

Practitioners using this article should carefully review the case law, *including memorandum opinions*, in their respective jurisdictions for variations from the representative cases discussed here. Although the Supreme Court has addressed a few issues, there remain substantial disagreements among the courts of appeals on some points.

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[4] It appears that West is treating Memorandum Opinions as not worthy of publication in the Southwest Reporter series; although at least one panel has designated its memorandum opinion for publication, West has yet to publish any.

[5] In 1997 there were 47 appellate cases involving termination of parental rights; in calendar year 2006, the Office of Court Administration reported 202 such appeals, and estimated that this was an under-count by at least 25%. A careful lawyer should always look for relevant memorandum opinions, as well as reported cases from the local Court of Appeals.

Best Interest

Termination of parental rights cannot be granted unless it is shown by clear and convincing evidence to be in the child's best interest. TFC § 161.001(2).

In 1976, *prior* to the adoption of the "clear and convincing evidence" standard in termination suits, the Texas Supreme Court *reversed and rendered* a termination order in a private case, finding that there was no evidence to support the trial court's finding that termination of the mother's parental rights would be in the best interest of the child. *Holley v. Adams*, 544 S.W.2d 367, 373 (Tex. 1976). The *Holley* factors are still used to evaluate the evidence relating to best interest, which include, but are not limited to, the following:

- the desires of the child;
- the emotional and physical needs of the child now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parenting abilities of the parties seeking custody;
- the programs available to assist these persons;
- the plans for the child by the parties seeking custody;
- the acts or omissions of the parent and any excuse for same; and the stability of the home or proposed placement. *Id.* at 372.

Additional statutory factors for determining the best interest of a child when the Department is a party to the suit include a preference for a "prompt and permanent placement of the child in a safe environment" and a list of factors to be considered in determining whether the child's parents are willing and able to provide the child with a safe environment. TFC § 263.307.

Following *Holley* and applying the "clear and convincing" evidence standard, as well as heightened standards of appellate review, several courts of appeals have reversed termination orders on the ground that the evidence of "best interest" was insufficient. In reversing one such appellate ruling, the Texas Supreme Court observed:

> The absence of evidence about some of these (*Holley*) considerations would not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child. Other cases, however, will present more complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* would not suffice to uphold the jury's finding that termination is required.

In re C.H., 89 S.W.3d 17, 25-26 (Tex. 2002).

The court also clarified the application of one of the enumerated *Holley* factors, "the plans for the child by the parties seeking custody," by stating:

> Evidence about placement plans and adoption are, of course, relevant to best interest. However, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located. Instead, the inquiry is whether, on the entire record, a fact finder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest—even if the agency is unable to identify with precision the child's future home environment. *Id.* at 28.

The court in *C.H.* also explicitly ruled that evidence used to prove termination under section 161.001 may also be used to meet the "best interest" prong, stating that "[w]hile it is true that proof of acts or omissions under § 161.001(1) does not relieve the petitioner from proving the best interest of the child, the same evidence may be probative of both issues". *Id.* On remand the court of appeals found "that the record contains evidence of specific acts, inaction, and a pattern of conduct that [the father] is incapable of child-rearing and that a reasonable jury could form a firm conviction or belief from all the evidence that termination would be in [the child's] best interest." *In re C.H.*, 2003 WL 789179 *1 (Tex. App.—El Paso Mar. 6, 2003) (mem. op.).

BEST INTEREST

Generally

In re C.H., 89 S.W.3d 17 (Tex. 2002) (although parental rights are of constitutional dimension, it is also essential courts recognize that parental rights are not absolute and that the emotional and physical interests of children should not be sacrificed to preserve that right; proof of acts or omissions under TFC § 161.001(1) also may be probative on the issue of child's best interest; conduct "inimical to the very idea of childrearing" is relevant not only to endangerment, but also to best interest; lack of definitive plans for child's permanent placement is not dispositive; evidence of all *Holley* factors is not required as a "condition precedent" to termination)

Holley v. Adams, 544 S.W.2d 367 (Tex. 1976) (seminal case establishing a non-exhaustive list of factors to consider in determining best interest in a private termination suit)

In re A.A.T., 162 S.W.3d 856 (Tex. App.–Texarkana 2005, no pet.) (children in filthy and unsafe housing, domestic violence, parents physically abusing children, parents engaging in "sexual play" in front of children, and mother's pattern of becoming romantically involved with pedophiles supports best interest finding)

Taylor v. Tex. Dep't of Protective and Regulatory Servs., 160 S.W.3d 641 (Tex. App.–Austin 2005, pet. denied) (1990 and 1997 drug convictions relevant as to best interest; elapsed time since drug convictions did not render them unfairly prejudicial relative to their probative value; convictions and illegal drug use were from 1980s until two years before trial)

In re J.M., 156 S.W.3d 696 (Tex. App.–Dallas 2005, no pet.) (father's belief domestic violence did not have any effect on the children presented an emotional danger now and in future; father's delegation of all responsibility for caring for the children to mother indicated lack of parental abilities; father's failure to meet with the Department's caseworker because work schedule interfered indicated lack of stability in home)

In re A.I.G., 135 S.W.3d 687 (Tex. App.–San Antonio 2003, no pet.) (although strong presumption exists that child's best interest is served by keeping child with his or her natural parents, that presumption disappears when confronted with evidence to contrary)

In the Interest of D.C., 128 S.W.3d 707 (Tex. App.–Fort Worth 2004, no pet.) (parent's inability to provide stable home and remain gainfully employed and failure to successfully complete drug treatment and to comply with her court-ordered family service plan supports finding that termination is in the children's best interest)

In re C.A.J., 122 S.W.3d 888 (Tex. App.–Fort Worth 2003, no pet.) (inability to provide adequate care for the child, lack of parenting skills, poor judgment, drug use, and repeated instances of immoral conduct may be considered when looking at best interest; parent's unstable lifestyle, lack of income, and lack of a home may be considered in determining a parent's inability to provide for a child's emotional and physical needs; a parent's "drug addiction clearly poses an emotional and physical danger to [the child] now and in the future")

In re N.H., 122 S.W.3d 391 (Tex. App.–Texarkana 2003, pet. denied) (although mother divorced abusive father after children were removed and completed all required services, evidence mother allowed children to remain in abusive environment for over four years supports finding that termination in best interest of children)

In re D.J., 100 S.W.3d 658 (Tex. App.–Dallas 2003, pet. denied) (*Holley* test focuses on best interest of child, not best interest of parent)

In re J.I.T.P., 99 S.W.3d 841 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (*Holley* factors are not exhaustive; Department does not have to prove all nine factors under *Holley* or all thirteen factors in § 263.307 before termination of parental rights can be granted)

In re J.O.C., 47 S.W.3d 108 (Tex. App.–Waco 2001, no pet.) (no one *Holley* factor is controlling; facts of case may mean evidence of one factor is sufficient to support finding that termination in child's best interest)

In re D.T., 34 S.W.3d 625 (Tex. App.–Fort Worth 2000, pet. denied) (despite mother writing bad checks, jumping bond, and leaving other children in another state, totality of evidence insufficient to show best interest where eighteen-month-old child was happy, healthy, and had no special needs; mother planned to move in with her mother and return to school when released from prison; no proof of mother's lack of parenting ability nor of agency's plan for child's future)

Edwards v. Tex. Dep't of Protective and Regulatory Services, 946 S.W.2d 130 (Tex. App.–El Paso 1997, no writ) (when considering best interest, need for permanence paramount consideration for child's present and future needs; requirement to show termination in the best interest of the child subsumes the reunification issue; a separate consideration of alternatives to termination is not required)

D.O. v. Tex. Dep't of Hum. Servs., 851 S.W.2d 804 (Tex. App.–Dallas 2003, no pet.) (*Holley* test focuses on best interest of child, not best interest of parent; fact finder may consider the possible consequences of a decision not to terminate and properly determine that the impermanent foster care arrangement that would be mandated if a parent retained any parental rights was not in the child's best interest; fact finder may compare the parent's and the Department's plans for the child and can consider whether the plans and expectations of each party are realistic or weak and ill-defined; in reviewing the parental abilities of a parent, a fact finder can consider the parent's past neglect or inability to meet the physical and emotional needs of her children)

In the Interest of S.H.A., 728 S.W.2d 73 (Tex. App.–Dallas 1987, writ ref'd n.r.e.) (best-interest analysis may be based not only on direct evidence, but also on circumstantial evidence, subjective factors, and the totality of the evidence as a whole)

Danger to/Needs of Child Now and in the Future

In the Interest of V.A., 2007 WL 293023 (Tex. App.–Corpus Christi Feb. 1, 2007, no pet.) (mem. op.) (fact finder can infer that the "identified risk factors establish[ing] endangerment … in the past … would continue to be present thus endangering the children's well-being in the future if the children are returned" to the parent; fact finder can infer that mother's past inability to appropriately care for her children as established by her mental health issues and her unstable housing, employment, and relationships, is indicative of the quality of care she is capable of providing the children in the future)

In the Interest of F.A.R., 2005 WL 181719 (Tex. App.–Eastland Jan. 13, 2005, no pet.) (mem. op) (continued drug use demonstrates "an inability to provide for [the child's] emotional and physical needs" and "demonstrates an inability to provide a stable environment for" the child)

Williams v. Williams, 150 S.W.3d 436 (Tex. App.–Austin 2004, pet. denied) (parent had history of unstable housing, unstable employment, unstable relationships, mental health issues, and drug usage; fact finder may infer that past conduct endangering the well being of a child may recur in the future if the child is returned to the parent)

In re C.T.E., 95 S.W.3d 462 (Tex. App.–Houston [1st Dist.] 2002, pet. denied) (evidence was factually insufficient to support best interest finding in spite of father's imprisonment for cocaine possession and conviction of domestic abuse because: (1) the children had behavioral problems and special needs and there was no evidence that they were adoptable or what the chances were that they would be adopted by the same family; (2) one child had been in nine different foster homes and the other in six different foster homes; and (3) there was evidence one child was sexually abused while in the Department's care)

In re M.D.S., 1 S.W.3d 190 (Tex. App.–Amarillo 1999, no pet.) (current and future incarceration of parents relevant to their ability to meet the child's present and future physical and emotional needs; parent's incarceration at the time of trial "makes [her] future uncertain")

In re D.L.N., 958 S.W.2d 934 (Tex. App.–Waco 1997, pet. denied), *disapproved on other grounds*, 96 S.W.3d at 256 and 89 S.W.3d at 17 (fact finder may infer from past conduct endangering well-being of children that similar conduct will recur if children are returned to parent)

Desires of Child

In re J.M., 156 S.W.3d 696 (Tex. App.–Dallas 2005, no pet.) (trial court could consider children had bonded with foster parents and called them "mommy" and "daddy" in applying this *Holly* factor)

In re W.S.M., 107 S.W.3d 772 (Tex. App.–Texarkana 2003, no pet.) (evidence child loves his parents and is bonded with them is an important consideration, but it cannot override or outweigh the overwhelming and undisputed evidence showing that the parents endangered the child)

In re U.P., 105 S.W.3d 222 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (toddler unable to articulate her desire; testimony relevant that child well cared for by, and was bonded with, foster family, and spent minimal time in presence of father and his family)

In re C.N.S., 105 S.W.3d 104 (Tex. App.–Waco 2003, no pet.) (child too young to express desire verbally; appellate court looked to evidence that no emotional bond existed between child and father)

In re M.D.S., 1 S.W.3d 190 (Tex. App.–Amarillo 1999, no pet.) (child just over a year old and thus unable to directly express his desire; fact finder can consider that the child acknowledges his foster mother and father as his parents)

Parental Ability

Wilson v. State, 116 S.W.3d 923 (Tex. App.–Dallas 2003, no pet.) (fact a parent has poor parenting skills and "was not motivated to learn how to improve those skills" is evidence supporting a finding that termination is in the child's best interest)

Permanence

Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982) (it "is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents"; "there is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current home under the care of his parents or foster parents, especially when such uncertainty is prolonged")

In re M.A.N.M., 75 S.W.3d 73 (Tex. App.–San Antonio 2002, no pet.) (failure to support child not sufficiently egregious behavior on its own to warrant finding termination in child's best interest; however, when combined with evidence of the father's drug use and the child's permanence and stability in the proposed adoptive placement, the evidence was sufficient)

Plans of Party Seeking Custody

Anderson v Tex. Dep't of Family and Protective Servs., 2007 WL 1372429 (Tex. App.–Austin May 9, 2007, pet. denied) (mem. op.) ((distinguishing *Horvatich* (below)– "the primary reason we reversed the decree [in *Horvatich*] was the Department's failure to present evidence of its future plans for the children. Here, the Department presented evidence of its future plan through testimony by the foster parents and the guardian ad litem that the foster parents are committed to the children and hope to adopt them both."))

Horvatich v. Tex. Dep't of Protective and Regulatory Services, 78 S.W.3d 594 (Tex. App.–Austin 2002, no pet.) (mere opinion of guardian ad litem without supporting facts held insufficient evidence of "best interest"; record lacked sufficient evidence of children's needs or agency's plan for sibling set; court also found scant evidence of reunification efforts)

In re A.R.R., 61 S.W.3d 691 (Tex. App.–Fort Worth 2001, pet. denied) (even without plan for adoption, termination in best interest of fifteen-year old whose fragile condition could deteriorate if father returned to her life after ten years)

Programs Available to Party Seeking Custody

In re W.E.C., 110 S.W.3d 231 (Tex. App.–Fort Worth 2003, no pet.) (best interest of the child is "quite often" infused with the statutorily offensive behavior; in other instances, best interest determination must have firm basis in facts apart from offending behavior; fact finder can infer from parent's failure to take the initiative to avail herself of the programs offered to her by the Department that the parent "did not have the ability to motivate herself to seek out available resources needed … now or in the future"; termination should not be used to merely relocate a child to better and more prosperous parents)

In the Interest of M.T., 2003 WL 22054247 (Tex. App.–Houston [14th Dist.] Sept. 4, 2003, no pet.) (mem. op.) (mother's failure to complete therapy is evidence fact finder can consider in determining child was at risk because mother had not completed services recommended by the Department)

Recent Turnaround

Smith v. Tex. Dep't of Protective and Regulatory Servs., 160 S.W.3d 673 (Tex. App.–Austin 2005, no pet.) (in considering best interest, evidence of a recent turnaround by mother does not offset evidence of pattern of past instability and harmful behavior)

In re J.W.M., Jr., 153 S.W.3d 541 (Tex. App.–Amarillo 2004, pet. denied) (the fact that there were improvements in mother's life during the months just before trial did not mandate the evidence in favor of best interest finding factually insufficient)

In re R.W., 129 S.W.3d 733 (Tex. App.–Fort Worth 2004, pet. denied) (despite father's contention he had stopped drinking, using drugs, and being depressed prior to his involvement with this case, the jury was not required to ignore a long history of dependency and destructive behavior merely because it allegedly abated before trial)

In re M.G.D., 108 S.W.3d 508 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (while expert testimony may be helpful in termination case, jurors may apply their own experience and common sense to facts to draw conclusions regarding best interest; compliance with family service plan and "recent turnaround" by parent do not necessarily preclude termination; jurors not required to ignore long history of dependency and abusive behavior that abates as trial approaches); *but see In re W.C.*, (98 S.W.3d 753 (Tex. App.–Fort Worth 2003, no pet.) and *In re K.C.M.*, 4 S.W.3d 392 (Tex. App.–Houston [1st Dist.] 1999, pet. denied)

In re Uvalle, 102 S.W.3d 337 (Tex. App.–Amarillo 2003, no pet.) (mother's participation in prison treatment and education programs began year after her incarceration and only short time before trial; trier of fact could reasonably infer her participation solely for purposes of trial)

In re W.C., (98 S.W.3d 753 (Tex. App.–Fort Worth 2003, no pet.) (finding best interest evidence factually insufficient citing, *inter alia*, uncontroverted evidence mother "has done everything the Department required of her")

In re K.C.M., 4 S.W.3d 392 (Tex. App.–Houston [1st Dist.] 1999, pet. denied) (evidence supported contention that "jail turned [mother's] life around" and rendered evidence that termination was in best interest factually insufficient)

Davis v. Travis County Child Welfare Unit, 564 S.W.2d 415 (Tex. App.–Austin 1978, no writ) (fact finder can measure the future conduct of parents by their recent past conduct, but is not required to believe that there has been a lasting change in a parent's attitude since his or her children were taken)

Termination Grounds

1. Voluntary or Constructive Abandonment

Seven of the 25 termination grounds are predicated on actual or constructive abandonment of the child. Parental rights may be terminated for voluntary or constructive abandonment if the parent has:

- voluntarily left the child alone or in the possession of another not the parent, and expressed an intent not to return [TFC § 161.001(1)(A)];
- voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months [TFC § 161.001(1)(B)];
- voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months [TFC § 161.001(1)(C)];
- abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence [TFC § 161.001(1)(G)];
- voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth [TFC § 161.001(1)(H)]
- constructively abandoned a child in DFPS conservatorship or an authorized agency for not less than six months and, despite reasonable efforts made by DFPS or the authorized agency to return the child to the parent, the parent has not regularly visited or maintained significant contact with the child and has demonstrated an inability to provide the child with a safe environment [TFC § 161.001(1)(N)]; or

- voluntarily delivered the child to a designated emergency infant care provider under § 262.302 without expressing an intent to return for the child [TFC § 161.001(1)(S)].

The duration of time required to show abandonment varies among these seven grounds, depending upon evidence of the parent's express or implied intent to abandon the child. There is no minimum time requirement for the clearest forms of abandonment; *i.e.*, when the parent demonstrates, by words or by actions, a clear intent to abandon the child. TFC §§ 161.001(1)(A), (G), and (S). There is a six-month requirement where the parent's intent to abandon the child is less clear. §§ 161.001(1)(C) and (N). Evidence that would support an abandonment ground may also serve as proof of a non-abandonment termination ground. For example, where evidence supported constructive abandonment and failure to comply with a court order [TFC §§ 161.001(1) (N) and (O)], but these grounds were not pled, the same evidence was cited to support termination under the pled termination grounds, [TFC §§ 161.001(1) (D) and (E). (See In re J.O.C., 47 S.W.3d 108, 112 (Tex. App.—Waco 2001, no pet.).

VOLUNTARY OR CONSTRUCTIVE ABANDONMENT

Holick v. Smith, 685 S.W.2d 18 (Tex. 1985) (termination under (C) ground reversed; mother left her children with adoptive parents to find a job in another city because she could not support them; (C) required mother only to make arrangements for adequate support of children, not to personally support them)

In re R.M., 180 S.W.3d 874 (Tex. App.–Texarkana 2005, no pet.) (evidence legally insufficient to prove father failed to provide adequate support of the child under (B) and (C); although father did not personally deliver the child to the third parties and did not initiate the arrangement whereby they would care for the child, he was aware of the arrangement at all times and agreed to the arrangement; "it should not be significant whether a parent physically delivers their child to someone who will care for the child" – "the controlling issue should be whether the parent was aware of, consented to, and participated in the arrangement for the child's support")

In re S.S.G., 153 S.W.3d 479 (Tex. App.–Amarillo 2004, pet. denied) (reversed and rendered termination under (A) because no direct evidence that each parent expressed "intent not to return"; under (A) any evidence of events occurring before the birth of the child cannot be considered)

In re K.W., 138 S.W.3d 420 (Tex. App.–Fort Worth 2004, pet. denied) (reversed and rendered on (N) (constructive abandonment); father, incarcerated in New York, became aware of child's whereabouts and abusive situation, corresponded regularly with the Department's caseworker to inquire about child's condition, expressed desire to become more involved in child's life, requested that child be placed with father's aunt, a licensed foster parent in New York, sent several letters to the court expressing his concerns and desires, and sent caseworker letter addressed to his son; even though father in prison, he established ability to provide child with safe environment by having the child live with aunt, an appropriate placement)

In re J.J.O., 131 S.W.3d 618 (Tex. App.–Fort Worth 2004, no pet.) (visiting only twelve times in nine-month period although weekly visits were scheduled, failure to maintain stable employment and housing, drug use, and failure to comply with service plan supports termination for constructive abandonment under (N))

In re D.S.A., 113 S.W.3d 567 (Tex. App.–Amarillo 2003, no pet.) (evidence supported termination of parental rights under subsection (N); father voluntarily committed acts causing incarceration; although father professed desire to be part of children's lives, "the jury could reasonably believe that [his] actions when he was not subject to a restricted regimen within the confines of prison walls spoke more convincingly of his abandonment of his children")

In re K.M.B., 91 S.W.3d 18 (Tex. App.–Fort Worth 2002, no pet.) (proof that Department prepared several service plans designed to help mother reunite with child is ample evidence Department made reasonable efforts to return child under subsection (N); father voluntarily leaving mother during pregnancy, failing to provide support even when working, seeing child only three times during six years, and failing to work with Department to obtain visitation after child's removal from mother evidence to support termination under (C) ground)

In re D.T., 34 S.W.3d 625 (Tex. App.–Fort Worth 2000, pet. denied) (finding that parent has not attempted to regularly visit or maintain significant contact to support constructive abandonment not warranted when incarcerated mother's repeated requests for visits with infant were denied)

In re B.T., 954 S.W.2d 44 (Tex. App.–San Antonio 1997, pet. denied) (mere imprisonment does not constitute intentional abandonment of a child as a matter of law; however, imprisonment is a factor to consider along with other evidence)

2. Endangerment

The two endangerment grounds are the most commonly pled grounds in termination suits. These grounds typically are pled together and are often referred to as "the (D) and (E) grounds". Termination of parental rights may be granted if a parent has:

- knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child; or
- engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child.

TFC §§ 161.001(1)(D) and (E).

The (D) ground focuses by its terms on the child's conditions or surroundings and the parent's knowing involvement with that placement. The (E) ground focuses on a parent's conduct or the conduct of persons with whom the parent placed the child. Some courts have interpreted these sections to require different types of proof, while others draw little distinction between the two grounds, reasoning that a parent's "conduct" creates the conditions or surroundings that place the child at risk.

The Texas Supreme Court has determined that endangerment is more than a threat of theoretical injury or possible ill effects of a "less-

than-ideal" family environment. *See Tex. Dep't of Human Services v. Boyd*, below, 727 S.W.2d at 533. The court defined "endanger" as to expose to loss or injury or to jeopardize. *Id.* The endangering conduct does not have to be directed at the child nor does the child have to actually suffer injury. *Id.* "Conduct of a parent or another person in the home can create an environment that endangers the physical and emotional well-being of a child as required for termination under subsection (D). For example, an environment which routinely subjects a child to the probability that he will be left alone because his parents or caregivers are incarcerated endangers both the physical and emotional well-being of a child." *Castaneda v. Tex. Dep't of Protective and Regulatory Svcs.*, 148 S.W.3d 509, 522 Tex. App.—El Paso 2004, pet. denied)

Conduct of the parent both before and after the child's birth "is relevant to the determination of whether the conduct endangers the child's physical or emotional well-being." *In re S.P.*, 168 S.W.3d 197, 204 (Tex. App.–Dallas 2005, no pet.). Where the parent "had used heroin, cocaine, methamphetamines, and marijuana from the age of twelve until the time of trial," failed to complete drug rehabilitation programs, had given birth to one of the children with cocaine and marijuana in his body at birth, and continued to smoke around the child in spite of his health problems, the evidence supported termination on (D) and (E) grounds. *In re K.G.M.*, 171 S.W.3d 502 (Tex. App.–Waco 2005, no pet.).

ENDANGERMENT

Tex. Dep't of Human Services v. Boyd, 727 S.W.2d 531 (Tex. 1987) (an actual or concrete threat is not necessary to establish endangerment; danger can be inferred from parental misconduct)

In re S.M.L., 171 S.W.3d 472 (Tex. App.–Houston [14th Dist.] 2005, no pet.) (parent need not know for certain that child is in an endangering environment, awareness of the potential for danger and disregarding that risk is sufficient; parent who repeatedly commits criminal acts subjecting the parent to the possibility of incarceration can negatively impact child's living environment and emotional well-being; parent's failure to maintain contact with child after learning she is in agency's custody is "evidence of endangerment")

In re C.J.F., 134 S.W.3d 343 (Tex. App.–Amarillo 2003, pet. denied) (abuse or neglect supports finding of endangerment even against child not yet born at time of conduct)

In re D.M., 58 S.W.3d 801 (Tex. App.–Fort Worth 2001, no pet.) (to determine whether termination is necessary because of endangerment, courts may look to parental conduct both before and after the child's birth)

In re M.J.M.L., 31 S.W.3d 347 (Tex. App.–San Antonio 2000, pet. denied) (conduct involves not only acts, but also omissions or failures to act)

161.001(1)(D)

Generally

In re M.C., 917 S.W.2d 268 (Tex. 1996) (unsanitary conditions can be considered conditions or surroundings which endanger the well-being of a child under (D))

In re Stevenson, 27 S.W.3d 195 (Tex. App.–San Antonio 2000, pet. denied) (error not to give jury instruction that father must have knowledge of paternity prior to committing conduct prescribed under (D) which requires a parent's *knowing* conduct; (E) requires only *conduct*).

Williams v. Tex. Dep't of Human Servs., 788 S.W.2d 922 (Tex. App.–Houston [1st Dist.] 1990, no writ) overruled on other grounds by *In re J.N.R.*, 982 S.W.2d 137 (Tex. App.–Houston [1st Dist.] 1998, no pet.) ((D) refers only to the suitability of the child's living conditions)

Allowing Child to Remain in Dangerous Place

In re J.P.B., 180 S.W.3d 570 (Tex. 2005) (witness credibility issues that depend on witness appearance and demeanor cannot be weighed by the appellate court; evidence legally sufficient to support termination under (D) where father reacted appropriately to child's symptoms of abuse by taking child to the hospital for treatment, but failed to ameliorate the underlying cause)

In re S.K., 198 S.W.3d 899 (Tex. App.–Dallas 2006, pet. denied) (termination of parents' rights under (D) upheld where mother and father lacked "insight" into the children's delays and still had limited parenting skills and did not understand the children's developmental needs after completing parenting classes and counseling; evidence was undisputed that the children were regularly dirty and covered with lice and that father saw the children in such a condition but allowed them to remain with the mother)

In re M.J.F., 2006 WL 2522200 (Tex. App.–Texarkana Sept. 1, 2006, no pet.) (mem. op.) (mother's termination under (D) supported where she used drugs around the child and permitted the child to stay with its father after father had been abusive to her; father's termination under (D) supported where father allowed the child to remain with its mother with knowledge of her drug use, and allowed the child to remain in his home with knowledge of his wife's physical abuse of other children in his home and knowledge of the violence and emotional turmoil in his home)

Castaneda v. Tex. Dep't of Protective and Regulatory Servs., 148 S.W.3d 509 (Tex. App.–El Paso 2004, pet. denied) (leaving child with father knowing he was "too rough" with baby, and refusing to separate in an effort to regain custody of her son supported termination)

In re M.N.G., 147 S.W.3d 521 (Tex. App.–Fort Worth 2004, pet. denied) (mother consistently endangered her children by exposing them to abusive partners)

In re M.S., 140 S.W.3d at 430 (Tex. App.–Beaumont 2004, no pet.) (failing to remove children from a home in which they were being physically abused, neglected, and where illegal drug use occurred supports termination)

Environment/Living Conditions

In re D.H., No. 2006 WL 3095252 (Tex. App.–Waco Nov. 1, 2006, no pet.) (mem. op.) (evidence characterizing home as "hazardous" with specific examples and testimony addressing home's condition throughout case being progressively worse sufficient to affirm finding that parents allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being)

In re W.R.E., 167 S.W.3d 636 (Tex. App.–Dallas 2005, pet. filed) (father's poor hygiene and unsanitary living conditions after child was born and removed from hospital supports finding of endangering conduct)

In re P.E.W., 105 S.W.3d 771 (Tex. App.–Amarillo 2003, no pet.) (exposure to continually unsanitary living conditions, continued uncleanliness, and parent's failure to attend to child's medical needs indicia of endangerment; child "need not develop or succumb to a malady" before endangerment arises)

Doyle v. Tex. Dep't of Protective and Regulatory Services, 16 S.W.3d 390 (Tex. App.–El Paso 2000, pet. denied) (without evidence of emotional or physical harm, roach-infested home with inoperable stove and oven, isolated incidents of physical abuse, and mother's poverty insufficient to show endangerment under either (D) or (E))

161.001(1)(E)

Generally

In re J.W., 152 S.W.3d 200 (Tex. App.–Dallas 2004, pet. denied) (parent need not know of child's existence to terminate under (E))

In re J.T.G., 121 S.W.3d 117 (Tex. App.–Fort Worth 2003, no pet.) (physical and emotional abuse of child, domestic violence, drug use during pregnancy and after births of children, and attempt to commit suicide supports termination)

In re N.K., 99 S.W.3d 295 (Tex. App.–Texarkana 2003, no pet.) ((E) does not require parent must personally commit direct physical or emotional abuse of child before child endangered)

Domestic Violence

In re T.L.S., 170 S.W.3d 164 (Tex. App.–Waco 2005, no pet.) (man's non-parent status and not being the biological father did not stop him from committing family violence in the past; trial court entitled to infer that abuse will likely continue as neither he nor the mother testified that they would not have future contact with each other)

Phillips v. Tex. Dep't of Protective and Regulatory Servs., 149 S.W.3d 814 (Tex. App.–Eastland 2004, no pet.) (drug use while children in house and not ending relationship with abusive husband supports termination under (D) and (E))

Drug Use

In re M.L.M. 2007 WL 79339 (Tex. App.–Amarillo Jan. 12, 2007, no pet.) (mem. op.) (trial court could draw adverse inferences from mother's invocation of her right against self-incrimination when asked questions regarding her drug use)

Cervantes-Peterson v. Tex. Dep't of Family and Protective Servs., 221 S.W.3d 244 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (finding of endangering conduct affirmed where mother admitted to cocaine use during pregnancy and that she had a serious, recurring problem with drugs; mother's cocaine use was part of a course of conduct over multiple pregnancies)

In re R.W., 129 S.W.3d 733 (Tex. App.–Fort Worth 2004, pet. denied) (evidence demonstrated that the parent struggled with substance abuse so excessive that he required medical assistance; despite the parent's testimony that he no longer used drugs, the jury was not required to ignore his long history of substance abuse and destructive behavior)

In re J.T.G., 121 S.W.3d 117 (Tex. App.–Fort Worth 2003, no pet.) (fact finder reasonably can infer parent's failure to take a drug screen indicates the parent was avoiding testing because parent was using drugs)

Robinson v. Tex. Dep't of Protective and Regulatory Services, 89 S.W.3d 679 (Tex. App.–Houston [1st Dist.] 2002, no pet.) (court may consider narcotics use and its effects on a parent's life and ability to parent as contributing to a course of endangering conduct)

In re W.A.B., 979 S.W.2d 804 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (use of drugs during pregnancy is conduct that endangers the physical and emotional well-being of the unborn child; court is not required to speculate as to the harm suffered by the child when its mother ingests drugs during her pregnancy)

Edwards v. Tex. Dep't of Protective and Regulatory Services, 946 S.W.2d 130 (Tex. App–El Paso 1997, no writ) (one parent's drug-related endangerment of a child by using drugs during pregnancy imputed to other parent)

Environment

In re M.J.F., 2006 WL 2522200 (Tex. App.–Texarkana Sept. 1, 2006, no pet.) (mem. op.) (mother's termination under (E) supported where she used drugs in the child's presence and during her pregnancy, drove while intoxicated with the child in the car, and drove the child around without a properly adjusted car seat; father's termination under (E) supported where father allowed mother to care for the child with knowledge of her drug use, and allowed his wife to care for the child with knowledge of his wife's violent tendencies)

In re N.H., 122 S.W.3d 391 (Tex. App.–Texarkana 2003, pet. denied) (mother divorced abusive father after children were removed and completed all services required by the Department, including attending battered women's group; evidence mother knew of father's abusive behavior and allowed children to remain in abusive environment for over four years supported termination)

In re C.L.C., 119 S.W.3d 382 (Tex. App.–Tyler 2003, no pet.) (abusive or violent conduct by parent or other resident of child's home can produce an environment that endangers the physical or emotional well-being of a child; probability that child will be left alone because parents jailed again endangers both physical and emotional well-being of child; scienter not required for appellant's acts under (E))

Inability to Parent/Failure to Protect

In re R.F., 115 S.W.3d 804 (Tex. App.–Dallas 2003, no pet.) (mother had been a child abuse victim and suffered from bipolar disorder; "[w]hile some of her behavior might be predictable given her circumstances, the question is not *why* [she] engaged in the conduct she did, but whether the conduct presented a danger to her children")

In re Uvalle, 102 S.W.3d 337 (Tex. App.–Amarillo 2003, no pet.) (mother's reliance on her mother to care for children on occasion "placed them at risk" because of evidence that maternal grandmother had history of drug abuse and had her parental rights terminated on two occasions)

In re J.I.T.P., 99 S.W.3d 841 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (a parent's mental state may be considered in determining whether a child is endangered if that mental state allows the parent to engage in conduct that jeopardizes the child's physical or emotional well-being)

In re R.G., 61 S.W.3d 661 (Tex. App.–Waco 2001, no pet.) (knowledge actual offense occurred not necessary for endangerment where father aware of daughter's claims of sexual abuse, but took no protective action)

In re J.O.C., 47 S.W.3d 108 (Tex. App.–Waco 2001, no pet.) (failure to learn to care for child with feeding difficulties, propensity to stop breathing, and susceptibility to infection presents great risk of physical harm to medically fragile child)

In re C.D., 664 S.W.2d 851 (Tex. Civ. App.–Fort Worth 1984, no writ) (a parent's mental condition and suicide attempts are factors to consider in determining whether the parent has engaged in endangering conduct)

Imprisonment/Criminal Conduct

Tex. Dep't of Human Services v. Boyd, 727 S.W.2d 531 (Tex. 1987) (while incarceration, standing alone, will not prove endangerment, it is a factor for consideration on the issue of endangerment)

In re D.T., 34 S.W.3d 625 (Tex. App.–Fort Worth 2000, pet. denied) (placement of healthy, clean baby in foster care when mother arrested insufficient for termination under (D), no proof child exposed to bad environment; writing bad checks and prison term of less than two years required for (Q) ground insufficient for endangerment under (E) without evidence of additional endangering conduct)

In re M.D.S., 1 S.W.3d 190 (Tex. App.–Amarillo 1999, no pet.) (imprisonment, standing alone, does not constitute engaging in conduct that endangers the emotional or physical well-being of the child; however, it is a factor for consideration by the trial court on the issue of endangerment; if the evidence, including the imprisonment, shows a course of conduct that has the effect of endangering the physical or emotional well-being of the child, a finding under (E) is supportable)

In re J.N.R., 982 S.W.2d 137 (Tex. App.–Houston [1st Dist.] 1998), *disapproved on other grounds*, 89 S.W.3d 17 (Tex. 2002) (continuing criminal behavior that results in incarceration, knowing one's parental rights are at stake is conduct that constitutes endangerment)

Allred v. Harris County Child Welfare Unit, 615 S.W.2d 803 (Tex. Civ. App.–Houston [1st Dist.] 1980, writ ref'd n.r.e.) (intentional criminal activity which exposes a parent to incarceration is relevant evidence tending to establish a course of conduct which endangers a child's emotional or physical well-being)

Neglect

In re M.C., 917 S.W.2d 268 (Tex. 1996) ("neglect can be just as dangerous to the well-being of a child as direct physical abuse"; leaving preschool children alone unattended by highway in car with engine running, exposing them to extremely unsanitary conditions, and failing to obtain necessary medical care supported termination based on neglect; physical abuse not required)

In re W.J.H., 111 S.W.3d 707 (Tex. App.–Fort Worth 2003, pet. denied) (neglect can be as dangerous to child's emotional and physical health as intentional abuse; actions or inactions that endanger other parent or another child can sufficiently support termination, even to unborn child)

Physical/Sexual Abuse

In re J.A.J., 225 S.W.3d 621 (Tex. App.–Houston [14th Dist.] 2006, pet. filed) ("we are not prepared to hold that a bruise on the buttocks or back of the legs is, by itself, proof of unreasonable or excessive force")

In re S.F., 141 S.W.3d 774 (Tex. App.–Texarkana 2004, no pet.) (parent who commits sexual abuse of child's sibling endangers the physical and emotional well-being of child; not required that child be aware of the sexual abuse or that abuse occur in parent's home or where child lived)

In re A.B., 125 S.W.3d 769 (Tex. App.–Texarkana 2003, pet. denied) (mother unwilling or unable to ensure emotional well-being of the children because of denial that two older children sexually abused their younger siblings; failure to participate in counseling and refusal to take children to counseling contributed to continued exposure to sexual abuse and children's hesitancy to report future sexual abuse)

In re D.P., 96 S.W.3d 333 (Tex. App.–Amarillo 2001, no pet.) (endangerment finding not warranted in absence of evidence of how or when injuries occurred, or who caused injuries in different stages of healing)

In re King, 15 S.W.3d 272 (Tex. App.–Texarkana 2000, pet. denied) (conviction for aggravated sexual assault of one child is conduct court could infer will endanger other children in home)

3. Failure to Support

Failure to support the child is a required element in some of the abandonment grounds discussed above and may help support a finding under the endangerment "conditions and surroundings" ground. Failure to support may be relevant to the issue of best interest, showing a lack of parental interest in, and responsibility for the child. Failure to support the child also is a separate termination ground, if termination can be shown to be in the child's best interest. To establish this ground the petitioner must prove that a parent has:

- failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition. TFC § 161.001(1)(F)

FAILURE TO SUPPORT

Wiley v. Spratlan, 543 S.W.2d 349 (Tex. 1976) (one-year period required in (F) means a continuous twelve-month period for both failure to support and ability to pay)

In re K.A.H., 195 S.W.3d 840 (Tex. App.–Dallas 2006, no pet.) (evidence factually sufficient to uphold trial court's finding of father's conduct under (F); father's defenses that he was young, under no order to pay support, and that he didn't know where the child was were rejected; "father cites us to no authority, and we have found none, excusing the failure to support one's child for reasons of youth or the absence of a court order to pay")

Williams v. Williams, 150 S.W.3d 436 (Tex. App.–Austin 2004, pet. denied) (testimony at default hearing that parrots statutory language without specificity and merely makes conclusory statement of conduct under (F) legally insufficient to prove ground)

In re M.A.N.M., 75 S.W.3d 73 (Tex. App.–San Antonio 2002, no pet.) (even without firm evidence of father's earnings during 12 month period, evidence he worked sporadically, spent significant money on drugs, and was able to earn money sufficient to show ability to pay)

Phillips v. Tex. Dep't of Protective and Regulatory Services, 25 S.W.3d 348 (Tex. App.–Austin 2000, no pet.) (ability to pay satisfied by father's admission he could have earned enough money to contribute to child's support but did not)

R.W. v. Tex. Dep't of Protective and Regulatory Services, 944 S.W.2d 437 (Tex. App.–Houston [14th Dist.] 1997, no pet.) (father who received the child into his home and held out the child to be his own subject to termination for failure to support child during time period preceding resolution of paternity suit)

Djeto v. Tex. Dep't of Protective and Regulatory Services, 928 S.W.2d 96 (Tex. App.–San Antonio 1996, no writ) (without judicial admission of paternity, court order, or acknowledgment of paternity, no duty to support to sustain termination)

4. Failure to Comply with Court Order

There are two termination grounds based on a parent's failure to comply with a court order. Termination may be ordered if the parent has:

- contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261 TFC § 161.001(1)(I).
- failed to comply with a court order that specifically established the actions necessary for the parent to obtain the return of a child who has been in the temporary or permanent managing conservatorship of TPRS for not less than nine months. TFC
- TFC § 161.001(1)(O).

The subchapter referenced in the (I) ground permits a court to order a parent (1) to allow access to the child's home for purposes of investigation [TFC § 261.303(b)]; (2) to provide medical or mental health records or submit to an examination [TFC § 261.305]; or (3) not to remove the child from the
state pending completion of the investigation [TFC § 261.306]. Given the limited scope of this ground, it is seldom used.

To qualify as an order that will support termination of parental rights under the (O) ground for failure of the parent to comply, the order must have "specifically established the actions necessary for the parent to

obtain the return of a child" and the child must have been in the custody of the Department for not less than nine months. Disobedience of an order that does not specify "actions necessary for the parent to obtain the return of a child" may be grounds for contempt, but not for termination. Prior orders that establish the actions required of the parent to obtain return of the child may be marked and offered into evidence, but must be redacted to delete any extraneous fact-findings. *In re M.S.*, 115 S.W.3d 534, 538 (Tex. 2003) (admitting the orders as evidence that the parent failed to comply was not in itself inappropriate, but the trial judge's factual findings that his order had, in fact, been violated, should have been redacted, so that the jury could draw its own conclusions).

FAILURE TO COMPLY WITH COURT ORDER

In re J.F.C., 96 S.W.3d 256 (Tex. 2002) (evidence supported termination under (O) as a matter of law where parents completed some services, however, they testified that they had consciously decided not to comply with many of the requirements imposed by the trial court's order; the parents' "sporadic" incidents of compliance with the court orders did not alter the undisputed fact that they violated many material provisions of the trial court's order)

In re T.N.F., 205 S.W.3d 625, 631 (Tex. App.–Waco 2006, pet denied) (Termination under (O) ground upheld where father testified that distance, time constraints, and employment issues excused his failure to complete court-ordered services; "[The parent] presents no authority for his novel excuse argument, and the statute itself does not make a provision for excuses")

In re D.L.H., 2005 WL 2989329 (Tex. App.–San Antonio Nov. 9, 2005, no pet.) (mem. op.) (parents' arguments that substantial compliance was sufficient to avoid termination under (O) rejected; "neither party has provided, and we have not found, any legal authority for their premise that 'substantial compliance' somehow renders undisputed evidence of a failure to comply somehow insufficient to support a trial court's finding")

In re M.C.M., 57 S.W.3d 27 (Tex. App.–Houston [1st Dist.] 2001, pet. denied) (parents not held in contempt for violating court's orders; parental rights were terminated under (O), so conduct not subject to criminal contemnor protections)

In re Verbois, 10 S.W.3d 825 (Tex. App.–Waco 2000, orig. proceeding) (mandamus denied where evidence did not show parents were forced to choose between protecting parental rights through compliance with court-ordered service plan or exercising constitutional protection against self-incrimination)

5. Truancy/Runaway

Rights may be terminated under TFC § 161.001(1)(J) where a parent has been the major cause of:

- the child's failure to be enrolled in school as required by the Education Code, or
- the child's absence from the home without the consent of the parents or guardian for a substantial length of time or without the intent to return.

This is a rarely used ground, although evidence of the child's chronic failure to attend school may be used to support a finding under the endangerment grounds or to show that termination would be in the child's best interest. One opinion, in a footnote, states that if a child was enrolled in school, this ground does not apply even if excessive absences caused the child to fail all her subjects. *Smith v. Tex. Dep't of Protective and Regulatory Services*, 160 S.W.3d 673, fn. 2 (Tex. App.—Austin 2003, no pet.). The second part of this ground appears to permit termination for parental kidnapping, but no reported case has discussed this ground.

6. Voluntary Relinquishment

Voluntary relinquishment of parental rights is undoubtedly the most commonly used termination ground in private termination cases. Relinquishment is also frequently used in cases involving the Department. This ground is met if a parent has:

- executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter. TFC § 161.001(1)(K)

Detailed formal requirements for an affidavit of relinquishment are set out in TFC § 161.103–and there are some notable differences between relinquishments in a private setting, and those in which the Department is involved. Note that while an affidavit of relinquishment may be revocable in a private case, TFC § 161.103(e) provides that the relinquishment in an affidavit that designates the Department or a licensed child-placing agency as managing conservator is irrevocable.

Issues of misrepresentation, fraud, duress, coercion and overreaching have become more common in direct appeals and petitions for equitable bills of review attacking termination orders based upon relinquishments, and a few illustrative cases are included here. Relinquishments in cases involving the Department are particularly vulnerable to such challenges, especially when the parent who relinquishes parental rights is unrepresented and/or unsophisticated. Practical and ethical concerns arise when a caseworker or an attorney representing the Department explains the meaning of the affidavit of relinquishment to an adverse party; therefore, best practice dictates that parents be encouraged to obtain *independent* legal advice before signing an affidavit.

VOLUNTARY RELINQUISHMENT; CHALLENGES

In re L.M.I., 119 S.W.3d 707 (Tex. 2003) (*cert. denied, sub. nom. Dueñas v. Montegut*, 541 U.S. 1043 (2004)) (parents waived (1) alleged father's issue whether signature on affidavit procured in violation of due process rights; (2) alleged father's claim affidavit did not comply with statute; (3) mother's issue whether custodial parents made unenforceable promises fraudulently inducing signing affidavit; and (4) mother's issue whether police detective and others improperly acted as adoption intermediaries)

Brown v. McLennan County Children's Protective Servs., 627 S.W.3d 390 (Tex. 1982) (Legislature expressly provided that an affidavit to the Department or to an authorized adoption agency is irrevocable; Legislature intended to make irrevocable affidavits of relinquishment sufficient

evidence on which a trial court can make a finding that termination is in the best interest of the children)

In re R.B., 225 S.W.3d 798 (Tex. App.–Fort Worth 2007, no pet.) (while appellants may have been under considerable pressure to make a decision, they were represented by counsel, were aware of the documents they were signing, and understood the consequences; fact that appellants may have been faced with potential criminal charges or the removal of their unaffected children does not prove the affidavits of relinquishment were wrongfully procured)

In re M.Y.W., 2006 WL 3360482 (Tex. App.–Houston [14th Dist.] Nov. 21, 2006, pet. denied) (mem. op.) (appellant filed a bill of review fifteen months after termination judgment attempting to set aside termination of her parental rights based on her affidavit of relinquishment; bill of review barred by the six month limitation period in § 161.211)

In re E.S.S., 131 S.W.3d 632 (Tex. App.–Fort Worth 2004 no pet.) (trial court erred in rendering judgment on the ground that appellant voluntarily relinquished his parental rights without a properly executed affidavit of relinquishment tendered to the court and offered as evidence; there is no statutory provision that an oral relinquishment will suffice to comply with the strict requirements of § 161.103 and the court found no common law authority allowing acceptance of an oral relinquishment in lieu of a signed affidavit)

Mosley v. Dallas County Child Protective Services, 110 S.W.3d 658 (Tex. App.–Dallas 2003 pet. denied) (equitable bill of review correctly dismissed where mother failed to establish prima facie right to judgment on retrial)

Jones v. Tex. Dep't of Protective and Regulatory Services, 85 S.W.3d 483 (Tex. App.–Austin 2002, pet. denied) (appellate court reversed trial court's denial of bill of review where department breached duty, based on prior relationship with the mother as former foster child, to tell "whole truth" to her, and such failure amounted to prima facie proof that relinquishment was involuntary)

In re D.R.L.M., 84 S.W.3d 281 (Tex. App.–Fort Worth 2002, pet. denied) (court's failure to follow mother's wishes regarding appointment of specific family as child's conservator does not make affidavit of relinquishment involuntary where relinquishment not conditioned on mother's statement)

Lumbis v. Tex. Dep't of Protective and Regulatory Services, 65 S.W.3d 844 (Tex. App.–Austin 2002, pet. denied) (no improper inducement where mother was represented and understood agreement to try to arrange open adoption was unenforceable; the fact that she was emotionally upset when she signed the affidavit of relinquishment does not make it involuntary)

Queen v. Goeddertz, 48 S.W.3d 928 (Tex. App.–Beaumont 2001, no pet.) (unenforceable promise of visitation makes relinquishment involuntary)

In re V.R.W., 41 S.W.3d 183 (Tex. App.–Houston [14th Dist.] 2001, no pet.) (reversible error to refuse to grant mother's timely request for jury trial if material issue of fact exists concerning intent of parties in signing affidavit of relinquishment)

In re M.A.W., 31 S.W.3d 372 (Tex. App.–Corpus Christi 2000, no pet.) (mother's subsequent change of heart does not invalidate relinquishment voluntary when executed)

Vela v. Marywood, 17 S.W.3d 750 (Tex. App.–Austin 2000, pet. denied) (child-placing agency's breach of special duty owed to pregnant mother; failure to notify that open adoption agreement is unenforceable justified finding relinquishment procured by misrepresentation, fraud, and duress, and was not voluntarily signed)

7. Parent's Bad Acts Directed Towards Another Child

Most termination grounds focus on a parent's acts or omissions that directly harm or endanger the child that is the subject of the termination suit. However, two termination grounds base termination on a prior bad act by the parent with respect to any child. In addition, "bad acts" involving other children may be critical evidence in showing endangerment to the particular child in a (D) and (E) suit; two examples are annotated here.

Parental rights can be terminated if the parent has been found criminally responsible for the death or serious injury of a child under one of the following Penal Code sections, or has been adjudicated under Title 3 (Juvenile Justice Code) for conduct that caused the death or serious injury of a child under one of the following Penal Code sections:

- § 19.02 (murder);
- § 19.03 (capital murder);
- § 19.04 (manslaughter)
- § 21.11 (indecency with a child);
- § 22.01 (assault);
- § 22.011 (sexual assault);
- § 22.02 (aggravated assault);
- § 22.021 (aggravated sexual assault);
- § 22.04 (injury to a child, elderly individual, or disabled individual);
- § 22.041 (abandoning or endangering child);
- § 25.02 (prohibited sexual conduct);
- § 43.25 (sexual performance by a child); and
- § 43.26 (possession or promotion of child pornography).
- §21.02 (continuous sexual abuse of young child or children) (eff. 9/1/2007 TFC § 161.001(1)(L).

Parental rights also can be terminated for culpable conduct towards another child if the parent has:

- had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) (the two endangerment grounds) or substantially equivalent provisions of the law of another state. TFC § 161.001(1)(M).

The conviction or adjudication required under (L) may be for acts or omissions directed at any child, whether or not that child is related to the parent or to the child who is the subject of the termination suit. This ground can be used when the child who is the subject of the suit was the victim of the crime; however, such cases also can be handled under the endangerment grounds of (D) and (E). Although termination under (L) occurs most commonly for acts committed against a child, this ground also is used where a parent has injured a child by omission, *i.e.*, where the parent has failed to protect the child from serious injuries inflicted by the other parent. *See, e.g.*, *Segovia*, below.

The Amarillo Court of Appeals has held that unless death or serious injury is an element of the offense, proof of criminal adjudication for one of the crimes listed in (L) is not, in and of itself, sufficient to support termination under that ground. *See Vidaurri v. Ensey*, below. In *Vidaurri* the court opined that the "premise that serious injury must automatically be inferred from the mere commission of indecency with a child fails to survive reasonable analysis". *Id.* at 146. *But see In re L.S.R.*, 92 S.W.3d 529 (Tex. 2002) (Texas Supreme Court denied the parents' petitions for review, but specifically "disavow[ed] any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury").

Termination under (M) may be proved by the admission of a copy of the judgment terminating the parent's rights under (D) and/or (E) or substantially equivalent provisions of the law of another State. It is not necessary that the State prove up the previous termination case again. *See In re J.M.M.*, below.

PARENT'S BAD ACTS DIRECTED TOWARDS ANOTHER CHILD

In re E.S.C., 2006 WL 1148144 (Tex. App.–Houston [14th Dist.] Mar. 30, 2006, no pet.) (mem. op.) (although E.S.C. (3 years old) and L.M.M. (1 year old) were not involved in family shoplifting ring that included other children, the "law does not require the State to wait until each child in a family is personally victimized before it may terminate a parent's rights") *see also* *In re S.P.*, 168 S.W.3d 197 (Tex. App.–Dallas 2005, no pet.) (court rejects mother's argument that endangerment finding can be supported only by evidence of conduct toward the child as to whom parental rights are to be terminated)

In re Castillo, 101 S.W.3d 174 (Tex. App.–Amarillo 2003, pet. denied) (evidence of father's conviction for murder of one of his children supports termination under subsection (L))

In re J.M.M., 80 S.W.3d 232 (Tex. App.–Fort Worth 2002, pet. denied) (appellant's rights to another child previously terminated based on findings she violated (D) and (E); Department need not re-establish that parent's conduct with respect to other child was in violation of (D) or (E), need only admit into evidence prior termination order terminating under those grounds for termination under (M))

In re A.R.R., 61 S.W.3d 691 (Tex. App.–Fort Worth 2001, pet. denied) (father's testimony that he made a mistake in sexually assaulting his child, coupled with caseworker testimony that type of sexual abuse committed causes a child to sustain serious emotional injury, sufficient to prove that criminal conduct caused serious injury under (L))

Vidaurri v. Ensey, 58 S.W.3d 142 (Tex. App.–Amarillo 2001, no pet.) (father's deferred adjudication for indecency with child insufficient to prove father caused serious injury to child under (L) ground) *see also* *In re L.S.R.*, 60 S.W.3d 376 (Tex. App.–Fort Worth 2001, pet. denied) (evidence legally insufficient to support termination under (L) ground where the only evidence presented was the father's deferred adjudication conviction for indecency with a child and that he had been treated for pedophilia; there was no testimony that the victim suffered death or serious injury; "where death or serious injury is not an element of the offense, the conviction or deferred adjudication is not by itself sufficient evidence to support termination under TFC § 161.001(1)(L)(iv)") *but see* *In re L.S.R.*, 92 S.W.3d 529 (Tex. 2002) ("we deny the petitions for review, but disavow any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury")

In re J.M.S., 43 S.W.3d 60 (Tex. App.–Houston [1st Dist.] 2001, no pet.) ((L) and (M) grounds are constitutional even though no causal connection to activities toward child subject of present suit)

Segovia v. Tex. Dep't of Protective and Regulatory Services, 979 S.W.2d 785 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (father's criminal conviction for injury to another child by omission supported termination under (L) even if facts insufficient to prove other endangerment grounds)

Lucas v. Tex. Dep't of Protective and Regulatory Services, 949 S.W.2d 500 (Tex. App.–Waco 1997, pet. denied) (father's conviction for aggravated sexual assault of seven year old daughter and diagnosis of pedophilia supports termination of parental rights of his other children based on endangerment)

Avery v. State, 963 S.W.2d 550 (Tex. App.–Houston [1st Dist.] 1997, no pet.) (involuntary termination of rights to another child seventeen years earlier not too remote to support termination)

Director of Dallas County Child Protective Servs. v. Bowling, 833 S.W.2d 730 (Tex. App.–Dallas 1992, no writ) (termination under (D) and (E) ground proper for violent or negligent conduct directed at the other parent or other children even where the behavior was not committed in the child's presence)

8. Drug and Alcohol Use

Rights may be terminated if the parent has:

- used a controlled substance as defined by Chapter 481 of the Health and Safety Code *in a manner that endangered the health or safety of the child*, and:
  - (i) failed to complete a court-ordered substance abuse treatment program; or
  - (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance. TFC § 161.001(1)(P) (emphasis added).

Parental rights also can be terminated if the parent has:

- been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by Tex. Family Code § 261.001. TFC § 161.001(1)(R).

A child "born addicted" is defined as a child who is born to a mother who during the pregnancy used a controlled substance as defined by Chapter 481 of the Health and Safety Code, other than a controlled substance legally obtained by prescription, or alcohol; and:

1) experienced observable withdrawal from the alcohol or controlled substance;
2) exhibited observable harmful effects in the child's physical appearance or functioning; or
3) exhibited the demonstrable presence of alcohol or a controlled substance in the child's bodily fluids. TFC § 261.001(7).

Note that the parent's use of a controlled substance must endanger the child under the (P) ground; the mere "demonstrable presence" of drugs or alcohol makes the child "born addicted" under (R). Note also that since the definition of a controlled substance under Chapter 481 of the Health and Safety Code explicitly *excludes* alcohol, tobacco, prescribed drugs, and over-the-counter medications, the use of alcohol is relevant to the child-born-addicted ground (R), but would not suffice to terminate rights under (P).

CHILD ENDANGERED BY DRUG USE OR BORN ADDICTED

In re M.J., 2006 WL 3438058 (Tex. App.–Beaumont Nov. 30, 2006, no pet.) (mem. op.) (evidence legally and factually sufficient to support finding of conduct under (P) and (R) where mother completed court-ordered substance abuse program and was reunited with her children; however, she began using cocaine during subsequent pregnancy, causing that child to be born addicted to cocaine; trial court could infer endangering course of conduct as mother admitted to using drugs at the beginning and end of her pregnancy and to staying away from her children and prostituting herself after her relapse)

In re T.N.J., 2005 WL 3115913 (Tex. App.–San Antonio Nov. 23, 2005, no pet.) (mem. op.) (father's argument that his parental rights could only be terminated for behavior relating to controlled substance abuse under (P) ground rejected; 161.001(1) contains no restrictions as to what findings are required in a particular case, and trial court was permitted to rely on drug addiction as conduct under (E) to support termination)

In re U.P., 105 S.W.3d 222 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (termination affirmed under (D) and (E); parents' rights could have been terminated under (R) because mother used drugs during pregnancy and father provided her with drugs after learning of her pregnancy)

In re H.R., 87 S.W.3d 691 (Tex. App.–San Antonio 2002, no pet.) (fact that child was born addicted supported logical inference mother's drug use while pregnant exposed child to injury; affirmed under (P) as well as (D), (N), and (O))

9. Imprisonment

Under TFC § 161.001(1)(Q), a parent's parental rights may be terminated if a parent has:

- knowingly engaged in criminal conduct that has resulted in the parent's:

(i) conviction of an offense; and
(ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition.

Until 2003, the courts of appeals were split as to whether (Q) should be applied prospectively or retrospectively. In July of 2003, the Texas Supreme Court ruled that (Q) was to be applied prospectively. *See In re A.V.*, below.

IMPRISONMENT

In re H.R.M., 209 S.W.3d 105 (Tex. 2006) (appellate court must give due deference to jury's finding and not supplant the jury's judgment with its own; father's testimony regarding parole was inherently speculative; jury could disregard father's testimony in light of evidence of his multiple convictions and prior revocation)

In re A.V., 113 S.W.3d 355 (Tex. 2003) ((Q) "aims to remedy the conditions of abused and neglected children, not to enhance the punishment of the parent"; (Q) applied prospectively from date petition filed; prospective reading "allows the State to act in anticipation of a parent's abandonment of the child and not just in response to it")

Hampton v. Tex. Dep't of Protective and Regulatory Servs., 138 S.W.3d 564 (Tex. App.–El Paso 2004, no pet.) (merely naming relatives without showing of willingness, capacity, and competence not sufficient to meet parent's burden to produce some evidence of how parent has arranged for care during incarceration)

In re Caballero, 53 S.W.3d 391 (Tex. App.–Amarillo 2001, pet. denied) (after the petitioner establishes that a parent's knowing criminal conduct has resulted in his/her incarceration for more than two years, the incarcerated parent must produce evidence showing how they would provide care for the child during their period of incarceration; if the parent meets this burden, the burden shifts back to the petitioner to show that the proposed arrangement would not satisfy the parent's duty to the child)

10. Murder of the Other Parent of the Child

Parental rights may be terminated if the parent has:

- been convicted of the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code. TFC § 161.001(1)(T).

House Resolution 193 (79th Legislature, 1st Called Session, 2005) explains the source of this legislation as follows: "Donna Hoedt of Angleton lost her life on April 2, 1996, at the age of 33, when she was murdered by her spouse; even though her husband was subsequently convicted of the crime and sentenced to life in prison, he retained parental rights over the couple's four children." The grandmother of the children succeeded in terminating the killer's parental rights after "a lengthy and expensive court battle," and has been promoting legislation on the issue. The one case affirming termination on this ground is also cited in the

section on "retroactivity," below. *In re E.M.N.*, 221 S.W.3d 815 (Tex. App.—Fort Worth April 5, 2007, no pet.) (mother's rights terminated under (T) for murdering child's father). *See also In re B.R.*, 950 S.W.2d 113 (Tex. App.—El Paso 1997, no writ) (father's shotgun slaying of child's mother constitutes endangerment and there is no need to prove adverse effect on child).

11. Failure of Alleged Father to Claim Paternity or Register with Paternity Registry

A self-alleged biological father does not have a constitutional right to notice or participation in a termination suit if he fails to comply with state procedures for making his claim known. *See Lehr v. Robertson*, 463 U.S. 248, 252-3 (1983) (alleged father's parental rights were terminated without notice based on his failure to register even though he had filed a petition to establish his parentage in another court). Unlike the registry provisions in some states, the Texas version of the registry has not eliminated the right of a self-alleged father to file a parentage suit without registering. However, for judgments rendered on or after January 1, 2008, a father who fails to register with the paternity registry not only waives citation but "**there is no requirement to identify or locate an alleged father who has not registered with the paternity registry under Chapter 160.**" TFC 161.002 (c-1) (eff. 9/1/2007).

An alleged father's rights may be terminated under TFC § 161.002 if:

- he has been served with citation *and* has failed to respond by timely filing an admission of paternity or a counterclaim for paternity under Ch. 160 [§ 161.002(b) (1)];
- if the child is over one year of age at the time the petition is filed, he has not registered with the paternity registry and after the exercise of due diligence by the petitioner, his identity and location are unknown, or his identity is known but he cannot be located (*but "due diligence" is not required if the judgment is rendered on or after January 1, 2008*) [§ 161.002(b)(2)];
- if the child is under one year of age at the time the petition is filed and he has not registered with the paternity registry [§ 161.002(b)(3)] (eff. 9/1/2007);
- he has registered with the paternity registry but he cannot be served at the address provided or at any other address known by petitioner, despite petitioner's due diligence [§ 161.002(b)(4)] (eff. 9/1/2007).

Termination of the rights of an alleged father who fails to register under the "paternity registry" provisions does not require either citation by publication, or a "diligent search" by the petitioner. For orders rendered on or after January 1, 2008, the court may terminate the alleged father's parental rights based solely on the certificate of the bureau of vital statistics that no man has registered the intent to claim paternity. TFC 161.002(e) (eff. 9/1/2007).

Appointment of an attorney ad litem for an alleged father who failed to register with the paternity registry or who could not be served after due diligence is still mandatory. TFC 107.013(a) (3) & (4).

If the alleged father **has** registered, but cannot be located or served at the address given, the trial court may terminate the alleged father's parental rights without further efforts at service, and without service of process by publication if, based upon "petitioner's sworn affidavit describing the petitioner's effort to obtain personal service of citation on the alleged father and considering any evidence submitted by the attorney ad litem for the alleged father," the court finds that the petitioner has exercised due diligence in attempting to obtain service on the alleged father. TFC 161.002(f) (eff. 9/1/2007).

These provisions apply only to the rights of an ***alleged father*** as defined by the Family Code, and not to a presumed, adjudicated or acknowledged father. *See* TFC § 101.0015. An alleged father's rights cannot be terminated under section 161.002 if he **timely** appears and seeks to establish paternity. *See* *Salinas v. Tex. Dep't of Protective and Regulatory Servs.*, 2004 WL 1896890 (Tex. App.—Austin, Aug. 26, 2004, no pet.) (mem. op.) (father did not timely file an assertion of paternity or counterclaim for paternity when he waited almost a full year after the Department took custody of the child to assert his paternity). If an alleged father timely appears and seeks to establish paternity, the court should proceed to adjudicate parentage under Chapter 160. If the man is adjudicated not to be the father, then he is not a parent and no termination is necessary. *See* TFC § 101.024 (definition of "parent"). If he is adjudicated to be the father, at least one of the termination grounds, as well as best interest, must be proven under TFC § 161.001 in order to terminate his parental rights.

The registry process should only be used for children born after August 1, 1997, because the registry was established September 1, 1997 and the statute requires registration to be done by the 31st day after the birth of the child. TFC § 160.402(a)(2). Thus, it is impossible for the father of a child born prior to August 1997 to have registered for notice.

TERMINATION OF ALLEGED FATHER'S RIGHTS

Lehr v. Robertson, 463 U.S. 248 (1983) (upholding the constitutionality of New York's paternity registry; notice of adoption to alleged father who fails to register not constitutionally required)

In re J.W.T., 872 S.W.2d 189 (Tex. 1994) (alleged biological father has state constitutional right to establish paternity over objection of presumed father and mother); *see also* TEX. FAM. CODE § 160.607 (four-year statute of limitations where child has presumed father); § 160.608 (presumed paternity may be protected by equitable estoppel provision)

In re Unnamed Baby McLean, 725 S.W.2d 696, 698 (Tex. 1987) (protecting rights of alleged biological fathers under Texas Equal Rights Amendment; "father who steps forward, willing and able to shoulder responsibilities of raising a child, should not be required to meet a higher burden of proof [than the mother] solely because he is male")

Toliver v. Tex. Dep't of Family and Protective Servs., 217 S.W.3d 85 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (termination of alleged father's rights under 161.002(b)(1) reversed where father failed to file an answer or counterclaim for paternity after being served; however, he appeared at trial and admitted his paternity and requested that his parental rights not be terminated; father's appearance at trial before his rights were terminated and subsequent admission of paternity "triggered his right" to require the Department to prove conduct under 161.001)

In re E.A.W.S., 2006 WL 3525367 (Tex. App.–Fort Worth Dec. 7, 2006) (mem. op.) (both default judgment and termination of alleged father's parental rights under 161.002(b)(1) were inappropriate as alleged father forwarded a signed, notarized, and witnessed document to the trial court, which even though it was a purported voluntary relinquishment, met the requirements of both an answer and admission of paternity)

In re K.W., 138 S.W.3d 420 (Tex. App.–Fort Worth 2004, pet. denied) (alleged father's letters to Department and court sufficient admissions of paternity to prevent termination under § 161.002(b)(1))

Phillips v. Tex. Dep't of Protective and Regulatory Services, 25 S.W.3d 348 (Tex. App.–Austin 2000, no pet.) (alleged biological father cannot simultaneously acknowledge paternity and claim protection against termination because paternity has not been adjudicated)

12. Inability to Care for Child Due To Mental or Emotional Illness

The trial court may order termination of parental rights in a suit filed by the Department if the court finds that:

- the parent has a mental or emotional illness or a mental deficiency that renders the parent unable to provide for the physical, emotional and mental needs of the child;
- in all reasonable probability, proved by clear and convincing evidence, the illness or deficiency will continue to render the parent unable to provide for the child's needs until the 18th birthday of the child;
- the Department has been the temporary or sole managing conservator of the child for six months preceding the date of the termination hearing;
- the Department has made reasonable efforts to return the child to the parent; and
- termination is in the best interest of the child. TFC § 161.003.

Immediately after the filing of a suit under this section, the court must appoint an attorney ad litem for the parent and the ad litem must represent the parent for the duration of the suit [§ 161.003(b) & (d)]. A hearing on the termination may not be held earlier than 180 days after the date on which the suit was filed [§ 161.003(c)]. This ground has been used to terminate a parent's parental rights where the parent has a persistent mental disability. The mental disability can be the result of either the parent's mental illness or mental retardation. Section 161.003 does not require culpable conduct. The emphasis is on the best interest of the child; however, the statute does require that the Department use reasonable efforts to return the child to the parent.

INABILITY TO CARE FOR CHILD DUE TO MENTAL OR EMOTIONAL ILLNESS

In re D.R., 2007 WL 174351 (Tex. App.–Fort Worth Jan. 25, 2007, no pet.) (mem. op.) (parental rights properly may be terminated under either §§ 161.001 or 161.003 in cases in which a parent's mental illness or deficiency is relevant)

In re S.G.S., 130 S.W.3d 223 (Tex. App.–Beaumont 2004, no pet.) (noncompliance with Americans with Disabilities Act may not be pled as affirmative defense to termination suit under (D) and (E), even though the mother was mildly mentally retarded; parents permitted to present evidence and argument to jury on ADA)

In re B.L.M., 114 S.W.3d 641 (Tex. App.–Fort Worth 2003, no pet.) (§ 161.003 requires "all reasonable probability", not scientific certainty or beyond a reasonable doubt, that a parent's mental illness will continue until the children turn 18; testimony of paranoid schizophrenic parent that he did not intend to take medication for his disease sufficient to establish that he will continue to be unable to care for the children)

In re J.I.T.P., 99 S.W.3d 841 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (mother's mental state found to endanger child where mother had suicidal ideations and long history of noncompliance with medication schedule; relationship with husband violent; foster parents wanted to adopt child; case affirmed under endangerment grounds, mental health grounds not pled)

In re E.L.T., 93 S.W.3d 372 (Tex. App.–Houston [14th Dist.] 2002, no pet.) (unlike in a criminal trial, parent not required to be competent before parental rights terminated; parent's mental illness may serve as basis for involuntary termination under § 161.003)

Salas v. Tex. Dep't of Protective and Regulatory Services, 71 S.W.3d 783 (Tex. App.–El Paso 2002, no pet.) (requires reasonable probability, not scientific certainty, that parent's mental illness will continue until children 18; dual diagnosis of mental retardation and mental illness, inability to protect children from physical and sexual abuse, and anticipated discharge from mental health facility at least one to three years in future sufficient)

13. Paternity Resulting from Criminal Act

Parental rights may be terminated if:

- the parent has been convicted of an offense committed under Tex. Penal Code §§ 22.011, 22.021 or 25.02 (*i.e.*, sexual assault, aggravated sexual assault, or prohibited sexual contact);
- the victim became pregnant as a direct result of the commission of the offense; and
- termination is in the best interest of the child. TFC § 161.007.

Note that this ground applies not to a possible parent-child relationship between the sex offender and the victim (as in the case of incest), but between the offender and the child born of the pregnancy caused by the sexual offense. Restated, this ground authorizes termination of parental rights between a rapist and a child conceived as a result of the rape. Termination under section 161.007 is not frequently pled or tried because

of problems of proof, *i.e.*, consent issues and "he-said/she-said" problems.

As of this writing, the authors could find only one case affirming termination under this ground. *See* *In re A.J.B.*, 2003 WL 21403480, (Tex. App.–Houston [14th Dist.] 2003, no pet.) (mem. op.). In *A.J.B.*, the appellant
father pled guilty to sexual assault and the criminal judgment was admitted into evidence at the termination trial. The appellant complained on appeal that there were no pleadings on which to base termination on sexual assault. He also complained that the evidence was legally and factually insufficient to show he had committed a sexual assault that resulted in a pregnancy. The court noted that the criminal judgment reflected that the sexual assault had occurred some nine months before the child's birth and that the victim's age was 16. The court held that the issue was tried by consent where the father acknowledged he pled guilty to the sexual assault. Genetic testing confirmed paternity. The court found that this was legally and factually sufficient proof that a sexual assault resulted in the birth of the child. The court also found that termination would be in the child's best interest where the child's conception was a result of the rape of a sixteen-year-old mother by the forty-one-year-old appellant, the mother was appellant's third cousin, and appellant was on parole when he committed the assault. The best interest finding was also supported because the appellant father would never be able to support the child financially or emotionally because he had been sentenced to twenty-one years in prison. In addition, the father was $18,000.00 in arrears in child support from another child and had never offered to support the child.

14. Res Judicata

The court may terminate the parent-child relationship after rendition of an order that previously denied termination if:

- a subsequent petition is filed;
- circumstances of the child, parent, managing conservator, or other party affected by the prior order have materially and substantially changed;
- the parent committed an act listed under § 161.001 before the date the order denying termination was rendered; and
- termination is in the best interest of the child. TFC § 161.004(a).

In a hearing under subsection (a), the court may consider evidence presented at the previous hearing denying termination to the same parent [§ 161.004(b)]. Section 161.004 means that the issue of termination can be revisited, notwithstanding a prior "final order" denying termination, if circumstances have *materially* changed since the first order. For example, if one or more of the grounds under § 161.001 were clearly established in the first trial, but termination was denied based on "best interest," a subsequent termination order can be entered based on the same conduct at issue in the first trial plus any new evidence going to best interest.

It also is possible to bring a second, or even a third, termination suit where it is based on *new conduct arising after* a "final order" denying termination of parental rights. In this situation, it is *not* necessary to show that circumstances have "materially" changed since the first order.

Note that the *Slatton* case discussed below was decided prior to the enactment of section 161.004, which was passed in response to the concern created by the holding in *Slatton*.

RES JUDICATA

Thompson v. Tex. Dep't of Protective and Regulatory Servs., 176 S.W.3d 121 (Tex. App.–Houston [1st Dist.] 2004, pet. denied) overruled on other grounds by *Ruiz v. Tex. Dep't of Family and Protective Servs.*, 212 S.W.3d 804 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (evidence sufficient to prove circumstances materially and substantially changed since original petition was denied under § 161.004(a)(2); mother's circumstances changed because her parental rights were terminated due to failure to follow the service plan, child's circumstances changed because progress in foster care readied him for more permanent placement, and father's circumstances changed because application for parole was rejected and because he failed to comply with service plan ordered by court in order denying the Department's original termination petition)

In re M.G.H., 2003 WL 22317209 (Tex. App.–Amarillo Oct. 10, 2003, no pet.) (mem. op.) (despite the fact that the word "final" appeared in the title of the order, order was not final based on its contents; res judicata is affirmative defense under TRCP 94 and the parents waived it as they failed to plead or present it; the Department's failure to file a new petition after the trial court's initial denial of termination vitiated by parents' appearance and participation at trial which had the same force and effect as being served; parents' argument that evidence was erroneously admitted at the subsequent jury trial not preserved because they failed to produce the record of the initial bench trial or make a bill of exceptions)

In re C.T.E., 95 S.W.3d 462 (Tex. App.–Houston [1st Dist.] 2002, no pet.) (trial court properly admitted evidence of father's conduct that occurred prior to previous termination proceeding in which trial court did not terminate parental rights)

In re K.S., 76 S.W.3d 36 (Tex. App.–Amarillo 2002, no pet.) (res judicata defense rejected; prior suit involved different children of mother by prior marriage; collateral estoppel rejected; best interest factual determination unique to individual child; possibility that father sexually abused other children relevant)

In re T.V., 27 S.W.3d 622 (Tex. App.—Waco 2000, no pet.) (§ 161.004 "was passed in response to the concern created by holding" in *Slatton v. Brazoria County Child Protective Services Unit*, 804 S.W.2d 550 (Tex. App.—Texarkana 1991, no writ); upholding trial court's use of evidence presented at *both* trials to support termination and best interest; § 161.004, instructive, not controlling, because no prior final appealable order denying termination)

15. Retroactive Application of New Grounds

There is some question as to whether the *actions* of the parent whose rights are being terminated must always have occurred after the effective date of the legislation. Although restrictions on "*ex post facto*" laws apply only to criminal statutes, Texas has a separate constitutional provision prohibiting "retroactive laws". Tex. Const. art. I, § 16. From the perspective of the child, most new termination grounds are "remedial" and do not involve substantive or vested rights in that they permit termi-

nation for behavior of the parent that is clearly harmful to the child. Nonetheless, to avoid a possible constitutional challenge, practitioners should avoid the retroactive application of new grounds to conduct occurring prior to the effective date of a new or amended ground. Bills adding new or modified termination grounds contain detailed information regarding effective dates, which can be located by reviewing the session laws, or on line at http://www.capitol.state.tx.us/.

RETROACTIVITY

In re A.V., 113 S.W.3d 355 (Tex. 2003) (retroactive application of (Q) permissible to terminate the rights of parent whose pre-1997 criminal conviction and imprisonment predated 1997 enactment of (Q))

In re E.M.N., 221 S.W.3d 815 (Tex. App.–Fort Worth April 5, 2007, no pet.) (mother's rights were not violated by retroactive application of (T) despite her conviction and imprisonment before its enactment; the underlying purpose of subsection (T) is not to add additional punishment to mother for murdering the child's father, but to safeguard public welfare and advance public interest by facilitating termination when one parent murders the other–an act previously used to support terminations under (E))

In re Tex. Dep't of Protective and Regulatory Services, 71 S.W.3d 446 (Tex. App.–Fort Worth 2002, orig. proceeding) (retroactive application of amended statute permitting continuance pending resolution of criminal suit under § 161.2011 procedural or remedial, does not involve substantive or vested right; retroactive application permissible)

In re A.R.R., 61 S.W.3d 691 (Tex. App.–Fort Worth 2001, pet. denied) (no valid ex post facto claim under (L) where sexual assault of child illegal when committed and earlier version of (L) provided for termination of rights for parent criminally responsible for death or serious injury of a child; nor under (Q) where two-year time from date petition filed did not extend before statute effective)

In re R.A.T., 938 S.W.2d 783 (Tex. App.–Eastland 1997, writ denied) (allowing jury to consider conduct of parent that predated the effective date of (N) ground violated constitutional prohibition on retroactivity)

Sims v. Adoption Alliance, 922 S.W.2d 213 (Tex. App.–San Antonio 1996, writ denied) (imposing 48-hour waiting period after birth for signing of voluntary relinquishment to a document signed before statute's effective date did not violate the prohibition against "retroactive" laws)

16. Alternatives to Termination

Courts may deny termination, but nonetheless grant permanent managing conservatorship to the Department or to an individual other than the parent. TEX. FAM. CODE § 161.205; § 263.404. PMC can be awarded to the Department only if the court finds that appointment of a parent as managing conservator would "significantly impair the child's physical health or emotional development; and it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator." TFC § 263.404(a). An award of PMC to the Department without the termination of parental rights may relegate a young child to long-term foster care, and should only be done after considering the age and specific needs of the child. TFC § 263.404(b).

Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?

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Should the standards currently used in making and reviewing orders that have the effect of limiting a parent's access to his or her children be re-examined? The current standards are contrary to the legislative mandate regarding parental access and fail to adequately address the potential to profoundly impair the fundamental interests of parents and children in the parent-child relationship. For example, it is not uncommon for trial courts to automatically adopt the minimum amount of time outlined in the standard possession order. This cannot be reconciled with the constitutional nature and weighty import of the rights and interests of parents, children and the State, as well as public policy of the State of Texas. The abuse of discretion standard should be altered so that trial courts are required to justify any deviation from maximum feasible time with both parents by clear and convincing evidence and make factual findings so that appellate courts may carefully review and scrutinize those findings. *See* *In re J.R.D.*, 169 S.W.3d 740 (Tex. App.—Austin 2005, pet. denied) (Puryear, J., concurring); *see also* *In re L.M.M.*, 2005 WL 2094758 (Tex. App.—Austin 2005, no pet.) (Puryear, J., concurring). The author has extracted liberally from Judge Puryear's concurring opinion in *In re J.R.D.*

The current standard of review of a trial court's determination of conservatorship, possession of and access to a child, and child support is abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles, *i.e.*, whether it acted arbitrarily and unreasonably. *Worford*, 801 S.W.2d at 109. Under the abuse of discretion standard, the legal and factual sufficiency of the evidence are not independent grounds of error, but are merely relevant factors in assessing whether the trial court abused its discretion. *Doyle v. Doyle*, 955 S.W.2d 478, 479 (Tex. App.—Austin 1997, no pet).

Undoubtedly, custody and possession determinations can severely limit the parent-child relationship and have the potential to profoundly impair the fundamental liberty interest of parents and children in the parent-child relationship. The abuse of discretion standard allows a trial court ruling severely curtailing parental rights to stand so long as there is some evidence upon which to base its findings and an appellant does not show that the trial court failed to follow any guiding rules or principles. This standard is inconsistent with the constitutional nature and weighty import of the rights and interests of parents, children and the State, as well as the legislature's mandate concerning parental access and presents a significant risk of erroneous deprivation of the liberty interests of parents and children.

Constitutional Dimensions of Parent-Child Relationship

The right to the companionship, care, custody, and control of one's own child is a fundamental liberty interest far more precious than any property right. *In re M.S.*, 115 S.W.3d 534, 547-48 (Tex. 2003). Thus, "the relationship between parent and child is constitutionally protected." *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 2060-2061 (2000) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549 (1978)). *See Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (The natural right existing between parents and their children is of constitutional dimensions.). Parents have the responsibility and the right to direct the upbringing and education of their children. *Troxel*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 2060. In fact, "[i]t is cardinal ... that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944).

It has been firmly established that the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children. *Troxel*, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060. "[T]he Due Process Clause does not permit States to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73, 120 S.Ct. at 2064.

Children also have a substantial interest in the proceedings that determine their custody and the direction of their lives. *See M.S.*, 115 S.W.3d at 547. Both parent and child have a weighty interest in the accuracy and justice of a decision affecting their ability to have a relationship with one another. *Id.* The State also has an interest in protecting the welfare of its children, which "must initially manifest itself by working toward *preserving* the familial bond" between a parent and child unless that parent will not provide a safe, stable environment. *Id.* at 548 (citing *Santosky v. Kramer*, 455 U.S. 745, 766-67, 102 S.Ct. 1388 (1982)).

While the grant of custody to another or the limitation of a parent's access to a child is not tantamount to absolute termination of parental rights, the State must tread very carefully when it infringes upon a parent's ability to participate in child rearing. *See Troxel*, 530 U.S. at 72-73, 120 S.Ct. 2054. Even when it does not terminate rights, a court that infringes on a parent's ability to rear his or her children may also violate the United States Constitution. *Id.* at 67, 120 S.Ct. 2054. In addition, the Texas Supreme Court has recognized that custody determinations between fit parents can risk a significant deprivation similar to termination of the relationship. *See Lewelling v. Lewelling*, 796 S.W.2d 164, 168 n. 8 (Tex. 1990). The weighty interests of parents, children, and the State in a just and accurate decision mandate that "*any* significant risk of erroneous deprivation is unacceptable." *M.S.*, 115 S.W.3d at 549 (emphasis added). Our government respects fit parents' abilities to act in the best interests of their children by applying a presumption that they do so. *Troxel*, 530 U.S. at 68, 120 S.Ct. 2054. The United States Supreme Court has recognized that, in accord with this presumption, so long as a parent is "fit," there is normally no reason for the State to inject itself between parent and child or disturb that parent's rearing of his or her children. *Id.* at 68-69, 120 S.Ct. 2054. In other words, court interference with the right of a

fit parent to bring up his or her own child potentially impacts a fundamental right and may violate the Due Process Clause.

Public Policy To Encourage Frequent Contact Between a Child and Each Parent

It is undisputed that the policy of the State of Texas is "to encourage frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child." TEXAS FAMILY CODE § 153.251(b); *see* TEXAS FAMILY CODE § 153.001(a). The legislature has implemented this policy by directing courts that "[t]he terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent's right to possession of or access to a child *may not exceed* those that are *required* to protect the best interest of the child." TEXAS FAMILY CODE § 153.193 (emphasis added).

In order to protect children's abilities to have a meaningful relationship with their parents, the legislature determined that the standard possession order would set a presumptive *minimum* amount of time for possession of a child by a joint managing conservator parent. TEXAS FAMILY CODE § 153.137 (emphasis added). Thus, the legislature has determined that it is in the child's best interest to have the minimum amount of time with *any* reasonably safe parent, and it makes no sense, nor is it authorized, to blindly apply that same minimum amount of time to a parent who is not merely safe but is an interested and active influence in his or her child's life without regard to the degree of emotional engagement or bonding between the parent and child. Whatever latitude courts have in setting possession periods, they do not have the discretion to automatically adopt the minimum amount of time and ignore the legislature's explicit directive in section 153.193 to allow maximum feasible time with both parents unless doing otherwise would impair the children's interests.

Unfortunately, it is not uncommon for trial courts to automatically adopt the minimum amount of time outlined in the standard possession order without considering whether that order will impose limits upon possession and access in excess of those necessary to protect the best interests of the children. Courts have a responsibility to do more than automatically adopt a standard minimum amount of time.

The Abuse of Discretion Standard Falls Short and Should Be Re-Examined

The abuse of discretion standard allows a trial court ruling severely curtailing parental rights to stand so long as there is some evidence upon which to base its findings and an appellant does not show that the trial court failed to follow any guiding rules or principles. This standard is inconsistent with the constitutional nature and weighty import of the rights and interests of parents, children and the State, as well as the legislative mandate regarding parental access and presents a significant risk of erroneous deprivation of the liberty interests of parents and children.

The abuse of discretion standard falls short of showing proper respect to the legislature's deliberate policy decisions commanding Texas courts to support and cultivate relationships between children and their parents so long as those parents are fit and to implement maximum parent-child contact to actively preserve parent-child relationships. Considering the importance of and the risk to the fundamental rights and inter-

ests of parents, children and the State and the legislature's clear mandates that courts take measures to protect this most sacred of relationships, the standards by which decisions that limit a parent's access to or possession of a child are made and reviewed need to be carefully re-examined. The abuse of discretion standard should be altered so that trail courts are required to justify any deviation from maximum feasible time with both parents by clear and convincing evidence and make factual findings, and so that appellate courts may carefully review and scrutinize those findings.

DIVORCE
Grounds and Procedure

SUBSTITUTED SERVICE WHOLLY INADEQUATE TO SUSTAIN CONTEMPT—RESPONDENT PERSONAL APPEARANCE AT HEARING DOES NOT PROVIDE RETROACTIVE PERSONAL JURISDICTION OVER HIM

¶ 07-3-1. ***In re* Sloan**, 214 S.W.3d 217 (Tex. App.—Eastland 2007).

Facts: Woman sued Man for divorce; it was disputed as to whether they were ever married. Anyway, Woman filed an unsworn motion for substituted service. Attached to her motion was an affidavit from one process server as to his attempts to serve the divorce petition in Hawley, Texas. In addition, there was an unsworn statement from the police chief of Hawley stating Man's mother told him Man was working in Iraq. Substituted service was ordered and a copy of various orders and the divorce petition were left with Man's stepfather at his mother's house in New Mexico. Apparently Man lived in Arizona and was in Iraq at the time the divorce papers were served at his mother's house.

At a temporary hearing in August, the trial court entered certain orders plus a temporary injunction. Man was ordered to turn over certain property and to pay $3,500 monthly spousal support. Man then filed a special appearance, plea in abatement, an answer, and a counter petition subject to his special appearance and plea in abatement. A few days later he filed a motion to vacate or modify the temporary orders. After a September hearing, at which Man was present, the trial court found service was proper and that the temporary orders were in effect. A week later at a compliance hearing, Man was found in both criminal and civil contempt for violation of the temporary orders to pay spousal support, return property, and pay Woman's interim attorney's fees; and was placed in jail. Man then filed for a writ of habeas corpus seeking to have the temporary orders declared void.

Held: Writ granted. No personal jurisdiction over Man because of deficient affidavit in support of substituted service of process.

Opinion: "A court acquires personal jurisdiction when a person, without legal reservation, voluntarily appears before the court or when the person is served with process in accordance with required procedures in accordance with due process." To be amenable to a court's jurisdiction, jurisdiction must be invoked by valid service of process. Service, other than personal delivery or by mail, must follow the requirements of Tex. R. Civ. P. 106(b). To obtain substituted service, the party "seeking such service must file a motion supported by affidavit showing the location of the defendant's usually place of business or usual place of abode…. The affidavit also must contain statements of fact that show specifically the unsuccessful attempts at personal or mailed service at the place named in the affidavit." In this case, there was nothing in the affidavit detailing the facts surrounding the service attempts. There were no dates or times listed as to the attempted service. "The affidavit does not contain information that the address named in the affidavit is even [Man's] usual place of abode…it contains no more than conclusory language."

Even if the service affidavit was imperfect, Woman argued Man voluntarily appeared when he presented his motion to vacate the temporary order. "Voluntary appearance is not retroactive." Acquisition of personal jurisdiction via proper service did not happen before the temporary orders were entered. "Because the affidavit wholly failed to support the motion for substituted service, the trial court never acquired personal service over [Man]. Because they are void, we set aside the trial court's temporary order."

COMMUNICATION THROUGH AN INTERPRETER WITH LEGAL REPRESENTATION TRUMPS ANY "CONFUSION" LITIGANT HAS AFTERWARDS

¶ 07-3-2. **Chisholm v. Chisholm**, 214 S.W.3d 463 (Tex. App.—San Antonio 2005), previously reported in Vol. 07-1-7, 209 S.W.3d 96 (Tex. 2006).

Summary: Wife argued error by the trial court in rendering a divorce decree because she did not understand or agree to it. Wife was Chinese and had an interpreter available during the divorce trial. After reviewing the record, the appellate court found Wife participated with her attorney in reaching the divorce agreement and understood it sufficiently for the trial court to enter a judgment.

Wife's "confusion primarily related to the unresolved matters that the court ruled on and not to the matters the parties had agreed upon. We further note that [Wife] in no way complains about the terms of the trial court's judgment. We cannot say the trial court erred in rendering the divorce."

DELAY IN APPEALING CAN BE FATAL (TO AVOIDING FINAL JUDGMENT)

¶ 07-3-3. **Presley v. Presley**, 214 S.W.3d 491 (Tex. App.—Dallas 2006).

Summary: Trial court signed a final decree of divorce on August 24, 2005. Husband filed a motion for new trial on September 16, 2005, and a notice of appeal on January 25, 2006. A docket sheet entry shows a new trial was granted and the trial court requested that an amended divorce decree be submitted. No amended decree was ever signed, "and a docket entry does not constitute a final judgment." The August, 2005 decree is the final judgment, making the January, 2006 notice of appeal untimely. The appellate court does not have jurisdiction because the notice of appeal was untimely as it was not filed within 30 days of the final divorce decree.

JURY DEMAND LOST IF LITIGANT GOES TO TRIAL WITHOUT REALLY, REALLY DEMANDING JURY

¶07-3-4. **Vardilos v. Vardilos**, 219 S.W.3d 920 (Tex. App.—Dallas 2007).

Facts: Husband appealed the characterization of a $112,000 bank account as Wife's separate property, and the denial of his request for a jury trial.

Held: Affirmed. Bank account was Wife's separate property; Husband waived jury request complaint.

Opinion: The evidence is clear and convincing that the $112,000 trust account was an inheritance from Wife's father, placed in a trust by Wife's brother with the brother as trustee. The account was Wife's separate property, *see* § 3.001.

Husband argued error in the trial court's denial of his request for a jury trial. "A party is required to act affirmatively in order to preserve the right to complain on appeal that he was denied his perfected right to a trial by jury … to invoke and perfect 'the right to a jury trial in a civil case a party must first comply with the requirement of rule 216;' once perfected, the right to a jury trial still may be waived expressly or by a party's failure to act." Husband did not object to the case going forward without a jury or indicate to the trial judge he intended to stand on his perfected right to a jury trial. "Therefore, we conclude appellant waived any right to complain on appeal of the trial judge's alleged error."

DIVORCE
Division of Property

FAILED TRACING MEANS EVERYTHING IS ON THE COMMUNITY TABLE

¶ 07-3-5. **Mock v. Mock**, 216 S.W.3d 370 (Tex. App.—Eastland 2006).

Facts: During the marriage, Wife received gifts of approximately $10,000 per year from her father. Sometimes the gifts were in the form of a check, sometimes as stock, and sometimes as land. When she received a check, Wife deposited it into a savings account in her name. She also had $150 deposited monthly from her paycheck into the savings account from her job as a teacher. During the marriage, Husband acquired debt of $55,000 in a credit card solely in his name. The divorce decree awarded Husband $29,827 out of the $39,654 in Wife's savings account, and ordered Wife to pay $26,204 [§ 6031] of Husband's credit card debt. Wife appealed.

Held: Affirmed. Husband gets Wife's savings, while Wife gets Husband's debt.

Opinion: "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property." *See* § 3.003(a). Clear and convincing evidence is required to rebut this community presumption. In this case, the $150 taken from Wife's paycheck each month was clearly community property. The gifts from her father were separate property. The characterization problem arose because Wife commingled the gifts with her community property without tracing the funds. Wife's evidence failed to show the amount of the separate funds she had deposited into her savings account. Wife failed to meet the clear and convincing evidence burden of proof to rebut the community presumption.

As for Wife's liability for Husband's credit card debts, she is liable. Husband incurred the debt during the marriage (although $23,000 was incurred after the couple separated), therefore, the debt is presumptively a community obligation. "Section 3.202(c) of the Family Code provides that 'Community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage.'" Community property that was under Husband's sole or joint management during the marriage could be reached to satisfy debts incurred solely by Husband. "The record does not demonstrate that the community property awarded to [Wife] did not include property subject to [Husband's] sole management or joint management during the marriage…." There was no error to order Wife to pay credit card debt solely in Husband's name.

Editor's note: *Of course, what family law attorneys know is not common knowledge, but should be passed on to laypersons when appropriate. For example, "Do not put community funds in a separate property account. And, arrange to siphon off any community property dividends or interest*

from such an account." Your future clients will bless you for your advice, or curse you for giving it to their soon-to-be ex-spouses.

Let us now turn to the absurd portion of the action of the trial court, affirmed by the appellate court. The wife took no part in the husband's running up a substantial credit card debt. There is no indication that she was a party to the contract with the credit card company. There is not a hint that the husband was acting as the wife's agent. Thus, no reason to believe the wife is personally liable.

But, assume all the above factors were present and she is personally liable, as well as in possession of community property assets awarded to her in the divorce (note, the creditors are not in the lawsuit). What, then, is there to prevent the trial court from ordering the wife "to pay some of appellee's credit card debts...."? Why, nothing; nothing that is, but TEX. CONST. art. I, § 18. Imprisonment for debt, dating back to the Republic. J.J.S.

PREMARITAL DEBT CANNOT BE ASSIGNED TO NONINCURRING SPOUSE—APPELLATE FEES ORDERED TO LOSER CAN BE SO ASSIGNED

¶ 07-3-6. **Love v. Bailey-Love**, 217 S.W.3d 33 (Tex. App.—Houston [1st Dist.] 2006).

Facts: A year after the couple began living together, they had a child. To help cover expenses, Wife took out student loans totaling over $90,000. The couple married and after eight years of marriage, Wife filed for divorce. The divorce judgment ordered Husband to pay Wife's entire student loan debt.

Husband appealed, and Wife was granted temporary orders pending the appeal which required Husband to pay Wife $5000 for appellate attorney's fees. Husband appealed the orders requiring him to pay the student loans and appellate attorney's fees.

Held: Reversed and remanded. Husband required to pay appellate attorney's fees, but not Wife's student loans.

Opinion: The student loans and their proceeds were acquired before the marriage. When Wife received the loan proceeds, they were separate property, § 3.001(1), (2). "The obligation to pay the loans arose before marriage and should be treated as [Wife's] separate debt—separate debt that could not be assigned to the non-incurring spouse." It was error by the trial court to order Husband to pay Wife's separate debt, and this error had more than a *de minimis* effect upon the property division, requiring a remand of the property division.

It was within the trial court's discretion to grant Wife's motion for temporary orders that included a provision requiring Husband to pay Wife $5000 in attorney's fees for appeal. Section 6.709(a) gives a court discretionary authority to enter "temporary orders when necessary, either to preserve the marital property pending appeal or to protect the parties pending appeal."

MISCHARACTERIZATION OF COMMUNITY AS SEPARATE ALMOST ALWAYS FATAL—REIMBURSEMENT ALWAYS DECIDED BY EQUITABLE PRINCIPLES

FATHER'S PRIMARY CUSTODY SUSTAINED ON BEST INTEREST FACTS

¶ 07-3-7. **Garza v. Garza**, 217 S.W.3d 538 (Tex. App.—San Antonio 2006).

Facts: A year before the wedding, Husband created a subcontracting business to install tile. The couple had two children, both with medical conditions requiring special attention. Former teacher Wife stayed home to care for the children. A few years after the marriage, Husband and his father expanded the business to include land acquisition and construction of custom homes.

After six years of marriage, Husband filed for divorce. The parents were appointed joint managing conservators, with Husband given the right to determine the children's residence, and to make medical and education decisions. Wife was to provide health insurance and pay $232 monthly child support. Husband was awarded the homestead with its $147,742 equity, and Wife was given $73,871 plus interest. The trial court found the business was Husband's separate property. Wife appealed.

Held: Affirmed in part, reversed in part, and remanded. Mischaracterization of property affected the just and right division of property; unequal possession order affirmed.

Opinion: On appeal, Wife claimed she was entitled to reimbursement for the increased value of Husband's rental home during the marriage and Husband's 1972 Oldsmobile Cutlass, and legal fees paid by Husband relating to his daughter from a prior marriage. Reimbursement is an equitable claim and not simply a balancing of the ledger between the marital estates. The "community is only entitled to reimbursement when the community's time, talent, and labor are used to benefit and enhance a separate estate beyond whatever care, attention, and expenditure are necessary for the proper maintenance and preservation of the separate estate."

Wife argued Husband checked monthly on his rental property and spent money making repairs. There was no evidence the repairs were capital improvements. Plus, there was no evidence of the enhanced value of the property was a result of the expenditures because there was no evidence of the fair market value of the house before the repairs were made. There was no trial court abuse in refusing to award Wife reimbursement for expenditures on the rent house. There was also no abuse in failing the reimburse Wife's claim for the enhanced value and community funds spent to restore Husband's car. Wife failed to present evidence that the enhanced value was actually due to the renovations made to the car.

During the marriage, Husband spent $25,000 in community funds on a SAPCR involving his daughter from a previous marriage. There was evidence that Husband made these expenditures with Wife's knowledge and "implicit consent." There was no evidence Husband's estate was

benefited by the expenditures or that Wife was deceived about the expenditures. There was no abuse in failing to reimburse Wife for these legal expenses.

Three lots purchased by the Husband during the marriage were found to be community property by the appellate court. On these lots, Husband built spec homes. The facts showed that the earnest money contracts for all three lots were entered into during the marriage. The earnest money contracts, the deeds, and the settlement statements were all in Husband's individual name. The financing was also in Husband's individual name. Besides one check for $500, Husband could produce no financial statements tracing the funds to his business. Evidence does not support the trial court's finding that the properties were Husband's separate property. "And, as the spec homes were a substantial portion of the community estate, the trial court's mischaracterization … affected the just and right division of the community estate, constituting an abuse of discretion."

The appellate court upheld the trial court's possession order regarding the couple's two children. "The best interest of the child is always the primary consideration in determining issues of conservatorship and possession…. While there is a statutory presumption that the parents be appointed joint managing conservators, there is no statutory presumption that joint managing conservators be awarded equal periods of possession." *See* §§ 153.002 and 153.131. In this case, Father was awarded more possession time than Mother. She had some problems thinking logically and coherently, with evidence of rage episodes, mood fluctuations, and impulsive and unpredictable behavior. A psychologist recommended the children's primary domicile be with Father. By entering a possession order that did not provide equal possession, the trial court did not abuse its discretion.

In addition, that the trial court was empowered to split Mother's 30-day summer possession into two periods separated by at least 14 consecutive days due to the children's young age and need to stay in a close relationship with the parent with primary possession. There also was no abuse of discretion by the trial court in granting Father exclusive rights to decide residence, medical treatments, legal matters, educational decisions, and to receive child support in view of Mother's psychological problems.

There was no abuse of discretion by the trial court in admitting Mother's medical and mental health records; they were relevant to the issue of custody of the children and the children's best interests. There was no error in admitting into evidence audiotapes of conversations between the couple because they were cumulative of other evidence and any error was harmless.

DIVORCE
Retirement Benefits

ELEVEN-YEAR-OLD DIVORCE DECREE CAUSES QDRO TROUBLE FOR EX-HUSBAND—TERMS OF DECREE IMPERMISSABLY ALTERED

¶ 07-3-8. **Gainous v. Gainous**, 219 S.W.3d 97 (Tex. App.—Houston [1st Dist.] 2006).

Facts: The couple was married in 1973, and Husband joined the Houston Fire Department in 1978. They divorced in 1995, before Husband was eligible to retire from the fire department. The divorce decree stated that "each party was awarded 'one-half (1/2) of the Houston Firemen's Relief and Retirement Fund standing in the name of [HUSBAND]." In 1996, a QDRO was entered awarding ex-Wife 50% of ex-Husband's retirement payments but specifically excluded DROP payments (deferred retirement option plan), COLA payments (cost of living adjustments), and other certain retirement payments.

Ex-Husband became eligible to retire in 1998, but continued working until 2003 when he retired. Ex-Wife filed a motion for enforcement or for clarification of the divorce decree, arguing the QDRO materially altered the divorce decree and that she should receive not only her portion of the service-pension benefit of ex-Husband's retirement, but also a portion of the DROP and COLA funds, the lump sum payment of $5,000, the $150 monthly supplemental payment, and the annual supplemental payment benefit. He argued res judicata and estoppel barred her claim.

The trial court denied ex-Wife's motion to enforce or to clarify, and rendered a take-nothing judgment against her. She filed a motion for new trial, which was denied. She appealed.

Held: Reversed and remanded. QDRO impermissibly altered the divorce decree.

Opinion: The QDRO was entered after the trial court's plenary power expired, and clearly precluded ex-Wife from receiving any portion of the DROP funds. A QDRO is a final, appealable order, and res judicata applies to final post-divorce orders. However, in this case, her challenge is a collateral attack, which is not barred by res judicata or estoppel. "One may raise a collateral attack challenging a void order at any time, and res judicata is not a bar…." Pursuant to § 9.007 (a)-(b), a court "may not amend, modify, alter, or change the division of property made or approved in the decree of divorce…." Section 9.007 is jurisdictional and orders violating its restrictions are void. The divorce decree awarded wife one-half of ex-Husband's firemen's retirement fund. "Nothing in the plain language of the divorce decree excluded benefits such as the DROP funds from the division of [his] retirement-related benefits in the Fund…. In fact, this language is broad enough to award [ex-Wife] half of all of [ex-Husband's] benefits in the Fund, not just those that could be

considered community property." Her award included some of his separate benefits in the Fund, "half of his separate-property, post-divorce benefits attributable to his continued employment." No one appealed the divorce decree; "courts must generally enforce its unambiguous provisions as written…." The QDRO's provision excluding the DROP funds was void, and ex-Wife can challenge it by collateral attack without a res judicata or estoppel bar.

Likewise, the QDRO's provision excluding COLA funds was void as it impermissibly altered the divorce property division. Ex-Wife was permitted to challenge it by collateral attack. The trial court abused its discretion by denying her motion to enforce or to clarify the divorce decree as to the DROP and COLA funds. It also abused its discretion by denying her motion to enforce or to clarify that portion of the divorce decree by misconstruing the decree as not having divided his lump-sum payment, monthly supplemental payment, and annual supplemental payment benefit. Half of these benefits were awarded to her by the divorce decree.

Lastly, the appellate court found that once ex-Husband retired, Tex. Gov't Code Ann. § 804.003(g)(7) did not permit the fire department retirement fund to reject a QDRO concerning his DROP funds or COLA increases.

Concurring Opinion: "I join in the panel's opinion and conclusion that under its literal language, the divorce decree awarded [ex-Wife] at the time of the divorce a future contingent interest in one-half (1/2) of the [total amount of the] … Fund" in the ex-husband's name at the time of his retirement.

Concurring Opinion: "I join the judgment only, and I write separately and respectfully to express my disagreement with the Texas Supreme Court's opinion in *Reiss v Reiss*, 118 S.W.3d 439 (Tex. 2003), and to urge the supreme court to revisit that authority…. Following the analysis of the *Reiss* dissent, I would give due weight to the plain and unambiguous language found in the … divorce decree and would hold that the decree awards [ex-Wife] one-half of the community portion of [ex-Husband's] retirement. The decree does not award [ex-Wife] one-half of [ex-Husband's] separate property."

Editor's note: *1996 is a long time ago as far as sophisticated practice of family law is concerned. After all, there have been a dozen Marriage Dissolution Institutes and another dozen Advanced Family Law courses, to say nothing of U.T.'s Family Law on the Front Lines and the Bar's Advanced Drafting. Indeed, some credit for the development of Texas practice might even be given to this humble publication. There will be no excuse for any lawyer reading this note to not do better in drafting a divorce decree dividing the retirement benefits of a party in a more thoughtful manner to capture all the community interest in the assets at the time of divorce, and to exclude the separate property interest to be earned after divorce. J.J.S.*

DIVORCE
Post-Decree Enforcement

POST-DIVORCE WARFARE COSTS THE EX-WIFE A PRETTY PENNY—WITHOUT RESOLVING ISSUES

¶07-3-9. **Broesche v. Jacobson**, 218 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2007).

Facts: The couple divorced in 1993, and began their many, many post-divorce litigations in 1996. The central issue in much of the post-divorce controversy was the definition of "working interest" in regards to oil and gas interests divided in their "agreed" divorce. Both spouses are geologists, and to further complicate matters, the ex-husband's employer, and operator of the wells in question, was also involved in the case. The ex-wife appealed, claiming error by the trial court in its interpretation of the divorce decree, the award of attorneys' fees and sanctions against her, and entering a turnover judgment awarding funds interpleaded by the employer to the ex-husband.

Held: Affirmed in part, reversed and remanded in part. Agreed decree was ambiguous as to ex-Wife's oil and gas interest.

Opinion: On appeal, the ex-wife claimed the trial court erred in its interpretation of "working interest" in the agreed divorce decree. "An agreed divorce decree is a contract subject to the usual rules of contract interpretation." The decree awarded each party one-half of all oil and gas interests of the parties as described in Exhibit A. "Working interest" was one of the columns in Exhibit A. The ex-wife argued this gave her an interest in the wells and the leaseholds enabling those wells to be built. The ex-husband argued working interest did not necessarily mean a leasehold interest. The court found it could not determine from the divorce decree if the term working interest was used in its technical sense to refer to leasehold interest or more loosely to mean mineral interests. The appellate court found the divorce decree ambiguous as to the exact nature of the oil and gas interests awarded to the ex-wife. We "conclude the trial court erred in finding that the decree unambiguously awarded [the ex-wife] an interest only in wells and not in any leaseholds."

Finding numerous incidents of misconduct (*i.e.*, hiring a legislator as co-counsel for delay purposes, frivolous and harassing claims), the trial court upheld sanctions against the ex-wife in the amount of $162,000 to the ex-husband and $17,500 to his employer. The appellate court also upheld $119,598 in attorneys' fees awarded the employer.

ENFORCING POST-DIVORCE INTRANSIGENCE BY CONTEMPT SOMETIMES WON'T WASH IF PAYING ATTORNEY'S FEES AND AMBIGUOUS ACTION ARE INVOLVED

¶ 07-3-10. **Tracy v. Tracy**, 219 S.W.3d 527 (Tex. App.—Dallas 2007).

Facts: The divorce decree ordered Husband to apply for refinancing of the marital residence and pay Wife $50,000 upon closing of the refinancing. Wife was ordered to tender a special warranty deed to the refinancing closing officer. The deed was to be held in trust until the transaction closed and Wife received the $50,000.

A year or so later, ex-Husband brought suit to enforce the decree, complaining that ex-Wife had failed/refused to deliver the deed and in fact had asked for $10,000 more before she would tender the deed. Two days after his petition was filed, ex-Wife executed and delivered the deed to ex-Husband. At the enforcement hearing ex-Husband's attorney acknowledged delivery of the deed, but argued he was entitled to attorney's fees. He asked the trial judge to hold ex-Wife in contempt and have her jailed until she paid his attorney's fees. At the hearing, ex-Husband stated ex-Wife did not deliver the deed as ordered to his knowledge, but that he had been able to refinance without the deed. Ex-Wife testified she received the $50,000 from ex-Husband but did not tender the deed. She also stated no one asked her to sign anything at the time of the refinancing closing. She explained the request for an additional $10,000 by stating ex-Husband had offered her $64,000 during the initial divorce discussions. Ex-Wife was found in contempt and ordered to pay ex-Husband's attorney $2360. The trial judge ordered ex-Wife confined for a period not to exceed 18 months or until she paid the attorney's fees. Her commitment would be suspended on the condition that she execute the deed and pay the attorney's fees by 5p.m., October 26. If she failed to pay the attorney's fees, a writ of commitment would issue.

Ex-Wife didn't pay the fees, but filed a motion to vacate and/or amend the order. She argued the attorney's fees were not enforceable by contempt and there was evidence she may have executed the deed and returned it to the lender at the time of refinancing (she did not realize she had signed the document). Her motion to vacate the contempt order was denied, and the trial judge agreed to suspend imposition of his order until her appeal was completed. No confinement order was issued.

Held: Appeal dismissed. Appellate courts do not have jurisdiction to review contempt order on direct appeal.

Opinion: Ex-Wife's appellate issues deal with the contempt order. "A court of appeals lacks jurisdiction to review a contempt order on direct appeal." The appeal was dismissed for want of jurisdiction, but the court stated "because of the unusual facts presented in this proceeding, we will never-the-less provide guidance to the trial judge on the validity of the contempt order under which [ex-Wife] risks confinement." Under the contempt order, she can only avoid jail by paying the attorney's fees of opposing counsel. She had already delivered the deed before the hearing on the petition for enforcement. "A trial court shall not imprison a person for debt. Tex. Const. Art. I, section 18." The contempt order purports to do what the law does not allow. "We presume a judge will not attempt to enforce a void order and direct confinement thereunder."

Editor's note: *I am willing to bet a not modest sum that the trial judge knew good and well the order was invalid. But, after all, trial judges are elected to do justice, and the threat was seen as serving justice by the*

judge. It just didn't work. My guess, which I don't want to bet on, is that everyone involved in this dance was aware of the defects in the case. J.J.S.

DIVORCE
Spousal Maintenance, a.k.a. Alimony

★★★★★ TEXAS SUPREME COURT ★★★★★

AGREED SPOUSAL MAINTENANCE IS NOT SUBJECT TO ENFORCEMENT BY CONTEMPT

¶ 07-3-11. ***In re* Green**, 221 S.W.3d 645 (Tex. 2007).

Facts: The couple's divorce decree included a contractual agreement that Husband pay Wife spousal maintenance. He was also ordered to pay for the children's health insurance. Several months after the decree was signed, ex-Husband sought to reduce his spousal maintenance payments on the grounds of inability to pay. The trial court denied his motion, finding the payments were not court ordered spousal maintenance under Family Code ch. 8, because contractual alimony is not subject to modification.

When ex-Husband failed to make his spousal support payments and to pay for the children's health insurance, ex-wife filed a motion for enforcement, requesting that he be held in contempt and incarcerated. He was found in contempt for failure to pay spousal maintenance and for the children's health insurance. On the criminal contempt aspect for failure to pay spousal maintenance he was ordered committed to jail for 180 days. He was also found in civil contempt and ordered jailed until he paid ex-Wife $32,384 and provided proof of current health insurance coverage for the children. He was incarcerated and filed for a writ of habeas corpus.

Held: Writ granted. No incarceration for failure to make contractual spousal support payments.

PER CURIAM: "The failure to pay a private debt, even one referenced in a court order, is not contempt punishable by imprisonment." Tex. Const. art. I, § 18, prohibits imprisonment for debt. In this case, the spousal payments were payments ex-Husband voluntarily agreed to pay as part of the divorce, not court ordered under the Family Code's provision for spousal maintenance.

Regarding Father's nonpayment of health insurance, a "failure to provide child support, including a failure to provide health insurance under a voluntary agreement, is punishable by contempt." *See* TFC §§ 154.124(c), 157.002(b)(2), and 157.166(b). However, Father "cannot validly be confined absent a proper order of commitment, and this contempt order omits two indispensable things: (1) a written judgment of contempt for neglecting to maintain his children's health insurance, and (2) a written order of commitment for that failure." The judge's order

lacks a written judgment of contempt concerning the health insurance. The order is ambiguous as to whether the court intended Father's failure to provide health insurance, standing alone, could serve as a sufficient basis for a judgment of contempt and commitment. "A contempt order 'cannot contain uncertainty or susceptibility of more than one construction or meaning.'"

Comment by David N. Gray: *although I've been critical of the Supremes for not accepting more family law cases to resolve conflicting appellate court opinions, kuddos to the Supremes. Contractual alimony or spousal maintenance isn't enforceable by jail time. Even if payment of agreed spousal maintenance is "ordered," unless the contract satisfies the other Chapter 8 requirements, contempt is not a remedy. Without mentioning it, the opinion in* In re Taylor, *130 S.W.3d 448 (Tex. App.—Texarkana 2004), is disapproved, i.e., just using command language in a decree approving a contractual spousal maintenance doesn't make the obligation contempt enforceable. It's such a comfort when the Supremes finally get around to agreeing with me.*

10-YEAR CONTRACTUAL ALIMONY NOT CONTROLLED BY SPOUSAL MAINTENANCE STATUTES

¶ 07-3-12. **McCollough v. McCollough**, 212 S.W.3d 638 (Tex. App.—Austin 2006).

Facts: The AID incorporated alimony payments into the divorce decree to be enforceable as a contract; Husband was required to pay $5,000 monthly as alimony for ten years unless one of several specified conditions occurred. One such condition was Wife's remarriage.

Ex-Husband sued to modify the alimony payments based on the allegation that ex-wife had entered into an informal marriage. He pleaded that his obligation to pay alimony terminated based on the terms of the AID and various provisions of the Family Code, namely §§ 8.056, 8.057, and 8.059. Specifically, ex-Husband pleaded that "his obligation to pay alimony terminated under § 8.056 because [ex-wife] had 'remarried' and had 'cohabited' with another person in a permanent place of abode on a continuing, conjugal basis." The trial court rendered a final judgment denying his claims; he appealed.

Held: Affirmed. Alimony agreement was governed by contract law, not by Family Code statues governing court-ordered maintenance.

Opinion: Prior to enactment of Family Code Chapter 8 in 1995, courts could not order alimony or spousal maintenance, but couples were free to agree to such awards contractually. Ex-Husband argued the "legislature's intent was that Chapter 8 embrace not only court-ordered 'maintenance' but also alimony agreed to by parties and incorporated into a divorce decree…." "Not so," found the appellate court, as the "legislature's evident intent in chapter 8 was to create narrow circumstances in which previously prohibited forms of spousal support could be awarded, not to govern the forms of contractual alimony previously permitted." The AID manifests no intent that the alimony obligation would be governed by

Chapter 8, as it would have violated chapter 8 from its inception. Chapter 8 allows rehabilitative alimony for only three years, and for the lesser of $2500 per month or 20% of the obligor's monthly gross income, whereas the AID provided for $5000 monthly alimony for 10 years. If the couple wanted the AID to be governed by chapter 8, they could have written language to that effect into the contract.

In this case the AID was governed by contract law and not by Family Code, chapter 8. "The fact that a court expressly approved such an agreement and incorporates it into the final divorce decree does not transform contractual alimony payments into court-ordered maintenance payments subject to the termination and modification provision of chapter 8 of the Family Code."

MARITAL PROPERTY RIGHTS

HOMESTEAD EXEMPTION PROTECTS AGAINST ATTORNEY'S FEES OF MURDEROUS HUSBAND'S CRIMINAL DEFENSE LAWYER

¶ 07-3-13. **Florey v. Estate of McConnell**, 212 S.W.3d 439 (Tex. App.—Austin 2006).

Facts: Husband was charged with murdering his wife, who died intestate. To secure the services of an attorney, Husband executed a promissory note payable to the attorney, secured by a deed of trust on real property owned jointly by Husband and the Estate of his late wife. The Estate brought suit against Husband and obtained a wrongful death judgment. The Estate then sued Husband's defense attorney to invalidate his deed of trust on the property, and to collect some of its wrongful death judgment from the property's sale proceeds. A trial court declared the attorney's lien invalid after finding the property was homestead. Attorney's fees were also awarded the Estate. Attorney appealed, claiming his lien was valid because his client had abandoned the homestead.

Held: Affirmed. Attorney's lien invalid; estate entitled to attorney's fees.

Opinion: Homestead laws protect property from all but a few types of constitutionally permitted liens. "Property that has been designated as a homestead will only lose that character through abandonment, death, or alienation." Husband's deed of trust to his attorney stated it was given for legal services and did not contain a disclaimer of homestead protection. "A lien to secure the payment of attorney's fees is not among the permissible homestead exceptions in the Texas Constitution."

The appellate court also found Husband had not abandoned his homestead right to the property. Husband and Wife had designated the property as their homestead in 1999, and the couple and their children were living in the home as of the date of the murder. Husband testified the property was his homestead on the date he signed the deed of trust and note. The appellate court found no error by the trial court in award-

ing the Estate attorney's fees under the Uniform Declaratory Judgments Act.

Editor's note: *Let's see. Who should get homestead; children of murdered mother or the defense attorney of the murderous father? Hmmm... that's a toughie.*

Oh, by the way, Husband ultimately pled guilty and got a mere 40 years. J.J.S.

SAPCR
Conservatorship

CUSTODIAL PARENT DOES NOT WANT TO RELOCATE

¶ 07-3-14. **Child v. Leverton**, 210 S.W.3d 694 (Tex. App.—Eastland 2006).

Facts: Mother was granted the exclusive right to determine the children's legal residence in Denton and Taylor Counties (Abilene) through May 2003. After that time, Mother had the right to determine their residence within Denton and Tarrant Counties (but not Taylor). In May 2003, Mother filed a petition to modify the geographical restrictions in the divorce decree. Father filed a motion to enforce the decree. The trial court found the decree "not specific enough" for enforcement and found it was in the children's best interest that Mother be allowed to designate the children's residence within Taylor and/or Denton and/or Tarrant Counties. Father appealed.

Held: Affirmed. Evidence supported no move by children.

Opinion: To modify the decree, Mother had the burden of proof to establish a material change in circumstances subsequent to the mediation agreement. Evidence showed one child had ADD and anxiety disorder. Both the child's principal and psychologist testified he needed stability and that moving the child would involve negative adjustments. Mother testified moving would adversely affect her ability to finish her music education degree and therefore, her earning ability. Mother also had a very flexible job where she and the children were presently living.

On the other hand, Father testified that moving the children to Denton or Tarrant County would enable the children to have more contact with him and his extended family. He further argued the changes that had occurred since the mediated settlement agreement with its geographic restrictions were not material and substantial.

The appellate court noted that in most cases involving geographic restrictions, the custodial parent is seeking to move. In this case, the custodial parent is seeking an order to allow her and the children to stay where they were. Providing a stable environment for children is the public policy of Texas, § 153.001(a)(2). "[C]ourts should be able to consider the current stability of the children as evidence of whether there has been a material and substantial change in circumstance. Such evidence might

every well serve as evidence not only of a material and substantial change in circumstance but, also, as evidence of the next inquiry—the best interest of the children." There was no abuse of discretion by the trial court in modifying the provisions relating to the residency of the children.

Dissent: "The record is absent any evidence that the parties' circumstances materially and substantially changed—as opposed to events normally occurring during the passage of time—subsequent to their mediation. Rather, it appears that the trial court modified the divorce decree based upon a determination that it would be in the children's best interest to remain in Abilene. Because this approach is contrary to the Texas Family Code and is also contrary to public policy favoring mediation agreements in suits, affecting the parent-child relationship, I believe the trial court abused its discretion."

MEDIATED SETTLEMENT CONTAINED DETAILED PROVISIONS FOR CHILDREN'S EDUCATION—PASSAGE OF TIME NOT SUFFICIENT TO SUSTAIN MODIFICATION BASED ON CLAIM OF "CHANGED CIRCUMSTANCES"

¶ 07-3-15. **Zeifman v. Michels**, 212 S.W.3d 582 (Tex. App.—Austin 2006).

Facts: Both parents were named joint managing conservators; the divorce decree incorporated an "irrevocable mediated settlement agreement" that stated the two children born during the marriage would attend: (1) the University of Texas Lab School until elementary school; and (2) either: (A) Bryker Woods or one other school; (B) the highest rated school which they were eligible to attend; or (C) the elementary school the parents agreed to. The agreement also stated if the parents could not agree on educational decisions, they would follow the recommendations of the child's teacher at the time of the decision. Finding their son had learning difficulties, the parents moved him from Bryker Woods, the local public school, to a private school. When the daughter reached school age, she started at Bryker Woods and did very well, academically and socially. Mom applied for her to attend a private religious school, and Daughter was accepted. Dad objected to the school change, insisting on following the AID. When consulted, Daughter's teacher advised Mom that it would be best for Daughter to remain at Bryker Woods.

Mom then filed a petition to modify the P-C relationship and award her the exclusive right to make educational decisions regarding Daughter. Mom was awarded the exclusive responsibility for educational decisions regarding Daughter, and Dad appealed.

Held: Reversed and rendered. Evidence insufficient to support a finding of material and substantial change in circumstances warranting modification.

Opinion: "To support modification of an order regarding conservatorship, a trial court must find that the modification would be in the best

interest of the child and, as it applies to this case, that the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the date of the rendition of the order." The dispute leading to the filing of the modification petition was Daughter's acceptance into a private Christian school, and Dad's opposition to his Jewish child attending a Christian school when she was thriving at the public school the couple agreed to in the AID. The evidence offered by Mom as to the material and substantial change in circumstances was that her daughter had grown from an infant to a 7-year old since the divorce and that her "academic abilities and opportunities had surpassed the expectations the parents had at the time of the divorce decree."

"Increase in age alone is not a changed circumstance to justify modification unless changed needs are shown." There is no evidence that the circumstances with respect to Daughter's education have materially and substantially changed. She was doing very well academically and socially at the local public school agreed to in the AID, and it is only speculative that the private school would be more suitable. "There was no expert testimony or other evidence that the change in schools would be in [Daughter's] best interest." Mother failed to carry her burden of demonstrating a material and substantial change of circumstances and that modification would be in the best interest of the child. *See* Family Code § 156.101.

CHANGED CIRCUMSTANCES TO SUSTAIN MODIFICATION OF SOLE M.C. REQUIRES EVIDENCE, NOT JUST JMC PRESUMPTION

¶ 07-3-16. ***In re* T.W.E.**, 217 S.W.3d 557 (Tex. App.—San Antonio 2006).

Facts: The 2001 original divorce decree named Mother as sole managing conservator, and Father as possessory conservator. In 2003, Father filed a motion to modify, and the trial court named the parents joint managing conservators. Mother appealed.

Held: Reversed and remanded. Insufficient evidence to warrant conservatorship modification.

Opinion: There is a statutory presumption that joint managing conservatorship is in the best interest of a child; but once a conservatorship order has been implemented, a subsequent modification requires a material and substantial change in circumstances and a best interest of the child test, *see* TFC § 156.101. In this case there was no evidence to show the conditions as they existed when the original decree was ordered in 2001 or what changes, other than Father's move to Arizona, had occurred since entry of the prior order. There was also no best interest evidence presented. The trial court "did not have sufficient information upon which to exercise its discretion on the issue of conservatorship…."

CUSTODY DECISION STANDS AFTER TIME TO COLLATERALLY ATTACK RUNS—OBVIOUSLY LACK OF SUBJECT MATTER JURISDICTION IRRELEVANT

¶ 07-3-17. **Skadden v. Alfonso**, 217 S.W.3d 611 (Tex. App.—Houston [14th Dist.] 2006).

Facts: On March 15, 1999, Wife instituted the Spanish equivalent of a divorce proceeding in Spain. On April 14, 1999, Husband filed for divorce in Texas. An affidavit filed by Husband stated there was one child of the marriage, who has lived in Spain his entire life except for 25 days spent in Houston. Husband tried serving Wife by various means—personal service, registered mail, service by publication, etc. She did not appear at the Texas divorce trial. The Texas decree adjudicated property and child custody issues and stated Wife had notice of the proceedings and was in default. It also found it had jurisdiction and that Texas was the child's home state. There is no trial record because the court reporter had discarded her notes by the time Father filed for enforcement.

Four years went by, and Father sought to enforce the SAPCR decree against Mother, and filed an application for writ of habeas corpus. She filed a "Motion to Dismiss for Lack of Subject-Matter Jurisdiction," claiming the trial court lacked subject-matter jurisdiction over child custody issues under Chapter 152 of the Texas Family Code. She also claimed the Texas decree was void because she was not validly served and that the trial court lacked personal jurisdiction over her. The trial court dismissed Father's motion for enforcement and petition for interference with possessory rights, finding that Mother was not served with process in the divorce action and that the court did not have personal jurisdiction. Father's application for writ of habeas corpus was also dismissed. He appealed.

Held: Reversed and remanded. Trial court erred in granting Mother's motion to dismiss enforcement action.

Opinion: The appellate court found it was bound by the holding in *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706 (1961) which held "that after the time for instituting a regular appeal has elapsed, a party may attack a final judgment based on a claim of invalid service in only two ways," by filing a writ of error (restricted appeal) or by filing a bill of review. Mother did not file a restricted appeal, and the trial court dismissed her bill of review because she filed it more than four years after the divorce judgment. Even if the trial court lacked personal jurisdiction over her when it rendered the divorce decree, "binding precedent bars [her] from attacking the Texas Decree in the Enforcement Actions." The trial court erred in granting her motion to dismiss.

As for ex-Wife's argument that the trial court lacked subject-matter jurisdiction in the underlying divorce proceeding, the record "did not affirmatively negate the existence of facts essential to the trial court's subject-matter jurisdiction." There is no trial record of the evidence, and in the "absence of a reporter's record from the bench trial, we presume that the evidence and other proceedings at trial supported the Texas Decree." The trial court did not dismiss the enforcement actions based on

her subject-matter jurisdiction argument, and it would have been error to do so.

Supplemental Opinion: After the appellate court issued its opinion and rendered judgment, ex-Wife sought to determine the status of the court reporter's notes from the divorce proceeding. In reality, the reporter had not destroyed her notes. She then sought to have the record supplemented, arguing the supplemental record negated the trial court's subject matter jurisdiction over the child-custody issues. She asserted a collateral attack on rehearing which "requires consideration of the evidence and proceedings from the divorce trial and the trial court's record at the time it rendered the Texas Decree." Before "dismissing the enforcement actions, the trial court reviewed and took judicial notice of the entire file from the underlying divorce action. Because we do not have that file in our appellate record, the recently filed supplemental reporter's record does not afford an opportunity for this court to determine whether the entire record before the trial court affirmatively negates the existence of facts essential to subject-matter jurisdiction. Therefore, we conclude that the supplemental reporter's record is not relevant to any issue before this court."

Editor's note: *I'm confused even after reading the 20-page opinion. Apparently, Texas timeframes run even if a litigant lacked notice of the proceeding, and was not personally bound. Moreover, the petitioner's pleading stated facts that demonstrated the trial court lacked subject matter jurisdiction over the child custody issue. Nonetheless, the trial court found jurisdiction without regard to the pleadings (or apparently the truth of the matter).*

The key fact missing is the whereabouts of the mother and child. If they still are in Spain, which seems to be the case, enforcement will be there. Good luck, Dad. Here's hoping the Spanish authorities do not jail you for nonpayment of child support. Actually, that is meant to be a joke. Europeans do not put anyone in jail for minor offenses, such as failure to pay child support. J.J.S.

MOTHER RAILROADED, THEN REPRIEVED—AT LEAST SHE WASN'T TAKEN OUTSIDE AND SHOT

¶ 07-3-18. ***In re* S.C.**, 220 S.W.3d 19 (Tex. App.—San Antonio 2006).

Facts: Father filed a SAPCR seeking to be named sole managing conservator of his three children. Mother was served on September 28 for the October 18 hearing. Father and his attorney and Mother, appearing *pro se*, attended the hearing. The case was called and a very brief recorded proceeding was conducted in chambers. Father's attorney told the court the children were currently living with Father and that he was seeking sole managing conservatorship. Mother objected and stated the children had always been with her. The court, without hearing any evidence, orally appointed Father sole managing conservator and granted Mother supervised visitation. The court then stated a final hearing would be held on November 1. Mother was told by the court to come with an attorney if she was going to object to Father having custody. On October 24, the

November hearing was cancelled and not rescheduled. The trial court then signed an order naming Father as sole managing conservator, and Mother as possessory conservator. Mother was granted supervised visitation "at times mutually agreed to in advance by the parties." Mother appealed.

Held: Reversed and remanded. Mother had inadequate trial notice, plus father failed to rebut presumption favoring joint managing conservatorship and standard visitation.

Opinion: The trial took place only twenty days after Mother was served. She was not afforded an opportunity to present evidence or cross-examine witnesses. Mother's due process rights to adequate notice and an opportunity to be heard were violated, U.S. Const. amend. XIV, section 1; Tex. R. Civ. P. 245.

In addition, the trial court abused its discretion in appointing Father as sole managing conservator, and by deviating from the standard possession order. It is presumed that appointment of both parents as joint managing conservators and the standard possession order is in children's best interest, § 153.131. Because Father presented no evidence to overcome these presumptions, "the trial court had no discretion to decide the conservatorship and possession issues contrary to the statutory presumptions."

Editor's note: *Sometimes you gotta wonder if we still are in the days of Judge Roy Bean. J.J.S.*

SAPCR
Child Support

GEORGIA CHILD SUPPORT "ORDER" THAT FAILS TO DESIGNATE OBLIGOR IS NOT ENFORCEABLE

¶ 07-3-19. **Office of the Attorney General v. Buhrle**, 210 S.W.3d 714 (Tex. App.—Corpus Christi 2006).

Facts: Texas Attorney General brought suit to enforce a child support judgment from Georgia requiring Mother to pay $36 weekly child support. The AG's motion was denied, as well as his motions to reconsider and for a new trial, or to modify, correct, or reform the judgment. The fill-in-the-blank agreement, incorporated into the Georgia divorce decree, read, "The sum of $36.00 per week PER CHILD as child support for the support, maintenance and education of such children…. The foregoing payments shall be made on the first day of each week, beginning the 1st day of December, 1992, and continuing thereafter…."

"Some time" after the divorce, the parents had a dispute over child support in Florida, and the Florida court ordered Mother to resume payment of child support. Texas Attorney General appealed the denial of his motions.

Held: Affirmed. The support order is invalid in Georgia, and therefore, void in Texas.

Opinion: The Uniform Interstate Family Support Act provides that a party may register an out-of-state support order in Texas. The nonregistering party then has 20 days to contest the registration. Mother did not contest the registration within the 20 days so she is precluded from contesting the order's validity or enforcement.

However, the appellate court found the Georgia order to be void. The order stated that $36 per week child support was ordered but it failed to state the party to pay the child support. Interpreting Georgia law, the Texas appellate court found the support order failed to comply with the George statutory requirements that a support order specify the amount and "from which party" the children are entitled to support. The Georgia order is invalid and void in Texas.

Texas cannot give full faith and credit to the Florida order. The AG's notice of registration was for the Georgia support order, not the Florida order. The AG did not argue or prove that Florida issued the controlling order in this case.

Editor's note: *Excuse me. The A.G. knew about the Florida litigation and loses a series of motions when the Florida order isn't before the court. Instead of refiling to enforce the Florida order, it pursues appeal on a loser of a case. Does the appellate division have too much time on its hands? Did the local office mislay the buttons necessary to punch out another case that can be proven? Finally, of course, 1992 is a long time ago, which also makes for wonderment about the process. J.J.S.*

APPEALING ASSOCIATE JUDGE'S ORDER MEANS DE NOVO HEARING—WHICH MEANS A.J.'S ORDER NOT FINAL (DISTRICT JUDGE DOESN'T SPEAK LATIN)

¶ 07-3-20. ***In re* Office of Attorney General of Texas**, 215 S.W.3d 913 (Tex. App.—Fort Worth 2007).

Facts: The A.G. filed a motion for enforcement seeking unpaid child support and contempt against Obligor. An associate judge signed an order granting a $42,248 arrearage judgment, but failed to mention the contempt request. "The order is signed by the associate judge only, who apparently attempted to issue a final order because he crossed out the paragraph titled 'associate Judge's Report' on the final page of the order. He also put his signature on the 'Order Adopting Associate Judge's Report' signature block intended for the district court…."

The A.G. appealed this order to the district court, complaining that the associate judge failed to find Obligor in contempt. Obligor countered that the contempt issue had already been tried to the Associate Judge, and to retry the issue would be double jeopardy. The district court sustained Father's double jeopardy argument, affirmed the associate judge's order, and dismissed the AG's appeal. The AG sought mandamus relief.

Held: Writ conditionally granted. Associate judge's order was not a final order triggering double jeopardy.

Opinion: Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. A contempt order is not a final judgment with appeal as a remedy, nor can one appeal a court's rejection of a contempt request. The order affirming the associate judge's arrearage judgment may be appealable, but the ruling that the AG's contempt request is jeopardy-barred is not appealable. Mandamus relief is available.

An order of an associate judge becomes final only if an appeal is not filed within three days, *see* § 201.015(a). In this case, the AG did file a timely notice of appeal; therefore, the associate judge's order was not final. "Without a final order, the double jeopardy prohibition did not come into play…."

Editor's note: *The 2007 amendments to Chapter 201 should help clear up the confusion about "appealing" an A.J.'s order. It is now labeled "request a de novo hearing," which thereby assigns "appeals" to appellate courts, not district courts. Here, of course, the use of the now eliminated terminology confused everyone (including me). J.J.S.*

ONCE CHILD SUPPORT ARREARAGE DETERMINED AS OF CERTAIN DATE, RELITIGATING NONPAYMENT BEFORE THAT DATE BARRED BY RES JUDICATA

¶ 07-3-21. ***In re* M.K.R.**, 216 S.W.3d 58 (Tex. App.—Fort Worth 2007).

Facts: "This is the case of the two-bite arrearage." In 1994, Obligee was granted a judgment for $5,825 for unpaid child support from 1991 to 1993. Obligor was ordered to pay $200 monthly on the arrearage plus his regular $250 monthly child support payments. In 2001, he filed a motion to modify, seeking custody of his son and modification of his support obligations. Obligee responded by filing a motion for enforcement, asserting Obligor had failed to pay almost all child support payments from 1984 through 1994 as well as some payments from 1996 to 2002. The trial court found Obligor owed an arrearage of $29,604, missed child support for 1985 through 2002, plus $6,720 in attorney's fees.
Father appealed.

Held: Reversed and remanded. Trial court erred by entering an arrearage judgment against Obligor that included amounts barred by *res judicata*.

Opinion: "*Res judicata* prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit." Obligee's 1994 motion for contempt set forth specifically Obligor's alleged missed payments for 1991 through 1993. The report for was signed by the parties, signed by the associate judge, and approved and signed by the district judge. It was a final order reducing Obligor's unpaid child support to judgment on the amount of unpaid child support owed by him as of June 15, 1994.

In 2005, Obligor was found in arrears in the amount of $29,604, including accrued interest, for the period January 4, 1985 though De-

cember 5, 2002. How this amount was calculated was not explained. The appellate court found r*es judicata* applied to all amounts of past due child support prior to the 1994 Report for Contempt. Obligee does not get a second bite at the apple for claims that she could have asserted in her earlier suit.

The appellate court overruled Obligor's motion to reverse the attorney's fees awarded to Obligee. The child support payment history admitted into evidence revealed Obligor did miss several payments and was late with others. Even if he had paid off any arrearage by the time of the hearing, a court may still order him to pay Obligee's attorney's fees because he did not make the payments when they were due, § 157.167(a).

NO COMMITMENT ORDER BEFORE ARREST (BUT FIVE DAYS AFTER) MEANS CONFINEMENT UNCONSTITUTIONAL INCARCERATION

¶ 07-3-22. ***In re* Richardson**, 218 S.W.3d 902 (Tex. App.—Texarkana 2007).

Facts: On March 8, Man was found in contempt for violating several court orders regarding support of his child and former wife. The contempt order had the Man held in the county jail for a period of 180 days, but the document did not specifically order any law enforcement officer to take him into custody. Man filed for a writ of habeas corpus.

Held: Petition granted. There must be a written order of commitment to jail a contemnor.

Opinion: "To confine a person for civil contempt, due process requires both a written judgment of contempt and a written order of commitment…. An arrest for contempt without a written commitment order is an illegal restraint from which the prisoner is entitled to habeas relief." In this case, Man was found in contempt on March 8, and a Writ of Commitment was issued on March 13, five days after Man had been confined for contempt. The confinement of man for five days before the writ of commitment was issued violated his due process rights.

SAPCR
Termination of Parental Rights

PETITIONER BEARS BURDEN TO PROVE PARENT FAILED TO SUPPORT CHILDREN "IN ACCORDANCE WITH ABILITY TO PAY"—ANOTHER REVERSED AND RENDERED

¶ 07-3-23. ***In re* D.S.P.**, 210 S.W.3d 776 (Tex. App.—Corpus Christi 2006).

Facts: Non-married Mother and Father had two children. Shortly after the birth of their second child, a trial court appointed Mother sole managing conservator of one child, appointed Dad possessory conservator, and awarded the paternal grandparents limited visitation and possession rights.
A couple of years later, the grandparents were appointed sole managing conservators of both children, with the parents appointed possessory conservators. A few years later, the grandparents filed suit to terminate the parental rights of both parents and to adopt the children. Both parents' rights were terminated after a finding that they had failed to support their children in accordance to their ability during a period of one year ending within six months of the termination petition; only Mother appealed.

Held: Reversed and rendered. There was no evidence that Mother had the ability to support her children.

Opinion: When the grandparents were appointed managing conservators, the trial court ordered Mother to pay $100 monthly child support for six months, then $195 monthly thereafter. During the one year time period under consideration for failure to support, Mother was living with her mother and sister, and staying at home to take care of her sister's child while the sister worked. Mother testified she was unable to get a job, even though she had a G.E.D.

In its consideration of this case, the Corpus Christi court determined that its previous holding in *In re R.R.F.*, 846 S.W.2d 65, was error when it found that "in a termination proceeding, the inability to pay support under a valid order is an affirmative defense that must be raised by the party defending the allegation of failure to pay support…. Requiring a parent at risk of losing her parental rights to present evidence of her inability to pay for the purpose of either (1) asserting an affirmative defense or (2) overcoming a child support order's implied finding of ability to pay, wrongfully shifts the burden of proving ability to pay to the parent and excuses the movant in the termination proceeding from the burden of proving that the parent failed to support in accordance with the parent's ability."

While there was clear evidence that Mother failed to support her children, there was no evidence that Mother failed to support her children in accordance with her ability. The grandparents had the burden to prove Mother had the ability to support her children.

ASSOCIATE JUDGE'S TERMINATION OF PARENTAL RIGHTS IS FINAL ORDER—DE NOVO APPEAL DOES NOT AFFECT TIMELY COMPLIANCE WITH DROP-DEAD STATUTE

¶ 07-3-24. **Garza v. Family and Protective Services**, 212 S.W.3d 373 (Tex. App.—Austin 2006).

Facts: On November 17, 2003, DFPS filed suit to terminate Mother's rights to four children. A hearing was set for October 29, 2004, and a dismissal date was scheduled for November 2, 2004.

On October 15, 2004, the paternal grandparents of two of the children intervened, seeking termination of both parents' rights and seeking

to adopt their two grandchildren. The Department was granted a continuance, and a new trial date was set for February 22, 2005, with a dismissal date of April 13, 2005. The associate judge hearing the case noted on his docket sheet on March 28 that both parents' parental rights should be terminated and that the paternal grandparents should be appointed the managing conservators of their two grandchildren and that the Department should be appointed managing conservator of the other two children.

Mother filed a notice of appeal seeking a trial de novo in the district court regarding the termination of her rights. On October 14, 2005, the district court rendered judgment that the mother's and one father's parental rights be terminated, and that the Department be appointed managing conservator of all four children.

Mother appealed, claiming DFPS failed to comply with the time restrictions of § 263.401. She limited her appeal to only two of her children.

Held: Affirmed. Associate judge's report constituted timely order before statutory dismissal deadline.

Opinion: On appeal, Mother argued that the district court did not render a final order before the April 13, 2005 final dismissal deadline as required by TFC § 263.401(a). Section 263.401(d) defines a final order as an order that: "(1) requires that a child be returned to the child's parent; (2) names a relative of the child or another person as the child's managing conservator; (3) without terminating the parent-child relationship, appoints the department as the managing conservator of the child; or (4) terminates the parent-child relationship and appoints a relative of the child, another suitable person, or the department as managing conservator of the child." On March 28, the associate judge noted on his docket sheet that the parental rights of the mother should be terminated and that the grandparents should be appointed managing conservators of two of the children, and that the Department should be appointed managing conservator of the other two children (the subject of this appeal).

"Chapter 201 authorizes district courts to appoint associate judges to consider suits affecting the parent-child relationship." If a party appeals an associate judge's report to the referring court, the decisions of the associate judge "are in full force and effect and are enforceable as an order of the referring." The associate judge's report constituted an enforceable order of the district court while Mother's appeal was pending and met the requirements of a final order under § 263.401. "While the referring court ultimately could reverse or otherwise depart from the associate judge's recommendations, that is the same contingency inherent in any appeal from a 'final order' in a termination proceeding, whether taken from the associate judge to the referring court or the district court to an appellate court."

QUICK MIND-CHANGE BY UNWED TEENAGER ABOUT GIVING NEWBORN UP FOR ADOPTION TRIGGERS CONTROLLING EFFECT OF PARENTAL PRESUMPTION

¶ 07-3-25. ***In re* Mata**, 212 S.W.3d 597 (Tex. App.—Austin 2006).

Facts: Unwed teenaged Mom allowed Mr. and Mrs. G to take her 2-day old baby home after signing a release so the couple could take him from the hospital. Mr. and Mrs. G wanted to adopt the baby and promised Mom they would have an open adoption. A week later, Mom told her parents about the baby and stated she wanted him back. Mom called Mr. and Mrs. G and told them she wanted her baby back. Mom and her parents went to pick up the baby, but Mr. and Mrs. G did not come to the meeting place. Two days later, Mom and her parents again drove to pick up the baby, but the adoptive couple never showed up. The adoptive couple filed suit to terminate Mom's rights, and the trial court granted the couple temporary managing conservatorship. Mom filed a petition for writ of mandamus.

Held: Writ conditionally granted; adoptive parents did not rebut parental presumption.

Opinion: "In determining who should have possession of a child, the primary consideration is the child's best interest…. Although a trial court need not make the same findings on temporary orders as it must in making a final order of termination…neither should the court ignore the probably arrangements that will be imposed on final hearing in considering temporary orders." When making temporary orders, a court should start with the presumption that the parent will be appointed managing conservator. "The strong presumption in favor of parental custody requires that the nonparent seeking custody affirmatively prove by a preponderance of the evidence that appointment of the parent as managing conservator would significantly impair the child…." In this case, there was no evidence to support the trial court's decision to disregard the presumption that Mom should have temporary possession of her son. The couple's petition did not allege facts showing that Mom would be an endangerment to her child. Nor had Mom signed any type of relinquishment papers; she let the adoptive couple know that she had changed her mind after only a week. "The trial court misplaced the burden of proof by not requiring the [adoptive couple] to rebut the presumption in favor of granting [Mom] possession of the child…."

The appellate court stated it was uncertain whether the adoptive couple even had standing to bring their termination suit. "We need not decide this issue, however, because we have determined that even if they do have standing, the trial court abused its discretion in naming them temporary managing conservators…. This case illustrates the dangers presented by informal and rushed adoption arrangements…. [T]he arrangement was made without the legal protections offered by affidavits of relinquishment or statements conferring standing. These hurried proceedings left both the birth mother and the would-be adoptive parents at risk for heartbreak."

INSUFFICIENT EVIDENCE TO TERMINATE MOTHER ON § 161(1) (D&E) GROUNDS—DECREE CANNOT BE BASED ON UNPLED GROUND

¶ 07-3-26. **Ruiz v. Texas Dept. of Fam. & Pro. Services**, 212 S.W.3d 804 (Tex. App.—Houston [1st Dist.] 2006).

Facts: DFPS removed the child after a referral that the child was being left with the great-grandmother for periods of time when the mother's whereabouts were unknown and there were unexplained cigarette burns on the child's arm. Mother was given a family service plan in which she was to attend counseling, anger management classes, parenting classes, a psychiatric follow-up, and drug assessment. Mother completed some of her service plan. When the child was under the supervision of DFPS, he lived with the great-grandmother and also with Mother's cousin. Mother was also living with the cousin at the time her child was living there. There were allegations of abuse by Mother's boyfriend, unstable living arrangements, no employment, and some drug use by Mother.

Mother's parental rights were terminated upon a finding that she left the child in endangering conditions and engaged in endangering conduct, and that termination was in the child's best interest. Mother appealed claiming insufficient evidence.

Held: Reversed and rendered. Evidence was insufficient to support termination on endangering conditions and conduct grounds.

Opinion: The appellate court found the evidence was insufficient for a reasonable fact finder to form a firm belief or conviction that mother knowingly endangered her child by allowing him to remain in endangering conditions or that Mother engaged in endangering conduct regarding her son.

There were allegations of cigarette burns that Mother could not explain. There was no evidence that the burns occurred while the child was in Mother's care. As for a cut found on the child's eye, there was no evidence that Mother caused the cut, or gave her son inadequate treatment for the cut. As for drug use evidence, Mother testified she used marijuana in mid-April, but there was no evidence of an on-going drug problem or that Mother used the drug in the child's presence or while he was in her care. There was no "course of conduct" regarding Mother's drug use.

DFPS tried arguing that Mother did not complete her family service plan and therefore, termination of her rights should be upheld via § 161.001(1)(O); but "a parental rights termination order can be upheld only on grounds both pleaded by [DFPS] and found by the trial court." The trial court terminated Mother's rights using sections 161.001(1) (D) & (E). The appellate court declined to uphold the termination order on a ground different from that stated in the order.

ATTORNEY AD LITEM NEED NOT LIKE BAD-GUY CLIENT TO REPRESENT HIM

¶ 07-3-27. ***In re* A.H.L., III**, 214 S.W.3d 45 (Tex. App.—El Paso 2006).

Facts: Father was convicted of jail escape in 1970, of capital murder in 1976, and of aggravated assault of a public servant, namely the sheriff in

1997. He is presently serving a 50 year sentence and not eligible for parole until 2021.

Anyway, he and Mother had a child in 1996. DFPS removed the child from Mother's care because of inadequate supervision; the child was shoplifting, vandalizing, and committing assault from the ages of five and eight. [My sainted mother always said that "the apple don't roll so far from the tree."] Mother voluntarily relinquished her parental rights. Father was appointed an attorney ad litem and initially a bench warrant was issued for him to attend the trial.

In the meantime, Father's attorney asked to withdraw from the case or in the alternative, that the scope of her representation be limited strictly to the termination proceeding. Father was also seeking monetary damages against Governor Perry and the director and board members of DFPS. Father then asked that his attorney be dismissed so he could represent himself. Father participated by phone, and the trial court denied the attorney's motion to withdraw, but stated that she did not have a duty to represent Father in his countersuits. Father was denied his motion to represent himself.

A jury terminated Father's rights, finding he had knowingly engaged in criminal conduct that resulted in his conviction and confinement and inability to care for his son for not less than 2 years, TFC § 161.001(1)(Q), and that termination was in the son's best interest.

Held: Affirmed. Denial of Father's request for a bench warrant and to represent himself was not error.

Opinion: On appeal, the court found no abuse of discretion in the denial of the bench warrant. Initially the trial court had granted Father his bench warrant request, but then revoked it when the sheriff reported that his security plan included ten deputies to secure the courthouse and jail when Father was present. After considering the costs and security implications, the trial court revoked the bench warrant. Father refused to participate by deposition, insisting he be physically present at trial and be allowed to proceed *pro se*. An inmate does not have an absolute right to appear in person as the "right of access to the courts must be weighed against the protection of our correctional system's integrity."

Contrary to Father's argument, he had no statutory right to self-representation in the termination proceeding. TFC § 107.013(a)(1) grants indigent parents appointment of counsel in termination cases, but does not require self-representation as a necessary component of a fair parental rights termination proceeding.

Lastly, Father argued he was denied effective assistance of counsel because of his lawyer's "personal dislike" of him. The record showed that at a pretrial hearing, Father's attorney stated she would not feel comfortable sitting next to him in the courtroom unless he was restrained. Father, who was participating by phone, objected. His objection was overruled. "Even assuming that counsel actually did not like [Father] as he claims, we are unable to find any evidence in the record that counsel's feelings caused her to [sic] performance to be deficient."

Note: *On appeal, Father argued ineffective assistance of counsel for his attorney's failure to collaterally attack his aggravated assault conviction—dating from 1997 if you don't remember the list of his convictions.*

SOVEREIGN IMMUNITY PROTECTS DPRS FROM MONETARY LAWSUITS NO MATTER THE LABELS OF INJUNCTIVE RELIEF OR DECLARATORY JUDGMENT

¶ 07-3-28. ***In re* C.S.**, 214 S.W.3d 465 (Tex. App.—Austin 2006).

Facts: The Stewarts have had three foster children in their care since 2001. They receive $3,150 monthly foster care payments for the three siblings and desire to adopt the children. They are the only family willing to adopt the children despite a nationwide search. Two of the children are teenagers with severe emotional and behavioral problems.

If they adopt the children, the Stewarts would not be eligible to receive their current $3,150 foster care payments, but would instead qualify for adoption subsidies of $1,635 monthly. "Based on the adoption subsidy, the Stewarts do not meet the financial requirement to qualify as an adoptive placement for the children." An attorney ad litem was appointed to represent the children for the purpose of "obtaining appropriate adoptive services." The attorney filed a claim for declaratory and injunctive relief as next friend of two of the children, requesting the trial court to issue a permanent injunction requiring the TDFPS director to provide the Stewarts with adoption subsidies equal to the amount they are paid in foster care payments.

TDFPS filed a plea to the jurisdiction, claiming the ad litem's suit for declaratory and injunctive relief was barred by sovereign immunity. The trial court denied the plea, and TDFPS appealed.

Held: Reversed and rendered. Ad litem's suit was barred by sovereign immunity.

Opinion: A plea to the jurisdiction challenges a trial court's authority to determine the subject matter of a pleaded cause of action. "Sovereign immunity protects the State from lawsuits for monetary damages absent legislative consent to sue the State…. Under the doctrine of sovereign immunity, in the absence of legislative consent to suit, a court has no subject matter jurisdiction to entertain a suit against a governmental unit." One cannot circumvent the State's sovereign immunity by characterizing a suit for money as declaratory or injunctive relief.

In this case, despite the ad litem calling his request injunctive relief to remove unconstitutional barriers to adoption, it is in reality, a suit for monetary relief. "The simple reality of this case is that it is an attempt to force the State to pay money to the Stewarts" to increase their adoption subsidy so they could meet the financial qualifications for adoption.

Adoption subsidies are distinguishable from sovereign immunity and school finance because there is a constitutional directive to support and maintain public schools, Tex. Const. art. VII, section 1, and there is no constitutional directive for the legislature to provide adoption subsidies.

MOTHER'S ACTIONS NOT SUFFICIENT TO SUSTAIN BEST INTERESTS TO TERMINATE

¶ 07-3-29. ***In re* C.E.K.**, 214 S.W.3d 492 (Tex. App.—Dallas 2006).

Facts: Following a report of domestic violence, CPS removed two children from the home of the Mother and the father of one of the boys. Her parental rights were terminated to both boys, and the bio-father of one boy was named sole managing conservator of both boys. Mother appealed.

Held: Reversed. Evidence insufficient to support mother's termination was in children's best interest.

Opinion: Following a domestic violence episode, the children were taken to the hospital; it was found that the three-month-old had a linear skull fracture. Each parent accused the other of violence. The father was initially charged with child abuse, but these charges were eventually dropped. Both parents admitted using marijuana periodically while the children were in the home. The mother admitted to using it while she was pregnant. During the pendency of the case, the father had several criminal charges against him. After reviewing the record, the appellate court found sufficient evidence to support termination on the basis that the mother had engaged in endangering conduct or placed the children with persons who engaged in endangering conduct, TFC § 161.001(1)(E). That, of course, reaches half-way to a final resolution.

After review, the appellate court found the evidence insufficient to support termination being in the children's best interest. "There is a strong presumption that the best interest of the child will be served by preserving the parent-child relationship." At trial, CPS argued termination was in the children's best interest because the mother demonstrated a lack of parenting skills, was unable to meet the children's needs, and was a continuing danger to her children. The CASA volunteer did not approve of the mother's apartment, noting that it had the barest of furnishings. She also criticized the mother for letting the older child have a Chapstick, almost letting the younger son fall off a rocking horse, letting the younger son eat a snack that fell off the table on the floor, and letting the younger son sleep in his carrier. The CASA volunteer admitted the mother was affectionate to her sons. The mother completed all the CPS required parenting classes, plus extra classes, had attended ten of the seventeen scheduled counseling sessions, and had attended 100% of the scheduled weekly visitation sessions with her children.

The mother did have instances of fighting with the father and some marijuana use in front of her children, but "[t]his case is not one where Mother's offending behavior, on its own, is egregious enough to warrant a finding that termination is in the children's best interest…. [T]he evidence is uncontradicted that Mother has done everything that CPS has required of her and more…. The best interest standard does not permit termination merely because a child might be better off living elsewhere…. The evidence shows Mother had made significant progress, improvements, and changes in her life." The evidence is insufficient to support the best-interest finding.

¶ 07-3-30. ***In re* V.I.**, 214 S.W.3d 707 (Tex. App.—Waco 2007).

Summary: Mother filed notice of appeal, a motion for a new trial, and a statement of points on appeal of the judgment terminating her parental rights. The trial court denied the new trial motion, found she was not indigent, and found her appeal was frivolous.

She was notified on October 11, 2006, of the trial court's findings, and informed she had 10 days to notify the court whether she intended to appeal the non-indigence or frivolousness findings. On November 15, 2006, the appellate court ordered her attorney to file with the court a response as to why the mother had not responded to the October 11 letter and why a record of the hearing finding her not to be indigent and the suit frivolous had not been filed with the appellate court. She failed to respond to the November order; her appeal was dismissed.

TWO BENCH TRIALS ORDERING TERMINATION NOT ENOUGH—MOTHER'S JURY DEMAND RAISED MATERIAL ISSUES OF FACT

¶ 07-3-31. ***In re* M.N.V.**, 216 S.W.3d 833 (Tex. App.—San Antonio 2006).

Facts: Mother's parental rights to her three children were terminated. She was granted a motion for new trial, after which she filed a jury demand fee. Mother did not appear; her lawyer announced not ready, the jury trial request was struck, and the case proceeded to trial by the bench.

Mother's parental rights again were terminated. Her subsequent motion for new trial was denied, and her appellate points were found to be frivolous by the trial court. Mother appealed.

Held: Reversed. Material issues of fact existed as to the best interest of the children.

Opinion: "An appeal is frivolous when it lacks an arguable basis in law or in fact." In this case, Mother requested a jury trial. There "is an arguable basis that the trial court erred in denying [Mother's] right to a jury trial." Refusal to grant a jury trial is harmless error only if there are no material issues of fact. The appellate court found there were material issues of fact as to the best interest determination of the children. The trial court erred in finding Mother's appellate point, relating to her jury trial demand, was frivolous.

Dissent: The record in this case "cannot possibly contain a material fact question since appellant does not even argue the trial court erred in finding grounds for termination and that termination would be in the children's best interest."

ALLEGED FATHER WHO APPEARS AT TERMINATION TRIAL ASSERTING HIS PATERNITY CANNOT BE TERMINATED

"TIMELY FILE" ADMISSION—HE SPOKE UP BEFORE HIS RIGHTS TERMINATED

¶ 07.3.32. **Toliver v. Texas DFPS**, 217 S.W.3d 85 (Tex. App.—Houston [1st Dist.] 2006).

Facts: Mother had three children by three different fathers. The oldest child (age 10) was medically fragile with brittle bone disease and the second oldest child (age 8) had violent rage outbursts. CPS began working with Mother because of allegations of medical neglect, narcotics use, and domestic disturbances between Mother and her boyfriends. The parental rights of Mother and the three fathers were terminated; Mother and two of the fathers appealed their terminations.

Held: Affirmed in part; reversed in part. Trial court erred in terminating second father's rights.

Opinion: Mother—Same old, same old. Drug-abusing mother endangering her children by continuous drug use. Although she had been enrolled in numerous drug programs and knew she could lose her children because of her drug use, Mother continued to use. She also had violent outbursts and threatened others in her treatment programs. At the time of trial, she had not visited her children in over a year and had paid none of the court ordered child support. The evidence supported termination.

First Father—The evidence also supported termination of the oldest child's father as being in the child's best interest. The child had brittle bone disease and was in a specialized foster home with trained parents who wanted to adopt him. Father was incarcerated at the time of trial, and wanted his mother to care for his son and the other two children. Although the paternal grandmother stated she was willing to care for her grandson and his two siblings, she was unable to work because of an injury, had only a one bedroom apartment, would need help in caring for the children, and would not be able to transport the grandson to receive his bone fusion treatments.

Second Father—TFC § 161.002 allows a court to terminate an alleged father who does not timely file an admission of paternity after being served with citation. The trial court terminated the second father's parental rights on the basis that he did not timely file an admission of paternity after being served. In this case, the second father appeared at trial and stated that he was the middle child's father and did not want his parental rights terminated. "Applying strict scrutiny to this termination statute, as we are required to do, we hold that [Father], by appearing at trial before his rights were terminated and admitting that he was in fact [the child's] father, triggered his right to require DFPS to prove that he engaged in one of the types of conduct listed in TFC § 161.001(1) before his parental rights could be terminated." Since that was not done, his rights could not be terminated.

HO HUM—ONE GLIMMER OF SEMI-GOOD CONDUCT DOES NOT A FIT PARENT MAKE

¶ 07-3-33. ***In re* C.D.B.**, 218 S.W.3d 308 (Tex. App.—Dallas 2007).

Facts: The four children were placed in foster care after allegations of physical abuse by Father. Mother was not present at the time Father was alleged to have hit one of his children. As part of the service plan for return of her children, Mother was to receive drug and alcohol treatment, a psychological evaluation, and parenting classes. Mother's parental rights were terminated, and she appealed.

Held: Affirmed. Once again, drug use is the root of family destruction.

Held: Mother's rights were terminated on the grounds of endangering conditions, endangering conduct, failure to comply with a court order, and use of a controlled substance that endangered her children, TFC §§ 161.001(D), (E), (O), and (P). Only one statutory ground must be proven in order to terminate a parent's rights. It is undisputed that Mother failed to comply with the provisions of the court order that specifically established the actions necessary for her to have her children returned to her. Mother did not complete either the drug or psychological assessments. She only visited her children six of the fifteen scheduled visitations. There was additional evidence to support the other termination grounds—unstable housing and employment, incarceration, attempted suicide, positive drug tests, and leaving the children with known drug users. The evidence was sufficient to support termination.

Editor's note: *This is hardly controlling, but making 40% of the scheduled visitations in a CPS case ain't that bad when compared with many other cases. Of course, the rest of the behavior mentioned is an everyday experience for the agency. J.J.S.*

MOTHER RELINQUISHED PARENTAL RIGHTS; TWO YEARS LATER SUED ATTORNEY WHO DUMPED HER; THIS ONE IS PERFECT FOR SUMMARY JUDGMENT

¶ 07-3-34. **Martinez v. Leeds**, 218 S.W.3d 845 (Tex. App.—El Paso 2007).

Facts: Mother's children were removed from her care by CPS, and an attorney ad litem was appointed to represent her. The attorney filed a motion to withdraw as her counsel, citing Mother's refusal to follow his advice and Mother's insistence on involving the local newspaper with a letter she wrote accusing the appointed attorney of being "inadequate and unprepared." The attorney's motion to withdraw was granted and substitute counsel was appointed to represent Mother.

A month or so later, Mother executed an affidavit of voluntary relinquishment of her parental rights. Two years later, Mother filed suit against the first appointed counsel, alleging legal malpractice, breach of contract, defamation, and violation of her constitutional rights, and seeking $50,000 in damages. The trial court granted the attorney both his traditional and no-evidence motion for summary judgment.

Held: Affirmed. Failure to raise a genuine fact issue lets summary judgment stand.

Opinion: "The movant for traditional summary judgment has the burden of showing there is no genuine issue of material fact and that he is entitled to judgment as a matter of law…. Once the defendant establishes his right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact, thereby precluding summary judgment…. A no-evidence summary judgment under Tex. R. Civ. Proc. Rule 166a(i) is essentially a pretrial directed verdict, and we therefore apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict…. The party moving for no-evidence summary judgment must assert that there is no evidence of one or more essential elements of a claim or defense on which the non-movant would have the burden of proof at trial…. The burden then shifts to the non-movant to produce evidence raising a fact issue on the challenged elements."

The appellate court only addressed the propriety of the no-evidence summary judgment motion because when a party moves for both a traditional and no-evidence summary judgment, the court must first review the trial court's summary judgment under the no-evidence standards of Rule 166a(i). It was up to the mother to produce more than a scintilla of evidence raising a genuine fact issue. Mother presented only conclusory statements, unsupported by argument or citation to legal authority. She presented nothing for the appellate court to review. In addition, her constitutional right to a jury trial was not denied by the granting of the summary judgment.

Associate Editor's note: *Mother appeared pro se, and the court noted that pro se parties are "held to the same standards as a licensed attorney and must comply with all applicable laws and rules of procedure." C.M.*

NO STATEMENT OF POINTS OF APPEAL OF TERMINATION EQUALS NO APPEAL

¶ 07-3-35. ***In re* R.M.R.**, 218 S.W.3d 863 (Tex. App.—Corpus Christi 2007).

Summary: Mother appealed the termination of her parental rights. Her appellate issues included as assertion of ineffective assistance of counsel, lack of notice, and insufficient evidence. Mother timely filed her appeal, but failed to include a statement of the point or points on which she intended to appeal as required by TFC § 263.405. "Under the express terms of the statute, because appellant did not file a statement of points, we cannot consider her issues on appeal, even ineffective assistance of counsel."

The Corpus Christi appellate court noted that it joined the appellate courts in Fort Worth, Waco, and Houston 1st, in questioning the practical applications and constitutional validity of the statute.

STATEMENTS OF POINT MAY BE TRAP FOR UNWARY, BUT NOT AN UNCONSTITUTIONAL ONE FOR INDIGENT PARENTS

¶ 07-3-36. ***In re* R.J.S.**, 219 S.W.3d 623 (Tex. App.—Dallas 2007).

Facts: Indigent mother's parental rights were terminated to her two children. Counsel was appointed for her at trial, and the same counsel represented her on appeal. A notice of appeal pursuant to the accelerated timetable under TEX. R. APP. P. 26.1 was filed, but a statement of points as required by § 263.405(b) was not.

Held: Affirmed. Requirement that appeal of termination present statement of points does not violate parent's constitutional rights.

Opinion: Under TFC § 263.405(i), an appellate court may not consider any issue on appeal that was not "specifically presented" to the trial court in a timely filed statement of points. "'Presenting' the statement of points requires both timely filing the statement and requesting a hearing."

There is nothing in the record showing what mother desired to appeal was considered by the trial court. "There is no evidence that a hearing was conducted and a hearing is mandatory. *See* § 263.405(d)…. Thus, under the circumstances of this case, we are compelled to hold that appellant has failed to present any issues for this Court's consideration."

"Although we conclude that Mother's failure to file a statement of points bars this Court's consideration of her issues, we feel compelled to address the trap for the unwary created by section 263.405(d)." The appeal provisions of § 109.002(a) appear to apply to all terminations; that section does not require filing of a statement of points. Terminations involving DFPS are under Family Code Ch. 263, and appeals under this chapter require a statement of points. "The legislature should warn parents that if they fail to present the trial court with a statement of points within fifteen days of a final order, there will be nothing for the court of appeals to consider. This goal could most easily be accomplished by amending § 109.002(a) to direct attention to the appeal requirements of § 263.405 in all suits involving TDFPS."

On appeal, Mother claimed "her right to equal protection was violated because the family code provides unequal treatment for parents involved in private termination suits versus termination suits involving the TDFPS." In private terminations, there is no requirement to file a statement of appellate points. Mother argued that since many parents involved in a TDFPS termination case are indigent, the "legislature has imposed a bar to indigent parents in TDFPS termination cases that litigants in private termination suits avoid." All parents, indigent or not, must comply with the appeal requirement of § 263.405. The purpose of the statement of points requirement "is to give the trial court an opportunity to correct any error and potentially avoid an appeal altogether." The appeal requirement applies to all parents, indigent or not, involved in a suit with DFPS and does not violate the Equal Protection Clause of the U.S. or Texas Constitutions.

JURY REFUSES MOTHER'S REQUEST FOR VISITATION ONLY—TERMINATION GIVES CHILD A CHANCE FOR A PERMANENT FAMILY

¶ 07-3-37. ***In re* K.C.**, 219 S.W.3d 924 (Tex. App.—Dallas 2007).

Facts: When he was four, the child was placed with his maternal grandmother by the court. Mother was appointed possessory conservator because custody by her would significantly impair his physical health or emotional development. When grandmother died two years later, CPS was appointed temporary managing conservator because Mother's possession would endanger the son. Eventually CPS filed suit to terminate her parental rights. Mother did not want to be managing conservator, but testified she wanted to be a mother to her son and be given visitation. She suggested two alternate managing conservators. The jury unanimously found evidence to terminate Mother's rights and found CPS should be the permanent managing conservator. Mother appealed.

Held: Affirmed. Evidence supported termination.

Opinion: Mother admitted she had a drug problem, and admitted her son may have been with her when she was high. Others testified to her heavy drug use. Mother's therapist testified to her personality, behavioral, and relationship disorders and her ultimate poor prognosis. There was testimony by several people that custody by Mother would endanger the son and not be in his best interest. Mother did not have a suitable home for her son, and had no history of stable employment.

Mother argued the evidence was insufficient to terminate because it was not in her son's best interest. She did not want managing conservatorship, only visitation until the court could find her a suitable parent. Mother's plan "ignores what we recognize as the paramount consideration in assessing a child's present and future physical and emotional needs in a best interest inquiry: the need for permanence…." The evidence supported the jury's decision to terminate Mother's rights.

The appellate court found the child's attorney ad litem waived his fee request. There was no evidence in the record where he adduced evidence on reasonable fees or preserved the issue in the trial court.

SAPCR
Parentage

BIO-FATHER STANDING BEFORE 80TH LEGISLATIVE SESSION

¶ 07-3-38. ***In re* H.C.S.**, 219 S.W.3d 33 (Tex. App.—San Antonio 2006).

Facts: While Woman 1 was dating Woman 2, Woman 1 expressed a desire to become a mother. The brother of Woman 2 agreed to act as a sperm donor, and Woman 1 was artificially inseminated and had a child. When the two women ended their relationship, the bio-father filed suit to adjudicate his parental rights. The parents executed a Rule 11 agreement which provided bio-father with limited access to the child; but Mother filed a plea to the jurisdiction based on bio-father's lack of standing as a sperm donor under the Family Code. Mother's jurisdiction plea was granted, and the case was dismissed. Bio-father appealed.

Held: Affirmed. Under these facts, bio-father lacked standing to pursue parentage.

Opinion: "Standing is a prerequisite to subject-matter jurisdiction and is essential to a court's power to decide a case." TFC § 160.702 states that "a donor is not a parent of a child conceived by means of assisted reproduction." It is undisputed that bio-father was a donor, but he argued his standing to adjudicate parentage was governed by TFC § 160.602, which states that "a proceeding to adjudicate parentage may be maintained by … a man whose paternity of the child is to be adjudicated…."

The appellate court in *In re Sullivan*, 157 S.W.3d 911 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding), found that § 160.602 confers standing on a man alleging himself to be the bio-father and seeking an adjudication of paternity. The issue of the man's status as a donor under § 160.702 would then be decided at the merits stage of the case rather than as part of the threshold issue of standing.

Disagreeing with *Sullivan*, the San Antonio court found the bio-father in this case did not have standing as a sperm donor to adjudicate paternity when he did not sign or file an acknowledgement of paternity. TFC § 102.003, the general standing statute, states a man alleging to be the father can file suit in accordance with Chapter 160. TFC § 101.0015(a) defines "alleged father," and TFC § 101.0015(b) specifically excludes male donor from the definition of alleged father.

Bio-father in this case relied on § 160.602 which states a parentage adjudication proceeding may be maintained by "a man whose paternity of the child is to be adjudicated." However, this statute is subject to other provisions regarding voluntary acknowledgment of paternity. A male donor may become a parent if he and the mother file an acknowledgment of paternity, *see* TFC §§ 160.301, 160.305. Bio-father failed to follow the statutory procedures for a male donor to determine parentage.

Editor's note: *The 2007 amendments to Chapter 160 are designed to resolve the conflict between the two appellate decisions. Basically, assisted reproduction is to be limited to medical doctors. The male's choice "donor or dad" is to be clearly stated. Finally, docs are going to keep records of all these complications. J.J.S.*

ADOPTION

DFPS vs. ADOPTION AGENCY A STANDOFF UNTIL BEST INTEREST EVIDENCE PRODUCED

¶ 07-3-39. **Dept. of Family and Protective Services v. Alternatives in Motion,** 210 S.W.3d 794 (Tex. App.—Houston [1st Dist.] 2006).

Facts: DFPS took possession of the two children when Mother was found in a ditch expressing her desire to sacrifice herself and her male child to God. DFPS filed a SAPCR seeking to terminate both parents' rights. Mother was involuntarily committed for psychiatric treatment at a

state hospital. Mother was discharged from the hospital in December 2004, and on January 5, 2005, both parents signed a voluntary relinquishment of parental rights affidavit in favor of a child-placing agency (Agency).

The Agency filed a petition to intervene in the DFPS termination suit. Mother then filed a revocation of her affidavit, and the Agency filed a motion to dismiss its SAPCR. Several months later, the Agency again intervened in the termination/conservatorship proceedings filed by DFPS based on a second set of affidavits of voluntary relinquishment executed by the parents. DFPS filed a motion to strike the Agency's intervention petition, arguing the Agency had no standing. The trial court denied DFPS' motion to strike. Summary judgment was entered terminating the parents' rights and naming the Agency as the permanent managing conservator of the children. DFPS appealed.

Held: Reversed and remanded. Error to appoint child-placing agency as managing conservator without hearing children's best interest evidence.

Opinion: DFPS argued the Agency did not have standing to intervene in its termination suit. "Section 102.003 of the Family Code sets out the general standing requirements for filing a SAPCR," and states that an original SAPCR may be filed at any time by a licensed child placing agency. But, to maintain a SAPCR, a party must show not only general standing, but also that it has a justiciable interest in the suit. When the parents' affidavits of relinquishment designated the Agency as managing conservator, the trial court had taken away the parents' managing conservator rights but not their possessory conservator rights. "When a valid affidavit of relinquishment designates a licensed child-placement agency as managing conservator of a child, the agency automatically has a statutory right of possession superior to the person who signed the affidavit and the rights and duties of a possessory conservator until modified by the court." The Agency had the right to intervene in the SAPCR by virtue of the affidavits of relinquishment signed by the parents.

But, the trial court improperly granted the Agency's motion for summary judgment and appointed it managing conservator without hearing evidence of the children's best interest. "Because the best interest of the child must be considered, we conclude that while appointment of a party designated in an affidavit of relinquishment in place of the parent whose rights are voluntarily terminated is automatic for the purpose of termination proceedings, appointment of that party as managing conservator in a suit to determine conservatorship of the child is subject to proof that the appointment is in the child's best interest." The trial court failed to hear evidence regarding best interest.

JOINT ADOPTION BY TWO WOMEN CANNOT BE ATTACKED AFTER TIME TO DO SO HAS ELAPSED

¶ 07-3-40. **Goodson v. Castellanos**, 214 S.W.3d 741 (Tex. App.—Austin 2007).

Facts: G and C, two women, lived together as a couple. G began researching adoption options, and found a child in Kazakstan. She traveled

to Kazakstan and adopted the child. Upon returning to Texas, G obtained a Texas birth certificate listing herself as the mother. G and C then filed jointly to adopt the child. The adoption decree specified that a parent-child relationship existed between G and the child and C and the child.

A year later, the relationship between the two women ended and C filed a SAPCR. The court appointed C the sole managing conservator and ordered G to pay monthly child support of $788 and for health insurance for the child. G was also ordered to pay $45,854 in attorney's fees to C, and $5,035 in attorney's fees to the court appointed amicus attorney. On the same day the trial court issued the SAPCR order, it also issued an opinion concluding that two members of the same sex may not jointly adopt a child under Texas law. G appealed.

Held: Affirmed in part; reversed and remanded in part. Adoptive mother precluded from attacking validity of adoption decree.

Opinion: Contrary to G's argument, the appellate court determined the trial court had subject matter jurisdiction to issue the adoption decree. G did not attack the validity of the adoption within the deadline mandated by statute. Section 162.012 prohibits all challenges to an adoption decree if they are filed more than six months after an adoption order is signed. The adoption decree was issued in 2001, and G did not attack its validity until 2003, more then six months later. The adoption decree was not void. The appellate court found there was no direct statement of public policy prohibiting the adoption of a child by two individuals of the same sex. In addition, the appellate court found it "would be inequitable and unconscionable to allow [G] to invoke the jurisdiction of a court for the sole purpose of creating a parent-child relationship between [C] and [the child] and then subsequently allow her to destroy that same relationship because her relationship with [C] had ended."

Because the adoption was not void, there was no parental presumption in favor of G. This is a SAPCR involving two individuals with co-equal legal rights to the child. The trial court was authorized to award sole conservatorship to C.

Based on the overall evidence and the highly prejudicial nature of the testimony, the appellate court found it was not an abuse of discretion for the trial court to rule that evidence regarding C's registered sex offender brother could not be admitted.

The appellate court also found that even if G's income had decreased from the time of the temporary child support orders, the evidence showed she had sizeable financial assets. It was not unreasonable or arbitrary for the trial court not to alter the child support award from its previous determination.

Because G did not preserve her complaint regarding payment of attorney's fees to C or post-judgment interest, the appellate court affirmed the $45,854 attorney's fees awarded C. However, the appellate court found insufficient evidence to support the amount of attorney's fees ordered to be paid to the amicus attorney. No testimony or sworn statements were presented at trial concerning the amicus fees.

DOMESTIC VIOLENCE

LIKELIHOOD OF FUTURE DOMESTIC VIOLENCE IS CLEAR TO EVERYONE BUT MAN ALLEGED TO BE LIKELY PERP AND HIS APPELLATE ATTORNEY

¶ 07-3-41. ***In re* Epperson**, 213 S.W.3d 541 (Tex. App.—Texarkana 2007).

Summary: A trial court may issue a protective order if it finds that family violence has occurred and is likely to occur in the future, § 81.001. A protective order was granted against Harry on application of his former fiancé, Lissa.

On appeal, Harry disputed that violence was likely to occur in the future. Based on notes left by Harry to Lissa, his impersonation of a deputy sheriff, his impersonation of Lissa's brother, his hiding under a trailer on property behind the house where Lissa was staying, his smearing red on a note to appear like blood, and the tone of his notes, the appellate court found it was reasonable for the trial court to conclude that family violence was likely to occur in the future.

Editor's note: *Great going, Harry! Terrific facts to take up on appeal. I do wonder, however, just what constitutes "terroristic threat or harassment" in East Texas, see* TEX. PENAL CODE §§ 22.07 *and* 42.07*, respectively. J.J.S.*

ATTORNEY'S FEES ORDERED MONTHS AFTER PERP LOST HIS APPEAL

¶ 07-3-42. ***In re* S.S.**, 217 S.W.3d 685 (Tex. App.—Eastland 2007).

Summary: After their divorce, the ex-wife was granted a protective order against her ex-husband. He appealed the protective order, but it was upheld on appeal. Several months later, the ex-wife filed a motion to modify the protective order, seeking attorney's fees to pay for the appeal. The ex-husband was ordered to pay his ex-wife $3525 in attorney's fees for his unsuccessful appeal.

Pursuant to § 87.001, the appellate court upheld the award of attorney's fees, finding the trial court had the jurisdiction and power to modify its order by either deleting or adding items to the order. Reasonable attorney's fees is an item that can be assessed against a party found to have committed family violence.

EXPIRED PROTECTIVE ORDER REMAINS REVIEWABLE DUE TO SIGMA AND OTHER CONSEQUENCES—TRIAL COURT LACKS POWER TO ISSUE P.O. WITHOUT PLEADINGS

¶ 07-3-43. **State for Protection of Cockerham v. Cockerham**, 218 S.W.3d 298 (Tex. App.—Texarkana 2007).

Facts: After a family altercation, Daughter sought and was granted a protective order against her father. A protective order was also issued on behalf of Father against her. The State, on behalf of Daughter, appealed the protective order entered against Daughter. By the time of the appeal, the protective order against Daughter had expired.

Held: Reversed and rendered. Trial court had no authority to *sua sponte* enter protective order against Daughter.

Opinion: Because the protective order had already expired, the appellate court found it first had to determine if there was a live controversy to be resolved, or whether the matter was moot and unreviewable. "Unless an exception to this general rule [of mootness] exists, it would be proper to dismiss this appeal as moot." The appellate court found "the collateral consequences exception" did exist in this case to permit its review. There is a serious social stigma connected to a protective order and substantial legal repercussions could continue even after the ending of the order (child custody issues, employment issues).

The appellate court found the trial court had no authority to enter a protective order on behalf of Father against Daughter because there was no application by him seeking a protective order against Daughter. Upon examination of TFC §§ 84.001 and 84.004 and TEX. R. CIV. P. 301, the appellate court found a separate application by Father had to be filed and served before the protective order could be issued on his behalf. Daughter had to have notice that when she was entering her hearing to apply for a protective order against her Father that she was "entering a hearing on the defensive as well as on the offensive."

MISCELLANEOUS

PARENTAL IMMUNITY APPLIED FOR ACCIDENTAL DROWNING OF CHILD

¶ 07-3-44. **McCullough v. Godwin**, 214 S.W.3d 793 (Tex. App.—Tyler 2007).

Facts: While Dad exercised his visitation with his 7-year-old son, the son drowned during an outing at the lake. The son became tangled in an inner tube when playing with other children while Dad visited with friends, listened to music, and consumed alcoholic beverages. Mother brought suit against Dad and his friends, asserting claims of wrongful death and survival, negligence, and gross negligence. Summary judgment was granted Dad on the basis of parental immunity and granted to the friends on the basis of no legal duty. Mother appealed.

Held: Affirmed. Parental immunity applies to child's accidental drowning.

Opinion: "Parental immunity has been adopted in Texas in order to provide parents with a certain amount of protection from litigation concerning the decisions they make in their capacity as parents." Parental activities include activities involving recreation. Parental immunity does not apply "when a parent commits a willful, malicious, or intentional wrong against a child or abandons or abdicates his parental responsibility…." Mother claimed Dad abandoned and abdicated his parental duty. Abandon and abdicate means to give up absolutely. Dad's behavior did not constitute an absolute relinquishment of the custody and control of his son. The "evidence does not raise a genuine issue of material fact concerning whether [Dad] abandoned and abdicated his parental duty."

The appellate court found that the doctrine of parental immunity is constitutional. Parental activities "could be seriously impaired and retarded if parents were to be held liable to lawsuits by their unemancipated minor children for unintentional errors or ordinary negligence occurring while in the discharge of such parental duties and responsibilities."