

***DEFENDING A DFPS CASE
PARENTS***

PRESENTED TO:

***ROBERT O. DAWSON JUVENILE LAW INSTITUTE
CORPUS CHRISTI, TEXAS
FEBRUARY 22, 2010***

PRESENTED BY:

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OVERVIEW:

As I have stated in my papers on past subjects I have spoken on I am a firm believer that papers presented at CLE programs should be outlines for practice in a given area and not treatises on the law. You may also access the current Family Code Sections at **<http://capitol.tlc.state.tx.us/statutes/statutes.html>**.

It is a great honor for me to be asked to speak at this conference. As you can tell from reviewing the course materials the esteemed speakers speaking at this conference have a wealth of knowledge when it comes to DFPS Law, as most attendees do. Therefore, as has been my practice when speaking at CLE programs in the past, today I will allot time during my oral presentation for questions and comments from the audience in the hope that maximum information may be imparted to all participants in the process. *So please feel free to ask questions or offer comments at any time!!!!*

JURY TRIAL OF A DFPS CASE

IF YOUR CLIENT WANTS A JURY TRIAL YOU MUST PAY THE \$30.00 JURY FEE AND FILE A REQUEST FOR JURY TRIAL AND SERVE A COPY OF THE JURY REQUEST ON ALL COUNSEL OF RECORD

1. **Motions in Limine**

In preparation for the trial of a DFPS case when representing parents it is imperative that you prepare and file a Motion in Limine. The motion can limit what evidence DFPS and other parties can be permitted to offer before the jury. When

drafting the Motion in Limine when representing parents it is also essential that you include not only DFPS but the attorney ad litem, guardian ad litem, other parents and intervenors if they are parties. Failure to include the attorney at litem, guardian ad litem, other parents and any intervenors can result in excluding DFPS from presenting evidence precluded by the Motion in Limine but can result in other parties offering the evidence.

The Motion in Limine must be filed prior to the commencement of trial and usually is dealt with at the pre-trial conference. If there is not a pre-trial conference setting in the case then the Motion in Limine must be presented prior to the Jury being brought into the courtroom for voir dire. Failure to present the Motion in Limine prior to the empaneling of the jury may result in matters presented to the jury panel that you desired not to be presented to the panel.

I have attached to this paper a form of a Motion in Limine that I have used in the trial of a case last month.

2. *Voir Dire*

Prior to the jury panel being brought into the courtroom the jury list and the jury questionnaires will be provided to the attorneys. Although there is not usually a great deal of time to review the juror questionnaires prior to the jury panel being brought into the courtroom, it is essential that you review the information. What I usually do is

use 5 different colored markers and review the questionnaires to determine age, education level, occupation, number of children, spouse=s occupation, prior jury service (civil, criminal), race and other relevant factors regarding the facts of the case. My experience in trying numerous DFPS jury trials is that I always exclude engineers, airline pilots, police officers and of course, anyone employed with DFPS or a spouse employed with DFPS. These persons have either hung a jury or resulted in a delay in the rendition of a verdict resulting in a 10-2 verdict of 11-1 verdict.

During voir dire always identify the juror you are questioning by juror number. This is necessary so that the record is clear as to which juror you are speaking to and so that the juror=s answers can be identified in the record. In voir dire you can use hypothetical scenarios to question the jury. You cannot discuss the facts of the case in voir dire. At the voir dire stage of the trial the purpose is to determine whether the prospective juror has any bias or prejudice that could preclude that juror from being fair and impartial. Since DFPS has the burden of proof the attorney representing DFPS will go first in voir dire. Representing a parent gives you the opportunity to glean a great deal of information regarding the prospective jurors. Although you may have already prepared a list of questions for the jury panel, it is imperative that you follow closely the answers given by the jury panel and adjust your questioning accordingly.

If there are questions asked by any party during voir dire that are improper you

must object to improper voir dire or any error will be waived. Judges generally will avoid ruling on objections. It is imperative that you secure a ruling from the judge on your objection on the record. Failure to obtain a ruling from the court will result in the objection being waived. In my personal experience, when the judge fails to rule on my objection, I will do the following: "Your honor, is my objection sustained or overruled?" Usually, the judge will then rule. In the event that the judge still does not rule, I politely say the following: "Your honor, I understand the court's statement regarding my objection and may I have a ruling as to whether my objection is sustained or overruled." Usually, the court will understand that I am requiring a ruling and will do so on the record. This necessity of securing a ruling also applies to any objection made during trial as well. In the trial of the case, either before a jury or a court trial failure to secure a ruling on your objection results in the objection being waived.

In order to preserve a motion to strike a prospective juror for cause you must secure a statement from the prospective juror that the juror cannot be fair or impartial to your client. I usually ask the prospective juror: "In this hypothetical, are you saying that you cannot follow the law as given to you by the judge in the jury charge and apply the law to the facts of the case?" I further ask: "As you sit here today, knowing that Mr. Jones has asked for a jury trial, do you believe that he has committed some act of omission regarding his child, that would cause you to believe that he is guilty of

that act or omission simply because he has asked for a jury trial.

The burden of proof is another area that needs to be covered in voir dire. It is imperative that the jury panel understand that the burden of proof always remains with DFPS. (Clear and convincing as to grounds and as to best interest) I always inform the jury panel that the burden never shifts to the parent. After covering the burden of proof, I tell the panel that the parent does not even have to present evidence. I usually ask: Are there anyone on the panel who will require that the parent present evidence? I further ask that if the panel hears the evidence and the parent does not present a case, and in their opinion, DFPS has failed to prove either grounds and/or best interest by clear and convincing evidence, can they render a verdict against DFPS.

There are many other questions that will need to be asked depending on the facts of each individual case and you must tailor your questions to the jury panel accordingly.

At the conclusion of voir dire, strikes for cause will be made before the bench. Depending on the court, the judge may have already determined who he believes should be struck for cause. In the 315th and 313th District Courts on Harris County the judges do exactly that. Additionally, the parties can agree to strike a juror for cause, and so announce on the record. In the event that there is a disagreement regarding the strikes for cause, then it is the burden of the proponent of the strike for cause to request

that the juror be brought before the bench and to question the juror to substantiate the grounds for the strike for cause. *Texas Rules of Civil Procedure Nos. 228, 229 and 230* provide the statutory guidance for strikes for cause.

After the strikes for cause are concluded then the parties make their peremptory strikes. If there has been no alignment of parties, each party gets six peremptory strikes. If there as been an alignment of parties then the strikes can be allocated among the aligned parties. *Texas Rules of Civil Procedure Nos. 232, 233 and 234* provide the statutory guidance for peremptory strikes.

After all strikes are made, the jury list with the strikes made are tendered to the clerk by each party. The clerk then complies the list of the remaining jurors who have not been stricken and the clerk announces the first 12 jurors who have not been stricken and they are seated and sworn. *Texas Rules of Civil Procedure No.234*. It is incumbent on the attorney for the parent to insure that no juror seated has been stricken and to make an objection at that time to the jury or the complaint is waived.

3. *Opening Statement*

Opening statement is made prior to the presentation of evidence. The Rules of Civil Procedure provide that the party shall state to the jury briefly the nature of his claim or defense and what the party expects to prove and the relief sought. *Texas Rules of Civil Procedure No. 265*.

4. **Trial**

The trial of a DFPS case in representing a parent procedurally is the same for both a court trial and a jury trial concerning the presentation of evidence. Since the burden of proof is on DFPS they are first in the presentation of evidence. The order of proceedings is covered in *Texas Rules of Civil Procedure No. 265*. Each party then presents his evidence and at the close of evidence the parties then have closing argument. If you are concerned at trial that DFPS witnesses or other witnesses should not remain in the courtroom during trial you may pursuant to *Texas Rules of Civil Procedure No. 267* invoke the rule and exclude all witnesses until called to testify.

Practice Tips for Trial

Each individual attorney has their own style of trying cases. The use of demonstrative evidence is of great value in the presentation of a DFPS case, especially when representing parents. I have found the use of an easel with large paper that is bound so that you can write on the paper with a sharpie most effective in presenting a case to the jury. I have used the easel while questioning witnesses to summarize specific points on the paper. As I make specific points and want the document in evidence I will ask the witness if the writing on the easel is an accurate summary of what the witness has testified to, mark it as Exhibit ____ and offer it into evidence. I have been advised by jurors after trial that they found it useful in their understanding

the testimony and in their deliberations.

Another effective tool is the use of photographs of the parent and the child or children. I have always had an 8X10 photograph framed, offered it into evidence after authenticated and used it in closing argument. Additionally, the compilation of a book of photographs admitted into evidence and published to the jury is a most effective way to present your client=s case.

Regarding publishing evidence to the jury, Patrick Hauptman and Dean Hobbs, the bailiffs in the 313th District Court have asked me to point out that the proper method for publishing evidence to the jury is to hand the evidence to the bailiff and have the bailiff tender the evidence to the jury. *Texas Rules of Civil Procedure No. 283* provides that only the officer attending the jury is authorized to have contact with the jury.

Additionally, depending on the facts of the case and the evidence the client has, I have found that DVD=s offered into evidence and played for the jury are extremely effective in the presentation of the case to the jury.

With respect to the presentation of the client himself or herself, depending on the employment of the client, insure that the client is clean and presentable and hopefully able to wear different clothing each day for trial. Unlike the parents that Ted Jerub and I represented in a jury trial, where Ted=s client smelled so bad that the jury requested

that she sit as far away from the jury as possible, and my client came to court so intoxicated that he blew a .23 in court on Tuesday morning, do everything possible to insure that your clients are presentable and look good for the jury.

Effective assistant of counsel at trial requires that counsel pay attention, question all witnesses vigorously, and cross examine all DFPS witnesses. Additionally, insure that only competent admissible evidence is admitted into evidence before the court and/or jury. The DFPS case file is not admissible as a business record because it contains hearsay upon hearsay and unless both levels of hearsay meet exceptions to the hearsay rule. *Texas Rules of Evidence 805*. Additionally, a business record which meets the business record exception to the hearsay rule may not be admissible if the information contained in the record is inadmissible hearsay. *Texas Rules of Evidence 805*. In order to be effective in your representation of your client insure that you assert those objections to any offer of evidence that falls within those exceptions.

It is imperative that the practitioner know the Rules of Evidence and Rules of Procedure and use them during trial. I always have with me during trial my Tool Kit booklet published by the State Bar of Texas Family Law Section. It outlines all evidentiary rules and objections as well as the predicates for the admission of evidence and objections to expert witnesses testimony.

5. *Jury Charge*

After the close of evidence and closing argument the jury charge is presented to the jury. ***Texas Rules of Civil Procedure Nos.271 and 272.*** The best practice is to have the jury charge ready prior to voir dire so that the practitioner knows what the jury is going to use in deliberations. In a DFPS case the county attorney usually prepares the charge. You should be familiar with the charges that DFPS uses in their cases. If you want an issue or question submitted to the jury that is not included in the charge you must do so in writing and present it to the court for inclusion in the charge. ***Texas Rules of Civil Procedure Nos.272, 273 and 276.*** Failure to submit your written request for inclusion in the charge will waive your objection. The better procedure is to prepare your own jury charge with the instruction you desire and present that charge to the court for submission to the jury.

After the jury has been read the charge and retired to the jury room to deliberate they may communicate to the court through written question. ***Texas Rules of Civil Procedure No.286.*** The judge must then summon all the attorneys, read the question and then respond to the question in writing. If there is a disagreement as to the evidence the jury may communicate in writing to the court their disagreement and have that portion of the testimony read to the jury. ***Texas Rules of Civil Procedure No.287.***

When the jury has reached a verdict they will communicate that fact to the bailiff and the jury returns into open court for the judge to read the verdict. ***Texas Rules of***

Civil Procedure No.293. At that time any party may request that the jury be polled to determine if the verdict is, in fact, their verdict. *Texas Rules of Civil Procedure No.294.* The best practice is to always poll the jury in the event that it is not the verdict of those jurors who signed the verdict. Stranger things have happened.

6. **Conclusion**

Trying DFPS cases representing parents is both challenging and rewarding. It is imperative in representing parents that you be both zealous and effective in your representation. Go forth and try those cases.

FORMS APPENDIX

1. Motion in Limine Jury Charge

1. MOTION IN LIMINE

NO. _____

IN THE INTEREST OF:	‘	IN THE DISTRICT COURT OF
_____	‘	HARRIS COUNTY, T E X A S
A CHILD	‘	____th JUDICIAL DISTRICT

<u>RESPONDENT,</u>	<u>MOTION IN LIMINE</u>
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This Motion in Limine is brought by _____, Respondent, who requests the Court:

1. To instruct the attorneys not to mention, refer to, or bring before the jury, directly or indirectly, on voir dire examination, reading of the pleadings, statement of the case, interrogation of the witnesses, argument, objections before the jury, or in any other manner any of the matters enumerated below, unless and until the matters have first been called to the Court's attention out of the presence and hearing of the jury and a favorable ruling received on the admissibility and relevance of the matters.

2. To instruct the attorneys for Texas Department of Family and Protective Services and any and all other attorneys and parties involved in the trial of this case to inform Texas Department of Family and Protective Services and all witnesses called by any party to refrain from mentioning or referring to, in any way, in the presence or hearing of the jury, any of the matters enumerated below, unless specifically permitted to do so by ruling of the Court.

3. To instruct the attorneys for Texas Department of Family and Protective Services and any and all other attorneys involved in the case that violation of any of these instructions may cause harm to _____ and deprive _____ of a fair and impartial trial, and the failure to abide by the instructions may constitute contempt of court.

The matters prohibited are:

1. The filing of this motion, or any ruling by the Court on this motion, suggesting or implying to the jury that _____ has wrongfully and improperly moved to prohibit proof.

2. Any reference to settlement negotiations.

3. Any evidence of the character, reputation, or quality of, or the fees for, legal services rendered by any attorneys in this case, unless attorney's fees are a jury issue.

4. Any suggestion that the law requires a showing of unfitness of a party before the other party can be appointed managing conservator.

5. Any references to the terms of any of the temporary orders entered in this case.

6. Any references to any mediated settlement agreements entered into by the parties before _____.

7. Any references to events or actions occurring before _____.

_____ prays that the Court grant this Motion in Limine.

Respectfully submitted,

BRIAN J. FISCHER

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Houston, Texas 77023

(713) 520-7500

FAX# (713) 644-8080

TBA#07040750

Attorney for Respondent, _____

NOTICE OF HEARING

The above motion is set for hearing on _____, 2010 at _____, in the ____ District Court of Harris County, Texas, _____, Houston, Texas, 77002.

BRIAN J. FISCHER

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on all interested parties in accordance with the Texas Rules of Civil Procedure on _____ 2010.

BRIAN J. FISCHER

NO. _____

IN THE INTEREST OF: _____ A CHILD	' ' ' ' '	IN THE DISTRICT COURT OF HARRIS COUNTY, T E X A S _____ th JUDICIAL DISTRICT
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ORDER ON RESPONDENT=S MOTION IN LIMINE

On _____ 19, 2010 the Court considered the Motion in Limine filed by Respondent, _____ and **ORDERS:**

The motion is **GRANTED** as to paragraphs _____, _____, _____, _____,

_____, _____, _____.

SIGNED on _____, 2010.

JUDGE PRESIDING

2. JURY CHARGE

NO. _____

IN THE INTEREST OF:

A CHILD

'
'
'
'
'

IN THE DISTRICT COURT OF

HARRIS COUNTY, T E X A S

_____th JUDICIAL DISTRICT

JURY CHARGE

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide only from the evidence you have heard or seen in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions that have previously been given you. I shall now give you additional instructions that you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.
5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more **jurors** must agree upon **each and every** answer(s) and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than **the same** ten jurors. **In other words eight jurors cannot agree to one part and two other jurors to a second part to come up with a number of ten.** If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. Any juror who disagrees as to any answer shall not sign the Jury Certificate; however, those remaining jurors (a minimum of ten) who agree to all answers shall each sign the Jury Certificate.

7. In arriving at your answers, consider the circumstances as they apply to the children.

8. The Petitioner bears the burden of proving by clear and convincing evidence, that the parental rights between the parent and child should be terminated. The Respondent has the burden of proving any affirmative claims by a preponderance of the evidence.

9. These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

10. The presiding juror or any other juror who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

11. When the words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

There is only ONE official record of the trial and that is the official court reporters notes.

If you disagree about the evidence, the presiding juror may apply to the court to have the court reporter's notes read to the jury as to specific areas of inquiry or disagreement. The court reporter may not read back entire examinations or large blocks of testimony but only limited and specific portions of testimony.

12. Answer "Yes" or "No" to all questions unless otherwise instructed.

GENERAL DEFINITIONS

"Clear and convincing evidence" is defined as that measure or degree of evidence or proof that produces a firm belief, or conviction that the allegations sought to be established are true.

"Preponderance of the evidence" is defined as the greater weight and degree of credible testimony or evidence introduced before you and admitted into evidence in this case.

"Conduct" or **"behavior"** as used herein may include acts, conduct or behavior of commission and/or omission.

"Circumstantial Evidence" means a fact may be established or proven by direct evidence or by circumstantial evidence or both. A fact is established or proven by direct admissible and relevant documentary evidence or by testimony from a witnesses who saw the act done or heard the words spoken.

A fact is established by **"circumstantial evidence"** when a fact may be fairly and reasonably inferred from all other direct evidence, indirect evidence, or circumstances which proves a fact.

As used herein the singular shall refer to and include the plural and the plural shall refer to and include the singular. The masculine shall refer to and include the feminine and the feminine shall refer to and include the masculine.

"Termination of parental rights" means that the parent-child relationship between the parent and the child is ended. All legal rights and duties with respect to each other are cut off except the child retains the right to inherit from and through the parent unless the court provides otherwise. The rights and duties a parent has are:

1. the right to have physical possession, to direct the moral and religious training, and to establish the residence of the child;
2. the duty of care, control, protection, and reasonable discipline of the child;
3. the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;
4. the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
5. the right to the services and earnings of the child;
6. the right to consent to the child's marriage, to enlistment in the armed forces of the United States, to medical and dental care, and to psychiatric, psychological, and surgical treatment;
7. the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
8. the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
9. the right to inherit from and through the child;
10. the right to make decisions concerning the child's education; and

12. any other right or duty existing between a parent and child by virtue of law.

If no termination of the parent-child-child relationship is ordered, the Court may modify these rights and duties by court order.

"The Best Interest of Child"

In this case, you will be required to determine whether termination of the parent-child relationship would be in the best interest of the child.

In considering the factors in determining the best interests of the child, the prompt and permanent placement of the child in a safe and stable environment is presumed to be in the child's best interest. While a presumption exists for a child to grow up with their parents in a stable home and a presumption exists for parents to be entitled to raise their own children, such presumption may be overcome by clear and convincing evidence that it is not in the best interest of the child to be raised by the parents, or to continue the parental relationship, parental rights, duties or obligations of the parents.

Some factors to consider in determining the "best interest" of the child are:

1. the desires of the child
2. the emotional and physical needs of the child now and in the future;
3. any emotional and physical danger to the child now and in the future;
4. the parenting ability of the individuals seeking custody;
5. the programs available to assist those individuals to promote the best interest of the child;
6. the plans for the child by those individuals seeking custody;
7. the stability of the home, or proposed placement;
8. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and,
9. any excuse for the acts or omissions of the parent;
10. the child's age and physical and mental vulnerabilities;
11. the frequency and nature of out-of-home placements;
12. the magnitude, frequency and circumstances of the harm to the child;
13. whether the child has been the victim of repeated harm after the initial report and intervention by the department or other agency;
14. the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, or other family members, that have access to the child's home.
15. whether there is a history of abusive or assaultive conduct by the child's parent(s), family who have access to the child's home;
16. the willingness and ability of the child's parents, family who have access to the child to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

17. the willingness and ability of the child's parents, family or persons who have access to the child to effect positive environmental and personal changes within a reasonable period of time;
18. whether the child's parents and/or family who have access to the child demonstrates adequate parenting skills, including, but not limited to, providing the child and any other child under the family's care with:
 - a. minimally adequate health and nutritional care;
 - b. care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;
 - c. guidance and supervision consistent with the child's safety;
 - d. a safe and stable physical home environment;
 - e. protection from repeated exposure to violence even though the violence may not be directed at the child;
 - f. an understanding of the child's needs and capabilities;
19. whether an adequate social support system consisting of an extended family and friends is available to the child.

INSTRUCTIONS FOR QUESTION 1

For the parental rights of the mother _____ to be terminated at least one, but not all, of the following ground(s) for termination must be proven by clear and convincing evidence as to _____ . **While the jury need only find one of the following grounds for termination, at least ten jurors must agree that a parent committed at least one of the grounds for termination regarding each child, AND at least ten of the same jurors must agree that termination of that parent's rights is in each child's best interest. (See Paragraph 6)**

- (a) The parent knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well being of the child;

OR

- (b) The parent engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

OR

- (c) The parent failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 (Procedures in Suit by Governmental Entity) for the abuse or neglect of the child;

OR

- (d) (1) 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;
- (2) the illness or deficiency, in all reasonable probability, proved by clear and convincing evidence, will continue to render the parent unable to provide for the child's needs until the 18th birthday of the child;
- (3) the Department of Family and Protective Services has been the temporary or sole managing conservator of the child of the parent for at least six months preceding the date of the hearing on the termination held in accordance with Subsection (c);
- (4) the Department of Family and Protective Services has made reasonable efforts to return the child to the parent; and

AND

Termination of the parental rights would be in the best interest of the child.

SPECIAL DEFINITION "A" FOR QUESTION 1.

In determining whether the parent “...**knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child...**” you may include, but are not limited to, the following in your deliberations:

"Endanger" means to expose to loss, injury or risk; to place in jeopardy or danger. The child need not witness, observe or be present during the exposure to endangering conditions, surroundings or conduct. Although “endanger” means more than the threat of abstract injury or the possible side effects of a less than ideal family environment, it is not necessary that the conditions, surroundings or conduct were directed at the child or that the child actually suffers injury.

SPECIAL DEFINITION "B" FOR QUESTION 1.

In determining whether a parent “...**engaged in conduct which endangers the physical or emotional well being of the child...**” you may consider, but are not limited to, the following in your deliberations:

"Endanger" means to expose to loss, injury or risk; to place in jeopardy or danger. The child need not witness, observe or be present during the endangering conduct. Although “endanger” means more than the threat of abstract injury or the possible side effects of a less than ideal family environment, it is not necessary that the conditions, surroundings or conduct were directed at the child or that the child actually suffers injury.

Abusive, violent, aggressive or detrimental behavior by a parent that endangers the physical or

emotional well being of a parent, the child or another person can be construed as endangering the physical and emotional well being of the child.

Evidence of conduct, whether leading to imprisonment or not, that indicates or displays a voluntary, deliberate and conscious course of conduct detrimental to the stability of the family or child including, but not limited to, failure to plan for: an adequate and stable home; adequate and stable parental care; adequate and stable emotional support; adequate, stable and sufficient economic support; adequate and safe surroundings; adequate and stable educational opportunities for the child; and failing to provide a reasonable and sincere effort to establish a positive, nurturing, stable, safe and constructive relationship with the child, will support termination of parental rights on the theory that such conduct endangers the physical or emotional well-being of the child.

A parent who, by commission or omission, exposes a child to risk of physical injury or emotional harm engages in conduct that endangers a child. The parent's knowledge of the possible consequences of their course of conduct implies a conscious disregard and indifference to the parent's rights, duties and responsibilities and is conduct, which endangers a child. Further, a party is responsible for the conduct of another person if the party solicits, encourages, directs, aids, or attempts to aid a person that is engaging in endangering conduct or if the party acquiesces to such endangering conduct and does not take immediate positive steps to protect the child from the endangering conduct.

While mere presence alone by a party is not proof positive of endangering conduct, presence is a circumstance tending to prove a party engaged in endangering conduct when presence is combined with other facts that show the party, by acts of commission and/or omission, knew or should have known that the conduct of another person was endangering conduct and the party failed to protect a child from or actually engaged in or furthered the endangering conduct toward a child.

A parent's failure to provide adequate plans for reunification of the family including, but not limited to: plans for an adequate and stable home; adequate and stable parental care; adequate and stable emotional support; adequate, stable and sufficient economic support; adequate and safe surroundings; adequate education of the child and other information necessary to convey to a reasonable person a sincere effort to establish a positive, nurturing, stable, safe and constructive relationship with the child.

QUESTION 1.

In answering QUESTION 1, you are bound by the previous instructions and definitions given.

Should the parental rights of the mother _____ be terminated as to _____?

Answer "Yes" or "No":

Answer: _____

ONLY AFTER YOU HAVE ANSWERED QUESTION 1, THEN TURN TO PAGE

INSTRUCTIONS AND DEFINITIONS - FOR QUESTIONS 2 AND 3.

COMMON TERMINOLOGY

Texas law has adopted certain terminology that varies from common usage of the language. In this state the “primary custodian” of a child is known as the “**MANAGING CONSERVATOR**”. What is ordinarily called “custody” is known as “**MANAGING CONSERVATORSHIP**” under Texas law.

What is commonly called “visitation” is known as “**POSSESSION OF OR ACCESS TO A CHILD**” in Texas. A “non-custodial parent” who is awarded “Possessory conservatorship” (visitation) is known as the “**POSSESSORY CONSERVATOR**”.

PARENT APPOINTED MANAGING CONSERVATOR

A parent appointed the sole managing conservator of a child has the following exclusive rights, privileges and duty, subject to any limitation imposed by the court:

1. the right to establish the primary residence of the child;
2. the right to consent to medical, dental, and surgical treatment involving invasive procedures and to consent to psychiatric and psychological treatment;
3. the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
4. the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child
5. the right to consent to marriage and to enlistment in the armed forces of the United States;
6. the right to make decisions concerning the child’s education;
7. the right to the services and earnings of the child;
8. except when a guardian of the child’s estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child’s estate if the child’s action is required by a state, the United States, or a foreign government [and;]

A parent shall be appointed sole managing conservator, in preference to a nonparent, unless appointment of the parent would significantly impair the children’s physical health or emotional development.

MANAGING CONSERVATOR – NONPARENT

A managing conservator who is not the parent of the child has the following rights and duties, subject to the rights of a parent appointed conservator, to those of a possessory conservator, and to any limitation imposed by court order;

1. the right to have physical possession and to direct the moral and religious training of the child;
2. the duty of care, control, protection, and reasonable discipline of the child;
3. the duty to provide the child with clothing, food, shelter, education, and medical, psychological, and dental care;
4. the right to consent for the child to medical, psychiatric, psychological, dental, and surgical treatment;
5. the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
6. the right to the services and earnings of the child;
7. the right to consent to marriage and to enlistment in the armed forces of the United States;
8. the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
9. except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
10. the right to establish primary residence of the child and to make decisions regarding the child's education;
11. if the parent-child relationship has been terminated with respect to the parents or only living parent, or if there is no living parent, the right to consent to the adoption of the child and to make any other decision concerning the child that a parent could make.

POSSESSORY CONSERVATOR

A parent who is not appointed managing conservator shall be appointed possessory conservator unless the appointment is not in the best interest of the child and possession or access by the parent would endanger the physical or emotional welfare of the child. A parent who is not appointed managing or possessory conservator may be ordered to perform other parental duties, including paying child support.

BEST INTEREST OF THE CHILD

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.

PREPONDERANCE OF THE EVIDENCE

In determining which party to appoint as managing conservator or possessory conservator, such answer must be based on “**preponderance**” of the evidence as defined in the general definitions of this charge.

NO DISCRIMINATION BASED ON GENDER

In determining which party to appoint managing conservatory, you shall consider the qualifications of the respective parties without regard to the gender of the parties.

NO DISCRIMINATION BASED ON MARITAL STATUS

1. In determining which party to appoint managing conservator, you shall consider the qualifications of the parties without respect to marital status.

JOINT MANAGING CONSERVATORSHIP

In determining whether joint managing conservators should be appointed, you must find that such an appointment is in the best interest of the child. In making this determination, you shall consider all the following factors:

1. whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;
2. the ability of the persons to give first priority to the welfare of the child and reach shared decisions in the child’s best interest;
3. whether each person can encourage and accept a positive relationship between the child and the other person;
4. whether both persons participated in child-rearing before the filing of the suit;
5. the geographical proximity of the persons’ residences;
6. if the child is twelve years of age or older, the child’s preference, if any, regarding the appointment of joint managing conservators; and
7. any other relevant factor.

In determining whether to appoint a party sole or joint managing conservator, you shall consider evidence of the intentional use of abusive physical force by a party against his or her spouse, against a parent of the child, or against any person younger than eighteen years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.

A person may not be appointed joint managing conservator if that person has a history or pattern of past or present child neglect or of physical or sexual abuse directed against a parent, a spouse, or a child.

FAMILY VIOLENCE

“Family violence” means an act by a member of a family against another member of the family that is intended to result in physical harm.

ACCESS PROHIBITION

A parent may not be allowed access to a child if the parent has a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit unless awarding access to the child would not endanger the child’s physical health or emotional welfare and would be in the child’s best interest.

**IF AND ONLY IF YOUR ANSWER TO QUESTION 1 WAS “NO” THEN
ANSWER ONLY THE RESPECTIVE PART IN QUESTION 2.**

In answering QUESTION 2, you are bound by the previous instructions and definitions given.

QUESTION 2.

Who should be named managing conservator(s) of _____ ?

ANSWER BY NAMING ONLY ONE OF THE FOLLOWING:

1. _____ , or
2. _____ , or
3. _____ ;
4. **Department of Family and Protective Services**

Answer: _____

In answering QUESTION 3, you are bound by the previous instructions and definitions given.

QUESTION 3.

**IF AND ONLY IF YOUR ANSWER TO QUESTION 1 WAS “YES” THEN
ANSWER ONLY THE RESPECTIVE PART IN QUESTION 3.**

Who should be named managing conservator(s) of _____?

ANSWER BY NAMING ONLY ONE OF THE FOLLOWING:

1. _____,
2. _____, **or**
3. **Department of Family and Protective Services**

Answer: _____

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. to preside during your deliberations;
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. to write out and hand to the bailiff any communication concerning the case that you desire to have delivered to the judge;
4. to vote on the questions;
5. to write your answers to the questions in the space provided; and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your homes, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into the court with your verdict.

Date: _____.

Judge Presiding

JURY CERTIFICATE

We, the Jury, have answered the above and foregoing questions as herein indicated, and herewith return the same into Court as our Verdict.

To be signed by the "Presiding Juror" if Verdict is unanimous:

Presiding Juror

OR

To be signed by each Juror rendering the verdict if not unanimous:
(Minimum of ten (10) signatures required)

1. _____ 7. _____

2. _____ 8. _____

3. _____ 9. _____

4. _____ 10. _____

5. _____ 11. _____

6. _____

**DEFENDING A DFPS CASE:
TRIAL: PARENTS CASE**
By Brian Fischer

JURY TRIAL FEES

*. IF YOUR CLIENT WANTS A JURY TRIAL
YOU MUST PAY THE \$30.00 JURY FEE
AND FILE A REQUEST FOR JURY TRIAL
AND SERVE A COPY OF THE JURY
REQUEST ON ALL COUNSEL OF RECORD*

MOTIONS IN LIMINE

•The motion in limine can limit what evidence DFPS and other parties can be permitted to offer before the jury

MOTIONS IN LIMINE

. When drafting the Motion in Limine when representing parents it is also essential that you include not only DFPS but the attorney ad litem, guardian ad litem, other parents and intervenors if they are parties.

MOTIONS IN LIMINE

The Motion in Limine must be filed prior to the commencement of trial and usually is dealt with at the pre-trial conference. If there is not a pre-trial conference setting in the case then the Motion in Limine must be presented prior to the Jury being brought into the courtroom for voir dire.

MOTIONS IN LIMINE

•Failure to present the Motion in Limine prior to the empaneling of the jury may result in matters presented to the jury panel that you desired not to be presented to the panel.

VOIR DIRE

•Prior to the jury panel being brought into the courtroom the jury list and the jury questionnaires will be provided to the attorneys. Although there is not usually a great deal of time to review the juror questionnaires prior to the jury panel being brought into the courtroom, it is essential that you review the information.

VOIR DIRE

•***During voir dire always identify the juror you are questioning by juror number.*** This is necessary so that the record is clear as to which juror you are speaking to and so that the juror's answer can be identified in the record.

VOIR DIRE

•If there are questions asked by any party during voir dire that are improper you must object to improper voir dire or any error will be waived. Judges generally will avoid ruling on objections. It is imperative that you secure a ruling from the judge on your objection on the record. Failure to obtain a ruling from the court will result in the objection being waived.

VOIR DIRE

•In order to preserve a motion to strike a prospective juror for cause you must secure a statement from the prospective juror that the juror cannot be fair or impartial to your client.

VOIR DIRE

•At the conclusion of voir dire, strikes for cause will be made before the bench.
•In the event that there is a disagreement regarding the strikes for cause, then it is the burden of the proponent of the strike for cause to request that the juror be brought before the bench and to question the juror to substantiate the grounds for the strike for cause. **Texas Rules of Civil Procedure Nos. 228, 229 and 230** provide the statutory guidance for strikes for cause.

VOIR DIRE

•After the strikes for cause are concluded then the parties make their peremptory strikes. If there has been no alignment of parties, each party gets six peremptory strikes. If there as been an alignment of parties then the strikes can be allocated among the aligned parties. **Texas Rules of Civil Procedure Nos. 232, 233 and 234** provide the statutory guidance for peremptory strikes.

OPENING STATEMENT

•Opening statement is made prior to the presentation of evidence. The Rules of Civil Procedure provide that the party shall state to the jury briefly the nature of his claim or defense and what the party expects to prove and the relief sought. ***Texas Rules of Civil Procedure No. 265.***

TRIAL

The trial of a DFPS case in representing a parent procedurally is the same for both a court trial and a jury trial concerning the presentation of evidence. Since the burden of proof is on DFPS they are first in the presentation of evidence. The order of proceedings is covered in ***Texas Rules of Civil Procedure No. 265.***

TRIAL: INVOKING THE RULE

. If you are concerned at trial that DFPS witnesses or other witnesses should not remain in the courtroom during trial you may pursuant to ***Texas Rules of Civil Procedure No. 267*** invoke the rule and exclude all witnesses until called to testify.

PRACTICE TIPS FOR TRIAL

I have found the use of an easel with large paper that is bound so that you can write on the paper with a sharpie most effective in presenting a case to the jury. I have used the easel while questioning witnesses to summarize specific points on the paper.

PRACTICE TIPS FOR TRIAL

•As I make specific points and want the document in evidence I will ask the witness if the writing on the easel is an accurate summary of what the witness has testified to, mark it as Exhibit ____ and offer it into evidence. I have been advised by jurors after trial that they found it useful in their understanding the testimony and in their deliberations.

PRACTICE TIPS FOR TRIAL

Another effective tool is the use of photographs of the parent and the child or children. I have always had an 8X10 photograph framed, offered it into evidence after authenticated and used it in closing argument. Additionally, the compilation of a book of photographs admitted into evidence and published to the jury is a most effective way to present your client's case.

PRACTICE TIPS FOR TRIAL

- Regarding publishing evidence to the jury, Patrick Hauptman and Dean Hobbs, the bailiffs in the 313th District Court have asked me to point out that the proper method for publishing evidence to the jury is to hand the evidence to the bailiff and have the bailiff tender the evidence to the jury.
Texas Rules of Civil Procedure No. 283 provides that only the officer attending the jury is authorized to have contact with the jury.

PRACTICE TIPS FOR TRIAL

- Additionally, depending on the facts of the case and the evidence the client has, I have found that DVDs offered into evidence and played for the jury are extremely
- effective in the presentation of the case to the jury.

PRACTICE TIPS FOR TRIAL

- With respect to the presentation of the client himself or herself, depending on the employment of the client, insure that the client is clean and presentable and hopefully able to wear different clothing each day for trial.

EFFECTIVE ASSISTANCE

- Effective assistant of counsel at trial requires that counsel pay attention, question all witnesses vigorously, and cross examine all DFPS witnesses. Additionally, insure that only competent admissible evidence is admitted into evidence before the court and/or jury.

EFFECTIVE ASSISTANCE

- The DFPS case file is not admissible as a business record because it contains hearsay upon hearsay and unless both levels of hearsay meet exceptions to the hearsay rule. **Texas Rules of Evidence 805**. Additionally, a business record which meets the business record exception to the hearsay rule may not be admissible if the information contained in the record is inadmissible hearsay. **Texas Rules of Evidence 805**.

JURY CHARGE

- After the close of evidence and closing argument the jury charge is presented to the jury. **Texas Rules of Civil Procedure Nos.271 and 272**. The best practice is to have the jury charge ready prior to voir dire so that the practitioner knows what the jury is going to use in deliberations. In a DFPS case the county attorney usually prepares the charge.

JURY CHARGE

- If you want an issue or question submitted to the jury that is not included in the charge you must do so in writing and present it to the court for inclusion in the charge. **Texas Rules of Civil Procedure Nos.272, 273 and 276.** Failure to submit your written request for inclusion in the charge will waive your objection.

JURY QUESTIONS

- After the jury has been read the charge and retired to the jury room to deliberate they may communicate to the court through written question. **Texas Rules of Civil Procedure No.286.** The judge must then summon all the attorneys, read the question and then respond to the question in writing. If there is a disagreement as to the evidence the jury may communicate in writing to the court their disagreement and have that portion of the testimony read to the jury. **Texas Rules of Civil Procedure No.287.**

JURY VERDICT

- When the jury has reached a verdict they will communicate that fact to the bailiff and the jury returns into open court for the judge to read the verdict. **Texas Rules of Civil Procedure No.293.** At that time any party may request that the jury be polled to determine if the verdict is, in fact, their verdict. **Texas Rules of Civil Procedure No.294.** The best practice is to always poll the jury in the event that it is not the verdict of those jurors who signed the verdict. Stranger things have happened.

CONCLUSION

- Trying DFPS cases representing parents is both challenging and rewarding. It is imperative in representing parents that you be both zealous and effective in your representation. Go forth and try those cases.
