Grounds for Termination of Parental Rights

by

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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Courts of Appeal may no longer designate opinions "do not publish"; older unpublished opinions may be cited as information but not as precedent.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, 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

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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.

[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.

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.

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.*, No. 08-98-183-CV, 2003 Tex. App. LEXIS 1967, *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 § 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.W2d 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., No. 13-06-237-CV, 2007 Tex. App. LEXIS 805 (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., No. 11-04-00014-CV, 2005 Tex. App. LEXIS 234 (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., No. 03-06-00327-CV, 2007 Tex. App. LEXIS 3593 (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., No. 14-02-00973-CV, 2003 Tex. App. LEXIS 7731 (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. §§ 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 [§§ 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, [§§ 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., No. 06-05-00113-CV, 2006 Tex. App. LEXIS 7858 (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. 10-05-00401-CV, 2006 Tex. App. LEXIS 9532 (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., No. 07-06-0226-CV, 2007 Tex. App. LEXIS 189 (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., No. 06-05-00113-CV, 2006 Tex. App. LEXIS 7858 (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 pre-school 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
- § 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., No. 04-04- 00876-CV, 2005 Tex. App. LEXIS 9288 (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 the Family Code at § 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, § 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. Duenas 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., No. 14-06-00185-CV, 2006 Tex. App. LEXIS 10060 (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., No. 14-04-01160-CV, 2006 Tex. App. LEXIS 2512 (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 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., No. 09-05-331-CV, 2006 Tex. App. LEXIS 10207 (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., No. 04-0500586-CV, 2005 Tex. App. LEXIS 9782 (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.*, No. 03-04-00065-CV, 2004 Tex. App. LEXIS 7640 (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., No. 2-06-00031-CV, 2006 Tex. App. LEXIS 10515 (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., No. 2-06-146-CV, 2007 Tex. App. LEXIS 450 (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, 2003 Tex. App. LEXIS 5136 (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., No. 07-02-0425-CV, 2003 Tex. App. LEXIS 8733 (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 termination 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).