IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 17-9070

REPORT OF THE HOUSE BILL 7 TASK FORCE FOR PROCEDURAL RULES IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP FILED BY A GOVERNMENTAL ENTITY

Submitted to the Supreme Court of Texas on November 27, 2017

TO THE HONORABLE SUPREME COURT:

I. INTRODUCTION

The House Bill 7 Task Force for Procedural Rules in Suits Affecting the Parent-Child Relationship Filed by a Governmental Entity ("HB 7 Task Force") was established on July 10, 2017 by the Supreme Court of Texas (hereinafter "Supreme Court"), pursuant to Misc. Docket No. 17-9070. The HB 7 Task Force was charged with the responsibility to advise the Supreme Court regarding rules to be adopted or revised for trial and post-trial proceedings in cases involving termination of the parent-child relationship.

The need for a revision of the rules arose from House Bill 7, enacted by the 85th Legislature (Act of May 26, 2017, 85th Leg., R.S., ch. 317), effective September 1, 2017. House Bill 7 added Section 105.002(d) of the Family Code, directing the Department of Family and Protective Services ("Department") and the Supreme Court of Texas Children's Commission ("Children's Commission") to consider whether broad-form or specific jury questions should be required in Suits Affecting the Parent Child Relationship (SAPCR) filed by the Department. House Bill 7 also added Section 263.4055 of the Texas Family Code (hereinafter "Family Code") directing the Supreme Court to establish procedures to address the conflict between the filing of a motion for new trial and the filing of an appeal of a final order rendered under Chapter 263 of the Family Code, as well as the period of time, including an extension of at least 20 days, for a court reporter to submit the reporter's record of a trial to an appellate court following a final order rendered under Chapter 263. In addition, the Supreme Court requested that the HB 7 Task Force examine possible reasons for the increase in parental termination appeals and make recommendations on how to address the increase. Supreme Court of Texas Misc. Order 17-9070 directs the HB 7 Task Force to advise the Court on the rules required by House Bill 7 as well as other recommendations deemed appropriate to expedite and improve the trial and appeal of cases governed by Family Code Chapter 263 no later than December 1, 2017. In formulating the recommendations, the HB 7 Task Force is to be guided by the principle that proceedings under Chapter 263 should be expedited to minimize disruption and confusion in the lives of children and parents without precluding full consideration of the issues and their just and fair resolution. House Bill 7 requires recommendations to be submitted to the Texas Legislature no later than December 31, 2017.

The Supreme Court of Texas, in Misc. Order 17-9070, appointed the following persons to the HB 7 Task Force:

Hon. Dean Rucker, Chair, Presiding Judge, Seventh Administrative Judicial Region of Texas, Midland

Hon. Debra H. Lehrmann, Justice, Supreme Court of Texas, Austin

Tina Amberboy, Executive Director, Supreme Court Children's Commission, Austin

Mark Briggs, Attorney, El Paso

Hon. Ada Brown, Justice, 5th Court of Appeals, Dallas

Audrey Carmical, General Counsel, Department of Family and Protective Services, Austin

William B. Connolly, Attorney, Houston

Lawrence M. Doss, Attorney, Lubbock

Anna Ford, Director of Litigation, Department of Family and Protective Services

Sandra D. Hachem, Assistant County Attorney for Harris County, Houston

Lisa Bowlin Hobbs, Attorney, Austin

Anissa Johnson, Attorney, Office of Court Administration, Austin

Hon. Sandee Marion, Chief Justice, 4th Court of Appeals, San Antonio

Hon. Michael Massengale, Justice, 1st Court of Appeals, Houston

Dylan Moench, Staff Attorney, Supreme Court Children's Commission, Austin

Richard R. Orsinger, Attorney, San Antonio

Hon. Paul Rotenberry, Judge, 326th District Court, Abilene

Georganna L. Simpson, Attorney, Dallas

Hon. John J. Specia, Judge (Ret.), San Antonio

Hon. Angela Tucker, Judge, 199th District Court, McKinney

Luz A. ("Lucy") Williamson, Attorney, Edinburg

Hon. Eva Guzman, Court Liaison to the HB 7 Task Force and Children's Commission's Chair, Justice, Supreme Court of Texas, Austin

Martha Newton, Rules Attorney, Supreme Court of Texas, Austin

II. PROCESS OF REVIEW

The HB 7 Task Force worked in accordance with a timeline and a work plan that outlined the issues for review. The HB 7 Task Force held one in-person meeting on August 18, 2017. Additional teleconferences were held on September 18th, October 11th, and October 18th. In addition to meetings and conference calls, the HB 7 Task Force reviewed and provided input to the Final Report.

Work Plan (Schedule and Deliverables):

08/18/17 (Fri)	HB7 TF met in Austin
09/01/17 (Fri)	8/18/17 meeting summary provided to HB7 TF
09/18/17 (Mon)	HB7 TF conference call, input collected
10/01/17 (Mon)	Report writing began
10/10/17 (Tues)	First draft of report to HB7 TF
10/11/17 (Wed)	HB7 TF conference call to discuss filing of court reporter record
10/18/17 (Wed)	HB7 TF conference call to discuss report
11/01/17 (Wed)	Second draft provided to HB7 TF
11/15/17 (Wed)	Edits completed
12/01/17 (Fri)	Report submitted to Supreme Court
12/29/17 (Fri)	Report submitted to Texas Legislature

III. RECOMMENDATIONS

The HB 7 Task Force recommends that the Supreme Court, as an exercise of its rulemaking authority, require granulated charges in parental termination cases and that Texas Rule of Civil Procedure (Tex. R. Civ. P.) 277 should be amended to eliminate the use of broad-form jury questions in termination of parental rights cases. The Task Force further recommends that Texas Rule of Appellate Procedure (Tex. R. App. P.) 28.4(b) be amended to require that notice of appeal should be provided to the court reporter(s) who prepared the record(s) and to the trial judge who heard the case. The HB 7 Task Force determined that there is no conflict between the rules related to a motion for new trial and the filing of a notice of appeal and thus no related rule amendments are required or recommended. Finally, the HB 7 Task Force requests additional guidance from the Supreme Court on the issues

related to the increase in number of appeals. The Supreme Court provided additional guidance prior to the September 18, 2017 conference call, and granted permission for the HB 7 Task Force to take up resolution of this last remaining issue after January 1, 2018. Thus, with regard to the increase in parental termination appeals, this report contains no recommendations or further discussion. The increase in parental termination appeals and related matters will be studied in early 2018 and a report will be issued to the Supreme Court in the near future.

IV. Discussion: Broad-Form Jury Charge in Parental Termination Cases

At the August 18, 2017 in-person meeting, the HB 7 Task Force discussed: (1) Broad-form Jury Submission; (2) Motion for New Trial and Notice of Appeal; (3) Filing of the Court Reporter's Record; and (4) Increase in Parental Termination Appeals. The discussion on broad-form submission centered on the case law in this area, the history of broad-form submission, the reasoning for the practice, and the problems presented by the use of broad-form submission. In particular, the inability to determine precisely which grounds form the basis of a termination presents a burden on the appellate courts because a challenge to the sufficiency of the evidence must address each and every alleged termination ground rather than being confined to those grounds actually found by a jury. The HB 7 Task Force also discussed the movement among parent advocates to require the jury to address each ground as to each parent, due process concerns, and whether changes to Rule 277 should apply to private termination cases.

Broad-form jury charges in parental termination cases have been specifically sanctioned by the Supreme Court since *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647 (Tex. 1990). The Court ruled that Tex. R. Civ. P. 277 (Rule 277) mandates broad-form submission to be used whenever feasible. However, in 2002, the Supreme Court allowed exceptions to the requirement for broad-form submissions in *Crown Life Ins. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), stating that Rule 277 is not absolute. The 10th Court of Appeals in Waco extended the application of *Crown Life*, to termination cases in *In the Interest of B.L.D.*, 113 S.W.3d 340 (Tex. 2003) stating "in termination cases, procedural due process requires a strict application of [Tex. R. Civ. P.] 292's requirement of accord by ten or more jurors" and "the disjunctive form of the charge, without more, may violate due process because it allows for the possibility of termination based on a statutory ground not found by at least ten jurors to have been violated." *Id. at 216.* The Supreme Court overturned the appellate court's ruling on the ground that the error had not been properly preserved but did not reach the merits of the argument and acknowledged the intermediate appellate courts were divided on the issue. See Appendix A for additional history related to use of broad-form submission.

The Task Force also discussed whether the Supreme Court set precedent for granulated questions when in 2012 the Court amended Tex. R. Civ. P. 306 (Rule 306) to require that in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator. Thus, amended Rule 306 may support

that broad-form submission is no longer "feasible" under Rule 277.

At the end of the discussion, Judge Rucker appointed a subcommittee to lead the charge on drafting proposed amendments to Rule 277. Task Force members Richard Orsinger, Justice Michael Massengale, Bill Connolly, and Brenda Kinsler (a Department litigation specialist who attended the August 18th meeting on behalf of Task Force member Anna Ford), agreed to serve on the subcommittee and report back to the full committee on the conference call scheduled for September 18, 2017.

On the September 18, 2017 conference call, Task Force member Richard Orsinger noted for the group that the challenge in drafting an amended rule was dealing with multiple children and multiple parents and multiple grounds. The concept for the change proposed to the full HB 7 Task Force was to fold the ground into the question so that the individual ground would be integrated into a stand-alone question, as to the mother, and father, and as to each child separately.

The HB 7 Task Force discussed that it is a rare case that has only one mother and one father, acknowledging that there could be one mother with several children and different fathers for each child. Also, there was discussion that it is unlikely that the same termination grounds would be applicable to all parents. In other words, there could be a ground (and thus a jury question) that would relate to only one parent – or one child. Representatives from the Harris County Attorney's Office noted that even if one parent abuses a child, but not others in the home, case law holds that parental rights can be terminated on all children based on the abuse of one child and the risk presented to others in the home. Task Force member Sandra Hachem expressed concern that granulated jury questions will cause confusion. Task Force member Justice Massengale noted that it is not always going to be the case that conduct endangering one child necessarily endangers another child and a jury needs to make a determination with regard to each ground and each child noting that the statutory language found in Family Code Sections 161.001(b)(1)(D) and (E) refer to "the child," not "a child."

The Task Force also discussed the House Bill 7 amendment to Section 161.206(a-1), Family Code, which requires clear and convincing evidence for each parent in order to terminate parental rights of that parent.

At the conclusion of the September 18, 2017 call, the HB 7 Task Force agreed to recommend amending Rule 277, adding a comment to the proposed rule change, and submitting an example of jury questions to be proposed for inclusion in the Supreme Court's administrative order announcing the rule amendment. See Appendix B. Task Force member Sandra Hachem objected to amending Rule 277.

On the October 18, 2017 conference call, the HB 7 Task Force discussed Rule 277 again, including whether the rule change should apply to all terminations, private and state-sponsored. Judge Rucker notified Task Force members that he had informed the Executive Committee of the Family Law Council that the Task Force was considering a recommendation to amend Rule 277 and that the

proposed recommendation would encompass both private and state-sponsored termination cases.

Task Force member Audrey Carmical, General Counsel for the Department of Family and Protective Services, expressed concerns about potential confusion of jurors if the state moves away from broad-form submission to granular questions. Ms. Carmical was invited by Judge Rucker to submit a written statement to the Task Force of the Department's concerns. Ms. Carmical submitted a written statement on October 18, 2017, noting that while the Department acknowledges and appreciates the importance of enhancing parents' due process protections, the use of granulated submission may lead to an unintended negative impact on permanency outcomes for children in care. Specifically, prior to the *E.B.* decision, attorneys who utilized narrow form submission experienced cases in which jurors would often become confused as to which ground constituted abuse and which ground constituted neglect. As a result, nine jurors might find for termination under Family Code 161.001(b)(1)(D) but another three might find for termination under (E), failing to meet the required number of jurors to find for termination of parental rights. Ms. Carmical's note went on to say that there were situations prior to *E.B.* where a judge was "forced to appoint DFPS as Permanent Managing Conservator of the subject children, leaving them to grow up in foster care." The Department anticipates that confusion is likely to increase with the use of narrow submission as pursuant to Tex. R. Civ. P. 292(a), because the same ten or more jurors are required to agree on all answers made upon which the court bases its judgment. Ms. Carmical also requested that an analysis of *In re E.M.*, 494 S.W.3d 209, 229 (Tex. App.—Waco 2015, pet. denied) from the Waco Court of Appeals in 2015 and *In re C.C.*, No. 10-16-00129-CV, 2016 WL 6808944, at *13 (Tex. App.—Waco Nov. 16, 2016, no pet.) be added as a report appendix. See Appendix C.

V. Discussion: Motion for New Trial and Notice of Appeal

The 2012 changes made to Rule 28.4, Texas Rules of Appellate Procedure, required that parental termination appeals be treated as an accelerated appeal under Tex. R. App. P. 26.1 (Rule 26.1), including the requirement that a notice of appeal be filed 20 days after the judgment is signed. Under Tex. R. Civ. P. 329b (Rule 329b), motions for new trial may be filed up to 30 days after a final judgment is signed and a trial court has 75 days to rule on the motion. The 85th Texas Legislature proposed a solution to this perceived conflict in the filed version of House Bill 7, which required a motion for new trial within five days of a final judgment in a child protection case and required the trial court to rule on the motion within 14 days. The language was withdrawn from House Bill 7 before final passage so that this matter could be examined by the HB 7 Task Force.

At the August 18, 2017 meeting, the HB 7 Task Force discussed whether five days was too short a time to properly prepare a motion for a new trial because it is unlikely that a court reporter's record could be produced in such a short amount of time. Also, there was concern that attorneys would not be able to properly review the record for errors and may therefore be motivated to file a boilerplate motion, potentially missing a point of error. The HB 7 Task Force also discussed the merits of

shortening the time for disposition of a motion for new trial in parental termination and child protection cases from 75 days to 60 days after the signing of a final order. However, it was pointed out that there is no rule or law that prohibits an attorney from pursuing both a motion for new trial and filing a notice of appeal at the same time.

This point was reiterated and discussed again during the September 18, 2017 conference call, and it was noted that a trial court's plenary power allows the court to rule on the motion for new trial even if a notice of appeal has been filed. Task Force member Justice Michael Massengale submitted additional reasons for not truncating the period for filing a motion for new trial in termination proceedings via an email sent to the Task Force on October 18, 2017, including that there may be a different lawyer handling the appeal and the new attorney will need time to become familiar with the case. Also, the motion for new trial may need to be supported by evidence, adduced either through affidavits or an evidentiary hearing.

Thus, the HB 7 Task Force recommends that time to file a motion for new trial should not be amended and to do so in the manner envisioned by the filed version of House Bill 7 would dramatically truncate the timeline and potentially damage a parent's ability to challenge error. However, the HB 7 Task Force did agree to recommend amendment to Tex. R. App. P. 28.4 (Rule 28.4) to require the attorney filing the notice of appeal to provide notice to the court reporter(s) who prepared the record(s) and the trial judge who heard the case. See Appendix D.

VI. Discussion: Filing of the Court Reporter Record

In 2011, the HB 906 Task Force appointed by the Texas Supreme Court studied the matters of time to file the reporter's record and the extension of time to file the record. In the HB 906 Task Force report submitted to the Supreme Court on October 14, 2011, the HB 906 Task Force recommended that court reporters be required to file the reporter's record within 30 days of the filing of the notice of appeal. The HB 906 Task Force also recommended that an extension or extensions could be granted by the court of appeals for good cause, not to exceed 60 days cumulatively, absent extraordinary circumstances. *Final Report of the Task Force for Post-Trial Rules in Cases Involving Termination of the Parental Relationship* (October 14, 2011), at pages 7 and 17. The Supreme Court did not adopt the recommendation and instead amended Tex. R. App. P. 35.3(c) to permit extensions of 10 days each in an accelerated appeal. The Court further provided in Tex. R. App. P. 28.4(b)(2) that any extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances. Since that time, court reporters have voiced concern about their ability to complete a trial record within the 10-day period while maintaining their normal court duties. Court reporters have also stated that trial courts are often reluctant to release court reporters from their regular duties to complete a trial record or hire substitute court reporters due to budgetary pressure from county commissioners' courts.

At the August 18, 2017 meeting, the HB 7 Task Force discussed whether timelines should be adjusted to account for the number of days it takes to prepare a record as well as who should have responsibility to notify the court reporter that a notice of appeal has been filed. Many court reporters had reported to HB 7 Task Force members that much of the problem stems from not receiving timely notice that a notice of appeal has been filed, and that by the time they are made aware, the deadline to file the record is upon them or has already passed.

Task Force members discussed commencing the 180-day deadline for the appellate court to resolve the appeal from the date the reporter's record is filed rather than the date notice of appeal is filed, but there was strong resistance to any changes that might delay the resolution of the appeal. General concern was also expressed that any changes that were made solely to parental termination and child protection cases would result in these cases receiving a lower priority than other accelerated appeals. Motions to extend the initial deadline for the reporter's record from 10 days to 15 days for all accelerated appeals, and to extend the initial deadline from 10 to 15 days only for child protection cases were considered by the HB 7 Task Force. Both motions failed to pass.

The HB 7 Task Force also discussed that the urgency of resolving child protection appeals outweighs a rule amendment allowing court reporters more time to file the reporter's record. This discussion was bolstered by the fact that the appellate court members of the Task Force stated that the courts of appeal are routinely granting requests for extensions of time to file the reporter record while still being able to timely issue opinions. It was also noted that the courts of appeal already have the authority to grant an extension beyond the 30 cumulative days for extraordinary circumstances, such as a lengthy jury trial.

All HB 7 Task Force members agreed that the Texas Rules of Appellate Procedure should be amended to require an attorney filing a notice of appeal to notify the court reporter at the time the notice of appeal is filed. This issue was revisited during the HB 7 Task Force's September 18, 2017 conference call and the decision was made to recommend that the attorney filing a notice of appeal also be required to notify the trial court judge who handled the trial. See Appendix D.

On the September 18, 2017, conference call, the HB 7 Task Force agreed to revisit the court reporter record issue once more and a conference call was scheduled for Wednesday, October 11, 2017. On the October 11, 2017 conference call, the HB 7 Task Force heard from three members about the volume of records created in CPS cases and that many court reporters are spending a great deal of their personal time to produce records timely. It was also reported that there is a shortage of substitute court reporters in certain parts of the state. A minority of members were of the opinion that the problem with filing the record timely is not related to whether there are 10 days or 15 days to do so, but rather the dearth of court reporter resources available throughout the state. Others expressed the opinion that if the deadline is to be extended to 15 days for this type of accelerated case, that the time to file the report record in all cases on an accelerated timetable should be adjusted to allow for 15 days rather than 10. The Task Force considered a motion to extend the time to file the reporter's

record in all accelerated appeals from 10 days to 15 days, noting that extending to 15 days encompasses two weekends for the reporter to timely file the record instead of just one. The motion passed 12-2. Subsequent to the call held on October 11, 2017, Task Force Member Judge John J. Specia, submitted a written statement on October 16, 2017, to Judge Dean Rucker, Task Force Chair, requesting that his prior vote in favor of the motion be changed to reflect that he abstained from voting. Thus the vote was revised and recorded as eleven in favor, two opposed, and one in abstention.

On the October 18, 2017 conference call, the Task Force again discussed the issue of extending the time to file the reporter's record from 10 to 15 days. Prior to the October 18, 2017 conference call, Task Force member Lisa Hobbs, in support of the Task Force recommendation to extend the time to file the reporter's record in all accelerated appeals, noted that it makes little sense to give more time solely to prepare a record in what should arguably be the most accelerated of appeals [appeals of parental termination and child protection cases] than other accelerated appeals, given the instability an appeal may create in a child's life. The HB 7 Task Force agreed to propose amendments to Tex. R. App. P 35.1 (Rule 35.1) to extend the time to file the court reporter(s) record(s) from 10 to 15 days. See Appendix E.

VII. CONCLUSION

I am honored to have again been selected to chair this Task Force of distinguished justices, judges and lawyers. On behalf of the members of the House Bill 7 Task Force, please allow me to express our gratitude for the privilege of assisting the Court in the exercise of its important role in overseeing the rules of procedure that govern litigation in the courts of our State.

DEAN RUCKER
Chair of the HB 7 Task Force

APPENDIX A

Background regarding broad-form submission was provided by Task Force Member Richard Orsinger of San Antonio, who served on the State Bar of Texas' Pattern Jury Charge Committee–Family Law that drafted the broad-form submission question for parental termination that is in use today. Orsinger explained that the Chair of that PJC Committee was U.T. Law Professor John J. Sampson, who wrote a law review article exploring the history of broad-form submission, *TDHS v E.B., The Coup de Grace For Special Issues*, 23 ST. MARY'S L.J. 221 (1991) ("Sampson"). Professor Sampson divided jury submission practice in Texas into three eras: the era from 1913-1973, where courts were required to submit issues "distinctly and separately;" the era from 1973-1988, where the courts had discretion to submit either separate questions or detailed instructions with questions in broad-form; and the era after January 1, 1988, where the courts were required to "submit ... the cause upon broad-form questions" "whenever feasible." *Id*. at 227-35 (quoting Tex. R. Civ. P. 277). Professor Sampson characterized the 1988 amendment to Rule 277 as a "radical" reform. *Id*. at 234. To add further context, Orsinger quoted the following language from Chief Justice Pope's unanimous Opinion for the Court in *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984):

> Prior to 1913 there was such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible. In 1913, to escape from the unsuccessful general charge, the Texas Legislature enacted article 1984a. Submission of Special Issues Act, ch. 59, § 1, 1913 Tex. Gen. Laws 113. The new procedure required the use of special issues that would be submitted separately and distinctly.
>
> In 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective. The Supreme Court in 1973 amended Rule 277, Tex. R. Civ. P., by abolishing the requirement that issues be submitted distinctly and separately. Since that time, broad issues have been repeatedly approved by this court as the correct method for jury submission.
>
> This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.

Given this background, the PJC Family Law Committee suggested a broad-form submission where the grounds for termination were specified in instructions, and the jury was further instructed that termination must be in the best interest of the child, and the jury was asked: "Should the parent-child relationship between PARENT and CHILD be terminated?" This instruction was used in a 1988 Travis County parental-termination case, *TDHS v. E.B.* The mother was terminated by the trial court, but the Austin Court of Appeals reversed, saying that the broad-form submission could have resulted in termination when only five jurors thought the mother had placed the child in a dangerous situation while another five jurors thought the mother had engaged in dangerous conduct, but the minimum required ten jurors did not agree that any one ground for termination existed. Sampson, at 244-45. The Court of Appeals also said that the jury question invaded the role of the trial court "to determine the ultimate legal question of whether the parent-child relationship should be terminated." *Id.*

A unanimous Supreme Court reversed the Court of Appeals, in an opinion authored by Justice Eugene A. Cook, who was Board Certified in Family Law by the Texas Board of Legal Specialization, and who wrote:

> The issue before this court is whether Rule 277 of the Texas Rules of Civil Procedure means exactly what it says, that is, "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions."

Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 648 (Tex. 1990). Justice Cook went on to say:

> The charge in parental rights cases should be the same as in other civil cases. The controlling question in this case was whether the parent-child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under § 15.02 the jury relied on to answer affirmatively the questions posed. All ten jurors agree that the mother had endangered the child by doing one or the other of the things listed in § 15.02. Petitioner argues that the charge, as presented to the jury, violates her due process right by depriving a natural mother of her fundamental right to the care, custody and management of her children. Recognizing her rights does not change the form of submission. The standard for review of the charge is abuse of discretion, and abuse of discretion occurs only when the trial court acts without reference to any guiding principle. Here the trial court tracked the statutory language in the instruction and then asked the controlling question. This simply does not amount to abuse of discretion.
>
> Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer.

> Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Id. at 649. Broad-form submission thus became the rule in parental-termination cases.

The pendulum on broad-form submission began to swing back in the case of *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), where the Supreme Court reversed a trial court for making a broad-form submission based on instructions relating to two theories of liability, one of which was valid under Texas law and the other of which was invalid. The Supreme Court wrote that Rule 277 required broad-form submission "whenever feasible," but that broad-form submission was not feasible when one or more grounds for recovery was invalid or uncertain. *Id.* at 389-90. In the parental termination case of *In the Interest of B.L.D.*, 56 S.W.3d 203 (Tex. App.–Waco 2001), *rev'd on other grounds*, 113 S.W.3d 340 (Tex. 2003), the Court of Appeals held that a broad-form submission that does not guarantee that at least ten jurors agreed on the same ground for termination violates due process of law. *Id.* at 219.

APPENDIX B

Rule 277. Submission to the Jury

In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.

The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.

In any cause in which the jury is required to apportion the loss among the parties the court shall submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.

In a suit in which termination of the parent-child relationship is requested, the court shall submit separate questions for each parent and each child on (1) each individual ground for termination of the parent-child relationship and (2) whether termination of the parent-child relationship is in the best interest of the child.

The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

Comment to 2017 Change:

The rule has been amended to require a jury question on each individual statutory ground for termination as to each parent and each child without requiring further granulated questions for subparts of an individual ground for termination. The rule has also been amended to require a separate question on best interest of the child as to each parent and each child.

Recommended Pattern Jury Charge

The following format for the submission of each of the grounds pleaded are recommended for submission to the Pattern Jury Charge Family/Probate Committee should the Supreme Court adopt the HB 7 Task Force recommendations:

Question No. 1

Do you find by clear and convincing evidence that MOTHER [and/or] FATHER knowingly placed or knowingly allowed the child[ren] to remain in conditions or surroundings which endangered the physical or emotional well-being of the child[ren]?

Answer by writing "Yes" or "No" as to MOTHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Answer by writing "Yes" or "No" as to FATHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 2

Do you find by clear and convincing evidence that MOTHER [and/or] FATHER engaged in conduct or knowingly placed the child[ren] with persons who engaged in conduct that endangered the physical or emotional well-being of the child[ren]?

Answer by writing "Yes" or "No" as to MOTHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Answer by writing "Yes" or "No" as to FATHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 3

Do you find by clear and convincing evidence that MOTHER [and/o]r FATHER constructively abandoned the child[ren] who [has/have] been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and (i) the department has made reasonable efforts to return the child[ren] to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child[ren]; and (iii) the parent has demonstrated as inability to provide the child[ren] with a safe environment.

Answer by writing “Yes” or “No” as to MOTHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Answer by writing “Yes” or “No” as to FATHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 4

Do you find by clear and convincing evidence that termination of the parent-child relationship between MOTHER [and/or] FATHER and the child is in the best interests of the child?

Answer by writing “Yes” or “No” as to MOTHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Answer by writing “Yes” or “No” as to FATHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

APPENDIX C

In *E.M.*, the Waco Court of Appeals, consistent with the Supreme Court's decision in *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W. 3d 647, 649 (Tex. 1990), concluded the trial court did not abuse its discretion in refusing Mother's request for a jury charge instruction requiring the agreement of 10 jurors as to any predicate act. *In re E.M.*, 494 S.W.3d 209, 229 (Tex. App.—Waco 2015, pet. denied). In so finding, the Waco Court reiterated and in essence reaffirmed the Supreme Court's reasoning in *E.B.* by quoting the following passage from that case:

> The controlling question in this case was whether the parent-child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under [the predecessor to family code section 161.001] the jury relied on to answer affirmatively the questions posed. All ten jurors agree that the mother had endangered the child by doing one or the other of the things listed in [the predecessor to section 161.001]. Respondent argues that the charge, as presented to the jury, violates her due process right by depriving a natural mother of her fundamental right to the care, custody and management of her children. Recognizing her rights does not change the form of submission.... Here the trial court tracked the statutory language in the instruction and then asked the controlling question. This simply does not amount to abuse of discretion.

Tex. Dep't of Human Servs. v. E.B., 802 S.W. 3d at 649; *In re E.M.*, 494 S.W.3d 209, 229 (Tex. App.—Waco 2015, pet. denied).

Notably, the decision in *E.M.* was penned by Chief Justice Gray, who was the lone dissenter in the Waco Court of Appeals decision in *In re B.L.D.*, in which Justice Gray had stated:

> [T]he due process argument regarding broad form submissions in a termination case has been considered and summarily rejected by the Supreme Court. *Texas Dept. of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex.1990). The Dosseys have not brought themselves within the *Crown Life* exception because they have not shown that any theory submitted to the jury was "an improperly submitted invalid theory." *Crown Life Ins. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000). We fly in the face of existing Texas Supreme Court precedent on this issue by holding to the contrary.

In re B.L.D., 56 S.W.3d 203, 221 (Tex. App.—Waco 2001), *rev'd on other grounds*, 113 S.W.3d 340 (Tex. 2003).

The Waco Court of Appeals also held the trial court did not abuse its discretion by submitting a broad-form jury charge on the six termination grounds. *In re C.C.*, No. 10-16-00129-CV, 2016 WL 6808944, at *13 (Tex. App.—Waco Nov. 16, 2016, no pet.). In so concluding, the Waco Court stated that:

> [L]ast year we noted that the Supreme Court has held that a trial court does not abuse its

discretion by submitting a broad-form jury charge in a termination case.

In re E.M., 494 S.W.3d 209, 229 (Tex. App.–Waco 2015, pet. denied) (citing *Tex. Dep't Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (op. on reh'g)).

APPENDIX D

Rule 28.4 Accelerated Appeals in Parental Termination and Child Protection Cases

(a) ***Application and Definitions.***

(1) Appeals in parental termination and child protection cases are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Rule 28.4.

(2) In Rule 28.4:

(A) a "parental termination case" means a suit in which termination of the parent-child relationship is at issue.

(B) a "child protection case" means a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship.

(b) ***Notice of Appeal.***

(1) Service of Notice. In addition to requirements for service of notice of appeal imposed in Rule 25.1(e), the notice of appeal must be served on the court reporter or court reporters responsible for preparing the reporter's record.

(2) Clerk's Duties. In addition to the responsibility imposed on the trial court clerk in Rule 25.1(f), the trial court clerk must immediately send a copy of the notice of appeal to the judge who tried the case.

(c) ***Appellate Record.***

(1) Responsibility for Preparation of the Reporter's Record. In addition to the responsibility imposed on the trial court in Rule 35.3(c), when the reporter's responsibility to prepare, certify and timely file the reporter's record arises under Rule 35.3(b), the trial court must direct the official or deputy reporter to immediately commence the preparation of the reporter's record. The trial court must arrange for a substitute reporter, if necessary.

(2) Extension of Time. The appellate court may grant an extension of time to file a record under Rule 35.3(c); however, the extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances.

(3) Restriction on Preparation Inapplicable. Section 13.003 of the Civil Practice & Remedies Code does not apply to an appeal from a parental termination or child protection case.

(d) ***Remand for New Trial.*** If the judgment of the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to commence the new trial no later than 180 days after the mandate is issued by the appellate court.

APPENDIX E

Rule 35. Time to File Record; Responsibility for Filing Record

35.1. Civil Cases. The appellate record must be filed in the appellate court within 60 days after the judgment is signed, except as follows:

(a) if Rule 26.1(a) applies, within 120 days after the judgment is signed;

(b) if Rule 26.1(b) applies, within ~~10~~ 15 days after the notice of appeal is filed; or

(c) if Rule 26.1(c) applies, within 30 days after the notice of appeal is filed.

SCHOOL AND FIREARM SAFETY ACTION PLAN

GOVERNOR GREG ABBOTT

MAY 30, 2018

STUDY A PROTECTIVE ORDER LAW TO KEEP GUNS OUT OF THE HANDS OF THOSE MENTALLY UNFIT TO BEAR ARMS, BUT ONLY AFTER LEGAL DUE PROCESS IS ALLOWED TO ENSURE SECOND AMENDMENT RIGHTS ARE NOT VIOLATED

As of March 2018, five states have laws that allow guns to be temporarily taken away by a judge if they believe individuals pose a threat to themselves or others.[43] A proper approach must focus on quickly identifying those who pose a risk without infringing on the rights of lawful gun owners by maintaining the highest standards of due process.

Recommendation: Encourage the Texas Senate and House leaders to issue an interim charge to consider the merits of adopting a red flag law allowing law enforcement, a family member, school employee, or a district attorney to file a petition seeking the removal of firearms from a potentially dangerous person only after legal due process is provided.

"Red Flag" or "extreme risk" protective orders create a mechanism to separate a potentially dangerous person from firearms for a period of time. Texas law currently has a system where victims of family violence can seek a protective order that protects victims and the due process rights of those they seek them against. Similarly, the Texas Family Code allows for the involuntary commitment of persons who pose a serious risk of harm to themselves or others, but only under stringent constitutional protections. Properly designed, emergency risk protective orders could identify those intent on violence from firearms, but in a way that preserves fundamental rights under the second amendment.

The legislature should consider whether the existing protective order laws are sufficient, or could be amended to include emergency risk protection, or whether emergency risk protective orders should be independently created. Texas Family Code Sec. 81.007 makes a county attorney or criminal district attorney responsible for filing family violence protective orders. A mental health protective order statute would likely have similar responsibilities under a red flag statute.

Mental Health Protective Order procedures would allow law enforcement, a family member, school employee, or a district attorney to file a petition seeking the removal of firearms from a person proven to be dangerous to himself or to others. The courts would then provide that person notice and a hearing, and only upon a finding that they pose a significant risk of danger to themselves or others would the court order law enforcement to take possession of firearms. These protective orders should be for a limited duration, provide for mental health treatment, and have a clear path to the full restoration of rights and return of firearms when the person is no longer a danger.

Such protective orders may not only protect the public but also protect dangerous individuals from themselves. Suicide is the 10th-leading cause of death in the U.S., with guns being the method most used.[44] An individual is more likely to use a firearm to commit suicide than mass murder.[45] In 2016, suicide accounted for 59 percent of deaths by firearms while homicide accounted for 37 percent.[46] In that year, firearms were used in a majority (51%) of all suicide deaths.[47]

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43 "Gun-Violence Restraining Orders Can Save Lives," David French, National Review, March 1, 2018. Online at: https://www.nationalreview.com/magazine/2018/03/19/gun-violence-restraining-orders-save-lives/.

44 "Suicide Rate is Up 1.2 Percent According to Most Recent CDC Data (Year 2016)," American Foundation for Suicide Prevention, January 2, 2018. Online at: https://afsp.org/suicide-rate-1-8-percent-according-recent-cdc-data-year-2016/.

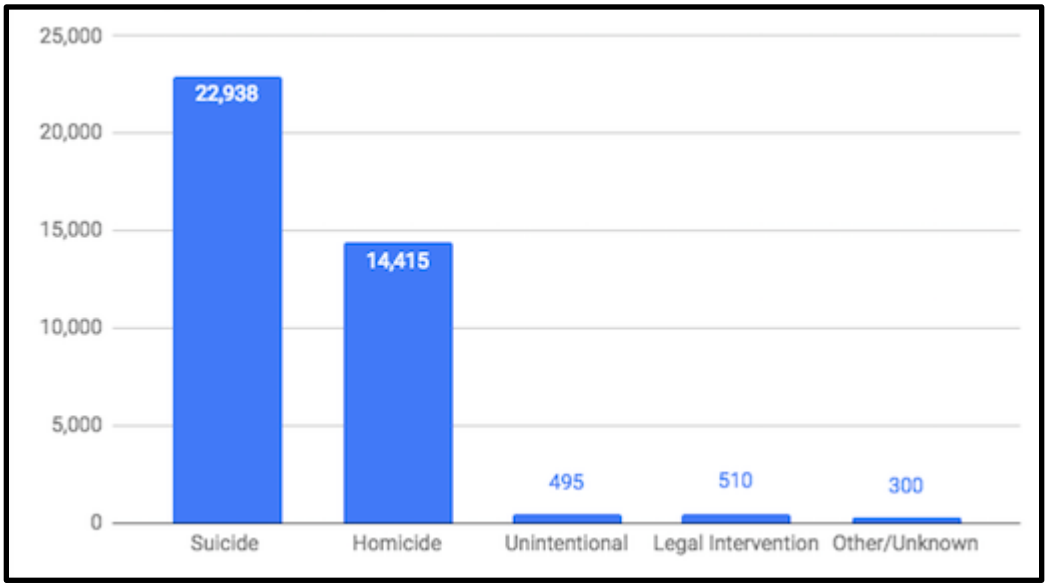
45 "Guns & Suicide: The Hidden Toll," Madeline Drexler, Harvard Public Health. Online at: https://www.hsph.harvard.edu/magazine/magazine_article/guns-suicide/.

46 Injury Facts: Firearms. National Safety Council. 2017; See: http://injuryfacts.nsc.org/home-and-community/safety-topics/firearms/

47 American Foundation for Suicide Prevention, "Suicide Statistics," available at: https://afsp.org/about-suicide/suicide-statistics/.

The orders contemplated by this proposal could have been used to prevent the shootings at Sutherland Springs and at Marjory Stoneman Douglas High School in Parkland, Florida.

Deaths by Firearm in the United States (2016)



Source: Center for Disease Control